



Disaster Operations Legal Reference

Version 3.1

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FEMA

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This mid-edition online update of the Disaster Operations Legal Reference (DOLR 3.1) describes the legal authorities for FEMA's readiness, response, and recovery activities. It supersedes DOLR 3.0, issued in March 2017. Because this reference is not exhaustive, the legal authorities are subject to modification and change, and the specific facts surrounding an issue may change the legal analysis, use of the information contained here should be verified with the FEMA Office of Chief Counsel before becoming the basis for a final decision by the Agency.

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ACKNOWLEDGEMENTS

FOREWORD

The FEMA Office of Chief Counsel (OCC) is pleased to issue this mid-edition online update of the Disaster Operations Legal Resource (DOLR 3.1). This text collects, in a single volume, a coherent narrative that both describes and explains the essential elements of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) and related legal authorities underpinning FEMA's disaster operations.

The DOLR is organized around the construct of an Emergency Management Operational Life Cycle (Chapter 1) with phases involving distinct operational and legal concerns including Disaster Readiness (Chapter 2), Declarations (Chapter 3), Response (Chapter 4), Recovery (Chapter 5: Public Assistance, Chapter 6: Individual Assistance, and Chapter 7: Hazard Mitigation Assistance); and Closeout (Chapters 5-7). It also includes discussion of ancillary legal issues in the context of federal emergency management operations regarding Environmental and Historic Preservation Laws (Chapter 8), Information Management (Chapter 9), Human Capital (Chapter 10), and Ethics (Chapter 11).

The DOLR also includes appendices providing insight and support for addressing the unique challenges in providing legal advice in the emergency operations context, including Advice in Crisis (Appendix A), Disaster Operations Legal Analysis Checklist (Appendix B), Key to Significant Stafford Act and Regulations (Appendix C), Electrical Power Restoration Primer (Appendix D), a FEMA Appropriations Table (Appendix E), and Fiscal and Appropriations Law in an Operational Environment (Appendix F).

- Sustain FEMA's disaster-related legal knowledge across Stafford Act events and over time by identifying, capturing, and validating relevant legal information and analysis that exists throughout the Agency;
- Help FEMA attorneys and their client-partners find, organize, and share the knowledge of disaster legal operations we already have; and

- Increase consistency, collaboration, and the creation and sharing of knowledge and innovative, flexible legal solutions for response and recovery.

The DOLR will always be a work in progress as future versions endeavor to add depth and nuance amidst a dynamic and ever-changing emergency management environment. For suggestions and feedback, please contact the DOLR Team at DOLR@fema.dhs.gov.

PREFACE

The Disaster Operations Legal Reference (DOLR), a product of the Office of Chief Counsel (OCC) for the Federal Emergency Management Agency (FEMA), is a legal resource that provides a detailed description of the authorities under which FEMA operates when the President declares a major disaster or emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).¹ The DOLR is intended to provide FEMA, as well as our state, territorial, tribal, and local government and non-governmental partners, with detailed legal information that explains how and when the Stafford Act applies and how it relates to the Homeland Security Act (HSA) and other relevant authorities and policies.

This Preface traces the history of federal emergency assistance from its beginning in a bill of relief passed by Congress after a single fire over 200 years ago, to FEMA's creation as an independent agency by executive order in 1979, and FEMA's evolution into the federal agency charged with comprehensive all-hazards emergency management for the Nation. This Preface also provides a brief explanation of the legal framework for federal emergency management.

I. Whole Community Approach to Emergency Management²

Disaster strikes anytime, anywhere, and in many forms—a hurricane, an earthquake, a tornado, a flood, a fire, or a hazardous spill, an act of nature or an act of terrorism. It may build over days or weeks, or strike suddenly without warning. Every year, millions of Americans face the devastating consequences of disasters and emergencies. The individual state, territorial, tribal, and local governments have the primary legal authority

¹ Pub. L. No. 93-288 (1974), as amended, 42 U.S.C. sections [hereinafter §§] 5121-5207.

² Whole community is defined in the National Preparedness Goal as “a focus on enabling the participation in national preparedness activities of a wider range of players from the private and nonprofit sectors, including nongovernmental organizations and the general public, in conjunction with the participation of all levels of governmental in order to foster better coordination and working relationships.” National Preparedness Goal, 2nd Ed. (May 2015), Appendix A: *Terms and Conditions*, p. A-3, <https://www.fema.gov/media-library/assets/documents/25959>.

and responsibility to protect their citizens and respond to disasters and emergencies. It is the local police, fire, and emergency medical technicians, as first responders, who do the “heavy lifting” in the first few days after a disaster or emergency strikes.

It is the mission of voluntary agencies like the American Red Cross and The Salvation Army to provide aid and support to disaster survivors, be they victims of a single house fire or a statewide event. Additional assistance from the federal government may be required, however, when state and local governments and nonprofit agencies cannot adequately respond to a disaster or emergency. FEMA’s statutory authorities, implementing regulations, and policies authorize and facilitate the provision of this federal assistance and reflect that a whole community approach is imperative if disaster response and recovery is to be timely and effective, and survivors are to be quickly set on the path toward self-sufficiency.

II. History of Federal Emergency Assistance³

The federal government can trace its first involvement in emergency management to the Congressional Act of 1803, which authorized federal assistance to a New Hampshire town following an extensive fire,⁴ generally considered the first piece of federal disaster legislation. Congress passed additional event specific disaster legislation more than 100 times in the next century. By the 1930s, Congress granted the Reconstruction Finance Corporation⁵ authority to lend money to banks and to dispense federal dollars in the wake of disasters to repair and reconstruct certain public facilities.

Community Preparedness Program, the Federal Preparedness Agency of the General Services Administration, and the Federal Disaster Assistance Administration activities from the Department of Housing and Urban

³ See CONGRESSIONAL RESEARCH SERVICES: REPORT FOR CONGRESS, *Federal Emergency Management and Homeland Security Organizations: Historical Development and Legislative Options*, Order Code RL 33369 (updated June 2006).

⁴ “An Act for the Relief of the sufferers by fire, in the town of Portsmouth”, ch. 6, 2 Stat. 201 (1803).

⁵ Reconstruction Finance Corporation, created by the Emergency Relief and Construction Act, Pub. L. 72-302, (1932) 47 Stat. 5.

Development. Civil defense responsibilities were also transferred to the new agency from the Defense Department's Defense Civil Preparedness Agency.⁶

FEMA relied for nearly a decade on the Disaster Relief Act, as amended, as its primary statutory authority to respond to disasters. In 1988, Congress amended the Disaster Relief Act of 1974 by enacting the Stafford Act.⁷ The 1988 Stafford Act created a new category of "emergency" declarations for those incidents that do not rise to the level of, or are different in nature from, a major disaster.⁸ It also confirmed the importance of individual assistance and emphasized mitigation of future hazards.

With the Loma Prieta Earthquake in 1989 (FEMA-845-DR-CA) and Hurricane Andrew (FEMA-955-DR-FL) in 1992, national attention focused on FEMA revealed the need for improvements. Between 1993 and 1995, FEMA initiated reforms that streamlined disaster relief and recovery operations, partly as a result of settling two lawsuits. These reforms included a new emphasis on preparedness and mitigation, and focusing agency efforts on customer service, including the ability to serve non-English speaking customers, providing detailed program information for disaster survivors, and broadening outreach to community based organizations.⁹ The U. S. Army Corps of Engineers,¹⁰ as well as other agencies, continued to provide piecemeal disaster response, and Congress continued to fund disaster relief on a case-by-case basis until enactment of the Federal Disaster Relief Act of 1950¹¹. That Act empowered the President to utilize, coordinate, and direct all federal agencies to respond to major disasters without independent approval of Congress but with a

⁶ See also EXEC. ORDERS 12148 (1979) and 12,656.

⁷ Pub. L. No. 100-707 (1988).

⁸ See Appendix C for a summary table of Stafford Act provisions.

⁹ Memorandum from Director, Human Services Division, to Regional Human Services Officers and HQ Human Services Division, *Implementation of commitments resulting from settled lawsuits* (July 7, 1995).

¹⁰ Numerous laws since 1932 are referred to as Flood Control Acts; however, it is the Flood Control Act of 1944, Pub. L. No. 78-534, that granted authority to the Army Corps of Engineers for the design and construction of flood control projects. That legislation had a significant impact on emergency management.

¹¹ Disaster Relief Act of 1950, Pub. L. No. 81-875 (1950).

budget, modest even for 1950, of only \$5 million.¹² After this initial framework of federal-to-state disaster relief assistance was established, additional laws increasing the scope of federal assistance further shaped the process for administering disaster relief.

A. How and Why FEMA Came into Being¹³

During the 1960s and 1970s, massive disasters requiring major federal participation in response and recovery efforts served to focus attention on the issue of natural disaster response. These included Hurricane Carla (DR-118) in 1961, the Alaska Earthquake (FEMA-168-DR-AK) of 1964, and Hurricane Betsy (FEMA-208-DR-LA) in 1965. Following these events, Congress enacted the Disaster Relief Act of 1966,¹⁴ which authorized a 50% federal cost share to repair, restore, or reconstruct public facilities damaged or destroyed as a result of a major disaster.

Following Hurricane Camille (FEMA-271-DR-MS) in 1969, Congress passed the Disaster Relief Act of 1969¹⁵ (effective for only 15 months), directing that the President appoint a “Federal coordinating officer” responsible for coordinating federal assistance in a major disaster area and establishing field offices; and authorizing temporary dwelling accommodations for individuals and families displaced by a major disaster.

The Disaster Relief Act of 1970,¹⁶ incorporated additional disaster support provisions, including emergency support teams, emergency shelter, emergency communication, emergency transportation, and disaster legal services. It also authorized a federal cost share of up to 100% for the repair, restoration, and reconstruction of damaged or destroyed public facilities.

¹² *Id.*

¹³ See Records of the Federal Emergency Management Agency (FEMA) for a comprehensive listing of its administrative history, including predecessor agencies at <http://www.archives.gov/research/guide-fed-records/groups/311.html>.

¹⁴ Pub. L. No. 89-769 (1966).

¹⁵ Pub. L. No. 91-79 (1969).

¹⁶ Pub. L. No. 91-606 (1970).

Following the San Fernando Earthquake in 1971 (FEMA-299-DR-CA) and Hurricane Agnes (FEMA-337-DR-FL) in 1972, Congress enacted the Disaster Relief Act of 1974,¹⁷ which established the process of Presidential disaster declarations, created the first program to provide direct assistance to individuals and households, and authorized efforts to mitigate disasters, as opposed to merely responding to them.

Other disasters, including the contamination of Love Canal (FEMA-3066-EM-NY, 1978), the Cuban refugee crisis of 1980 (EM-3079), and the nuclear accident at Three Mile Island, emphasized the growing complexity of emergency management. By 1979, more than 100 federal agencies were involved in some aspect of disasters, hazards, and emergencies. Parallel programs and policies existed at the state and local levels. To address this fragmentation at the federal level, President Jimmy Carter issued Executive Order 12127¹⁸ on March 31, 1979, transferring many of the separate disaster-related responsibilities from other federal agencies (OFAs) to FEMA.

President Carter's Reorganization Plan No. 3 of 1978,¹⁹ which became effective on April 1, 1979, created the Federal Emergency Management Agency as an independent agency. Pursuant to that Plan, among others, FEMA absorbed the Federal Insurance Administration, the National Fire Prevention and Control Administration, the National Weather Service

The FEMA OCC²⁰ hired several attorneys in the aftermath of Loma Prieta and Hurricane Andrew and the Northridge Earthquake (FEMA-1008-DR-CA) in 1994 to specifically work on disaster-related issues for these events. Ultimately, FEMA OCC established a field attorney cadre to deploy attorneys to field offices and provide legal counsel to Federal Coordinating Officers and program leads. FEMA OCC now deploys Deployable Field Counsel (DFC) and Procurement Disaster Assistance Team (PDAT) attorneys to provide field support on program and grant procurement

¹⁷ Pub. L. No. 93-288 (1974).

¹⁸ The provisions of EXEC. ORDER 12127 appear at 44 Fed. Reg. 19,367, 3 C.F.R., 1979 Comp., at 376.

¹⁹ 43 Fed. Reg. 41,943 (1978).

²⁰ The FEMA Office of Chief Counsel was then known as the Office of General Counsel. It became the Office of Chief Counsel following FEMA's inclusion into the DHS and the establishment of the DHS Office of General Counsel.

issues, respectively. This focus on providing legal advice on site and in real time to decision-makers continues today and has contributed to the evolving body of emergency management law and the growing emergency management legal practice.

B. FEMA's Evolving Role to Include All Hazards

Executive Order 12148, which President Carter issued on July 20, 1979, assigned FEMA responsibility for anti-terrorism programs. Numerous other orders and White House policies confirmed FEMA's role in anti-terrorism,²¹ FEMA's focus, however, was largely on natural disasters until the terrorist attacks of September 11, 2001. Congress reacted to 9/11 (FEMA-1391-DR-NY, FEMA-1392-DR-VA) with the passage of the Homeland Security Act²² in 2003, and FEMA joined 22 OFAs, programs, and offices in becoming part of the new Department of Homeland Security (DHS).

The HSA transferred the “functions, personnel, assets and liabilities” of FEMA to DHS, including the functions of the FEMA Director to the DHS Secretary. The Secretary thereafter delegated the authority for activities under the Stafford Act to the now-defunct Under Secretary of Emergency Preparedness and Response.²³ DHS has worked to bring a coordinated approach to national security from emergencies and disasters—both natural and man-made. In addition, Homeland Security Presidential Directive (HSPD) -5, *Management of Domestic Incidents* (2003) and Presidential Policy Directive (PPD) -8, *National Preparedness*, (2011)²⁴ implemented many of the mandates of the HSA.

Once again, however, a natural disaster resulted in significant legislative change. As a result of the issues that arose during the federal government's response to Hurricane Katrina (FEMA-1602-DR-FL, FEMA-1603-DR-LA, FEMA-1604-DR-MS, FEMA-1605-DR-AL) in 2005—the single most catastrophic natural disaster in U.S. history—Congress passed the Post-

²¹ For a detailed chronology of FEMA's role in terrorism attacks, see <http://www.fas.org/irp/agency/dhs/fema>.

²² Homeland Security Act of 2002, Pub. L. No. 107-296, (2002), 6 U.S.C. § 101-557, as amended.

²³ DHS Delegation 9001.1 (Dec. 10, 2010).

²⁴ PPD 8 essentially replaced HSPD-8 (2003).

Katrina Emergency Management Reform Act (PKEMRA)²⁵ in 2006. It amended both the HSA and the Stafford Act; it also provided substantial new authorities to FEMA and defined FEMA’s mission as the following:

The primary mission of the Agency is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.²⁶

Title V of the HSA, as amended by PKEMRA, designates the head of FEMA as the Administrator and, for the first time, statutorily mandates the Administrator have a specific level of emergency management and leadership experience, and provides the Administrator with specified authority and responsibilities.²⁷

In particular, “the Administrator shall lead the Nation’s efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents,” and he is “the principal advisor to the President, the Homeland Security Council, and the Secretary [of Homeland Security] for all matters relating to emergency management in the United States.”²⁸ In addition, the HSA, as amended by PKEMRA, mandates that FEMA be maintained as a distinct entity within DHS.²⁹

A natural disaster again resulted in significant legislative change following Hurricane Sandy in 2012, which caused catastrophic damage to the Northeast region. Hurricane Sandy, also known as Super Storm Sandy is the second costliest hurricane for the United States after Katrina, as it

²⁵ PKEMRA, Pub. L. No. 109-295 (Oct. 4, 2006).

²⁶ 6 U.S.C. § 313(b)(1).

²⁷ See 6 U.S.C. §§ 313(c)(2) & 314.

²⁸ See 6 U.S.C. §§ 313(b)(2)(A) & 313(c)(4)(A).

²⁹ 6 U.S.C. § 316(a). The DHS Secretary may not change the responsibilities or functions of the agency, nor direct any assets, function, or mission to another entity within DHS. The Secretary’s authority to reprogram or transfer funds is also limited. See 6 U.S.C. §§ 316 (c) and (d).

affected one of the most population dense area of the country, including New York and New Jersey. As part of the disaster relief bill, Congress enacted the Sandy Recovery Improvement Act (SRIA) of 2013³⁰ to focus on recovery.

SRIA authorized new alternative procedures for Public Assistance (PA) permanent work and debris removal, as well as new alternative dispute resolution procedures for PA appeals. It allowed Native American tribes to make their own stand-alone requests for Stafford Act declarations apart from state governments, established child care as an eligible expense for reimbursement under FEMA's Other Needs Assistance program, and authorized FEMA to lease and repair multi-family housing units to provide housing to disaster victims. SRIA represented the most significant change to how FEMA provides disaster assistance to survivors since the passage of the Stafford Act; it will continue to change the ways FEMA carries out its mission for years to come.³¹

In practice, FEMA works within the DHS structure to assure coordination in the field (i.e., at or near the location of an incident), as well as with federal departments and agencies, nonprofit organizations, and the private sector to assist states, localities, and tribal organizations most effectively and efficiently with their recovery needs. The National Response Framework (NRF), Third edition (2016),³² provides a comprehensive, national, all-hazards approach to domestic incident response, while the National Disaster Recovery Framework (NDRF), 2nd edition (2016), provides a structure to manage and promote effective long-term recovery by enabling disaster recovery managers to operate in a unified and collaborative manner.³³

In recent years, FEMA has seen its emergency management coordination, planning, surge staffing, and logistics infrastructure capabilities leveraged for non-Stafford Act events involving other Federal authorities and

³⁰ Sandy Recovery Improvement Act of 2013 (SRIA), Pub. L. 113-2 (2013).

³¹ See <http://www.fema.gov/sandy-recovery-improvement-act-2013> for a summary of the Stafford Act program changes.

³² The Homeland Security Act, at 6 U.S.C. § 314(a)(13), requires the Administrator to administer and implement a National Response Plan, which is now known as the National Response Framework. See <http://www.fema.gov/national-disaster-recovery-framework>

³³ <http://www.fema.gov/national-disaster-recovery-framework>.

responsible agencies. Examples include the 2014 Unaccompanied Alien Children (assistance to DHS/U.S. Customs and Border Protection (CBP), DHS/Immigration and Customs Enforcement, and the Department of Health and Human Services) and the 2014 Ebola Response (assistance to the HHS/Centers for Disease Control and Prevention).

III. Disaster Response and Recovery Legal Framework

In utilizing the DOLR, it is important to understand that the Stafford Act and the HSA are two of the myriad of statutes and authorities under which FEMA operates. The following provides a brief outline and broad overview of the framework of the legal authorities applicable to the delivery of FEMA's mission.

A. The Constitution of the United States of America

The Supremacy Clause of the Constitution affirms that it is the supreme law of the United States.³⁴ It is the framework for the organization of the U.S. government and for the relationship of the federal government with the states and citizens. The Constitution creates three branches of the federal government: a legislature, the bicameral Congress; an executive branch led by the President; and a judicial branch headed by the Supreme Court.

The Constitution specifies the powers and duties of each branch and reserves all unenumerated powers to the respective states and all the people within the United States.³⁵ In addition, the Constitution and its amendments establish that no person shall be deprived equal protection of the laws or deprived of life, liberty, or property without due process. When disasters occur, FEMA must be mindful that the federal government does not have a general police power, the states do, and federal assistance, even though discretionary, must be delivered in a manner that is not arbitrary or capricious.

³⁴ U.S. CONST., art. VI, § 2.

³⁵ U.S. CONST., amend. X.

B. Federal Statutes

The United States Congress is the sole legislative body within the federal government.³⁶ The Government Printing Office codifies and publishes most federal statutes in the United States Code (U.S.C.). Federal statutes applicable to FEMA include authorizing statutes, appropriations acts, and statutes imposing responsibilities on the federal government in carrying out its authorities. Authorizing statutes can be found in volumes of the U.S.C.

For example, the Stafford Act can be found in Volume 42, U.S.C., Sections 5121 through 5207. Congress passes appropriations acts each fiscal year (October 1 to September 30) to provide funds to operate each federal department. FEMA's actions must conform with the requirements set forth in numerous other statutes; only Congress may waive or make exceptions to requirements in federal statutes.

C. Presidential Executive Orders

The President has the power to issue executive orders, directives, and other forms of direction to the executive branch. executive orders and other directives of the President govern actions by federal officials and agencies. Only the Constitution and federal statutes limit the President's authority over the executive branch. Executive Order 13,286 (February 28, 2003) is an example of an executive order; it transfers certain agencies and agency components to the DHS.³⁷ Examples of other forms of directives include HSPDs and PPDs

D. Federal Regulations (Rules)

Departments and agencies in the executive branch, based on either general authority assigned to them under the law or directions Congress mandates in a specific piece of legislation, draft regulations to implement their authorizing legislation. A properly promulgated regulation has the full force and effect of law.

³⁶ U.S. CONST., art. I, § 1.

³⁷ See 3 United States Code (U.S.C.), § 301, which provides the general authority of the President to transfer authority to various departments within the federal government.

Regulations therefore bind agency officials who do not have discretion to violate them. Agencies may implement and change regulations through rulemaking procedures set forth in the Administrative Procedure Act,³⁸ which includes giving notice to the public through publication in the *Federal Register*. The Government Printing Office codifies and publishes the rules in the Code of Federal Regulations (C.F.R.). FEMA's rules are published in 44 C.F.R. Parts 1-362.

1. Department of Homeland Security Directives

FEMA is a federal agency and a component of the DHS. The DHS Directives System is an official means of communicating to all DHS components and employees the policies, delegations of authority, and procedures necessary for DHS to comply with pertinent executive orders, statutes, regulations, and policies. Policy statements address the overarching objectives of major departmental or governmental initiatives or programs.

Policy Statements may trigger the issuance of a directive. Directives articulate and build on DHS policy statements, missions, programs, activities, or business practices of a continuing nature. Instructions implement or supplement DHS Directives, executive orders, regulations, and *Federal Register* notices by providing uniform procedure and/or prescribing the manner or plan of action for carrying out the policy, operating a program or activity, and assigning responsibilities. Certain implementing documents that provide more detailed information include manuals, guides, handbooks, reference books, standard operating procedures, and other similar documents. See, e.g., DHS Directive Number 112-01, Revision 1, *Directives System* (09/26/2011).³⁹

2. FEMA Directives, Publications, Guidance, Policy statements

In addition to rules and regulations, which have the full force and effect of law, FEMA publishes information to assist and inform employees and the

³⁸ 5 U.S.C. § 553.

³⁹ http://dhsconnect.dhs.gov/policies/Instructions/112-01_Directives_System.pdf.

public, including Administrator directives, policy statements, policy guides and manuals.

The Administrator's directives are internal documents that provide policy and program guidance to FEMA employees. Directives publish policies, delegate authority, establish programs, and assign responsibilities. An example of an Administrator's directive is number 112-5, Rev. 1, issued April 30, 2015, entitled *Obtaining Legal Review and Assistance*.⁴⁰ This directive sets forth issues that require legal review, issues where such review is advisable, and establishes procedures for seeking review or advice. The Administrator also issues policy statements of special interest that expire after 90 days.

FEMA publishes procedures, policies, and guidance for employees and the public. These publications are indexed and available on FEMA's website.⁴¹ FEMA's Hazard Mitigation Grant Program (HMGP) guidance has long been issued in a unified, comprehensive manner.⁴² FEMA has recently worked to consolidate policy and guidance for the PA Program with issuance of the Public Assistance Program and Policy Guide (PAPPG)⁴³ for all incidents (disasters and emergencies) declared on or after January 1, 2016, and the Individuals and Households Program with its Individuals and Households Program Unified Guidance (IHPUG) for all incidents declared on or after September 30, 2016.⁴⁴ Agency policy and guidance sets out "rules of the game" to ensure: 1) that the agency implements its actions and programs in a consistent, non-arbitrary manner; and 2) that all recipients of FEMA assistance receive fair and equitable treatment by being aware of and subject to the same procedures and requirements.

3. Judicial Opinions or "Case Law"

The federal and state court systems consist of two levels of courts: trial courts and appellate courts. The federal courts have jurisdiction over cases involving federal statutes and other federal questions. They also have

⁴⁰ Available under *Directives* at

https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx.

⁴¹ <http://www.fema.gov/>.

⁴² <http://www.fema.gov/media-library/assets/documents/103279>.

⁴³ FP 104-009-2, <http://www.fema.gov/public-assistance-policy-and-guidance>.

⁴⁴ FP 104-009-3, <https://www.fema.gov/ihp-unified-guidance>.

jurisdiction over cases in which the parties reside in different states. State courts have jurisdiction over most other types of cases.

Statutes or executive office action are the basis upon which most courts settle disputes and make decisions in cases; however, another body of law exists based on prior decisions of courts. This “common law” system gives precedential weight to past decisions of the courts.⁴⁵ If a similar dispute has been resolved, the court is bound to follow the reasoning used in the prior decision if the case is in the same jurisdiction. Judicial decisions for a relevant court represent law that the agency must follow.

Interactions between constitutional law, statutory law, common law, and regulatory law give rise to considerable complexity.

4. State Constitutions and Statutes

State legislatures can pass laws on matters for which they share jurisdiction with Congress and on matters in which the Constitution does not grant jurisdiction to the federal government. For example, the Constitution—by not assuming the authority for police power—leaves the police power to the individual states.⁴⁶

State constitutions and statutes are the supreme law within the state, but federal legislation and the Constitution can preempt state and local rules. State agencies may adopt regulations to carry out state laws. The individual states have the primary role in emergency management; state and local officials are the true first responders to emergencies and disasters within their state borders, just as tribal officials are on tribal lands.

⁴⁵ BRITANNICA CONCISE ENCYCLOPEDIA, describes “common law” as the “Body of law based on custom and general principles and that, embodied in case law, serves as precedent or is applied to situations not covered by statute. Under the common-law system, when a court decides and reports its decision concerning a particular case, the case becomes part of the body of law and can be used in later cases involving similar matters. This use of precedents is known as *stare decisis*. Common law has been administered in the courts of England since the Middle Ages; it is also found in the U.S. and in most of the British Commonwealth. It is distinguished from civil law.”

⁴⁶ Courts have broadly defined the police power as the inherent authority never surrendered by the states to the federal government to control matters within their territories relating to the public health, safety, and welfare. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 1885 U.S. LEXIS 1879 (1885).

5. Municipal Charters, Ordinances, Rules and Regulations

These mechanisms of local governance apply only to local issues. State and federal rules typically preempt these local rules if there is conflict.

CHAPTER 1
Emergency Management Operational Life Cycle
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Emergency Management Operational Life Cycle

I. Introduction

Practicing operational law in the federal emergency management environment is dynamic and exciting, with issues coming at rapid speed depending on the phase or stage of disaster relief operations. The successful emergency management operations law practitioner has the ability to create order out of the seeming chaos by quickly gathering the relevant facts and intended purpose, framing the legal issues, and identifying the relevant authorities necessary to provide timely, legally sufficient, and responsive advice for decision-makers.

II. All-Hazards Operational Life Cycle

Disaster relief operations, which operate with a constantly changing scenario, can be described as following a life cycle with the following phases:

All-Hazards Operational Life Cycle

- A. General Readiness or Steady State
- B. Threat Identification
- C. Event Imminent/Event Occurs
- D. Federal Declaration Issued
- E. Response
- F. Recovery
- G. Closeout

Each phase has its unique challenges, time frames, responsible and interested parties, and authorities. A mastery of these phases enables experienced operations law practitioners to quickly identify relevant issues, associated authorities, and attendant risks. Learning to recognize these phases is one of the first crucial steps for the beginning operations law practitioner to understanding the emergency management environment.

A. The General Readiness or Steady State Phase is comprised of nationwide and regional monitoring, planning, training, and preparation. The primary federal components involved include FEMA headquarters, the regional offices, and the Emergency Support Function Leaders Group. This phase includes drafting and revising policies, standard operating procedures, memoranda of understanding, and “pre-scripted” mission assignments both in reaction to lessons learned from past events and in anticipation of future events. It also entails working with other federal agencies (OFAs) on delineating areas of responsibility and authority with respect to OFA authorities when gaps and seams exist between Stafford Act assistance and those OFA authorities. Preparation includes the execution of in-place contracts for evacuation transport support and for perishable commodities, as well as the purchase, storage, and maintenance of other commodities and equipment. This phase is described in detail in Chapter 2, *Disaster Readiness*.

B. The Threat Identification Phase is a trigger point in disaster relief operations for notice events, such as hurricanes or severe storms and flooding, to increase and focus monitoring, including limited activation of the National Response Coordination Center (NRCC), Regional Response Coordination Centers (RRCCs), and Emergency Support Functions (ESFs). Threat Identification may also trigger the forward movement of personnel including Incident Management Assistance Teams (IMATs) and commodities and equipment. Additional staff and ESFs may be placed on alert, and staging areas may be identified and established. Close coordination with state emergency management officials is crucial in order to gauge likely response needs and to plan for potential evacuations, sheltering, and other emergency response measures as indicated by the nature of the threat. This phase is described in Chapter 2, *Disaster Readiness*.

C. The Event Imminent/Event Occurs Phase is another critical trigger point along the disaster life cycle, leading to mobilization of federal assets in a targeted manner, and involves constant communication and coordination with state officials through deployed IMATs and state liaisons, often co-located with state officials at the state Emergency Operations Center (EOC). This phase will involve rapidly necessary assessments to support issuance of a federal declaration. A notice event, such as an approaching hurricane, may trigger an emergency declaration if there is an imminent threat in order to support emergency protective measures under the Public Assistance (PA) program. A no-notice event, such as an earthquake, will cause an abrupt transition from General Readiness, creating a very fluid and time-compressed operational environment. Prior to a declaration being issued, the thrust of federal activity is to pre-position assets for rapid deployment. Ongoing state and local response activity may be reimbursed if a declaration is issued, including for evacuations, sheltering and other emergency protective measures. Temporary federal facilities, such as an Initial Operating Facility, may be identified and secured. This phase moves the disaster life cycle from readiness to federal declaration to response, and further information can be found in Chapter 2, *Disaster Readiness*; Chapter 3, *Declarations*; and Chapter 4, *Response*.

D. The Federal Declaration Issued Phase is the turning point in the life cycle because a federal declaration authorizes implementation of Titles IV or V of the Stafford Act for disaster relief assistance and the appointment of a Federal Coordinating Officer (FCO) who is responsible for coordinating disaster relief. Until and unless a declaration is issued, financial and other assistance under these titles is not authorized. Full mobilization of federal assets and assistance may be triggered depending on the type of declaration (major disaster or emergency) and its scope (programs and designated areas). The declaration sets out the specific parameters for the Stafford Act assistance to be provided in response to the event. The ability to tailor the framework of assistance (designated programs and eligible areas) to meet the needs of the affected community is one of the great strengths of the Stafford Act disaster relief statutory scheme. This requires close coordination between the state, FEMA, and the President of the United States, as this is not a “one size fits all” program of assistance. This phase is described in Chapter 3, *Declarations*.

E. The Response Phase primarily deals with life-saving and sustaining measures and the protection of public health and safety with little or no time to spare. This is a very fluid phase, requiring a proactive (two steps ahead) not reactive (one step behind) approach in order to be successful, which makes this phase fraught with risk. Action may be taken with little or no review of costs or discussion of exit strategies. Large scale operations may be commenced without a clear understanding of actual need because of limited windows of opportunity to act, changing circumstances, and lack of adequate information. A failure or perceived failure of leadership at this critical juncture may not only potentially endanger lives and property, but may also lead to a lack of public trust in government.

This phase includes the transition of operations from the NRCC and RRCC to the Joint Field Office (JFO) and the establishment of Disaster Recovery Centers and congregate shelters, responder support camps, and planning for Direct Housing Operation Programs (DHOPs) under the FEMA Individuals and Households Program (IHP) under the Individual Assistance (IA) Program. Although IHP is considered a Recovery Program, the DHOP may need to be immediately initiated when there is widespread devastation of housing stock. A dedicated surge staff of FEMA disaster assistance employees, in addition to regional and national office subject matter expert employees, will be activated to respond. Search and rescue teams and medical assistance teams may also be activated. FEMA works closely with the state and FEMA's ESF partners, who may be providing assistance under their own authorities and funding, or via mission assignment (MA) taskings under Stafford Act authority.

The primary focus during the response phase is on emergency work including debris removal (Category A) and emergency protective measures (Category B) under the PA Program. PA work conducted as direct assistance is handled by the Logistic Directorate of the FEMA Office of Response and Recovery (ORR) for in-house direct assistance and the Response Directorate of ORR for MAs within the ORR. Reimbursement of PA work conducted by PA applicants under Project Worksheet (PW) grant assistance is handled by the Public Assistance Branch in the Recovery Directorate of ORR. DHOP activity may include direct assistance activity for the establishment of group sites via contract or MA and may involve

the Logistics and Response Directorates and the IA Branch of the Recovery Directorate. See Chapter 4, *Response* for direct assistance; Chapter 5, *Public Assistance* for PWs; and Chapter 6, *Individual Assistance* for DHOP activity for in-depth information.

F. The Recovery Phase signals an affected community's shift in focus from response to moving forward in the aftermath of a disaster. Rather than just an attempt to return to conditions as they existed pre-event, a successful recovery phase will result in a more resilient community, both in infrastructure and in attitude. Very large scale events may require a transition from a JFO setting to a longer term Recovery Office setting with a longer term workforce, including locally hired staff and Cadre of On-call Response and Recovery Employee (CORE) positions.

This phase includes the repair/replacement of infrastructure (PA Permanent Repair work), residences (IHP) and personal property (Other Needs Assistance, or ONA), temporary housing (IHP), and hazard mitigation measures. Issues arise regarding program-wide implementation and case specific eligibility determinations. The IA and PA recovery programs are implemented by the Recovery Directorate. Hazard Mitigation measures may be funded under PA permanent repair or under the Hazard Mitigation Grants Program (HMGP), which is under the auspices of the FEMA Federal Insurance and Mitigation Administration.

There is an inherent tension between applying the broad statutory authorities of these recovery programs in a predictable manner from disaster to disaster and state to state, and in taking unique, disaster specific circumstances into account in providing assistance and support in a meaningful way in order to maximize a speedy and comprehensive recovery.

This phase is generally not affected by a lack of information but rather by an excess of information, which can lead to a paralysis of action when attempting to implement programs while trying to anticipate every possible variance in fact patterns. It is the trap of allowing the perfect to be the enemy of the good.

Vulnerabilities in this phase may include class action lawsuits regarding eligibility determinations and termination of IA temporary housing assistance programs, and responses to information requests including case specific media and congressional inquiries subject to Privacy Act protections (*See* Chapter 9, *Information Management*). Program specific information for Recovery activity can be found in Chapter 5, *Public Assistance*; Chapter 6, *Individual Assistance*; and Chapter 7, *Hazard Mitigation Assistance*.

G. The Closeout Phase is a winding down of operations and transition from a JFO or Recovery Office to the Regional Office. This includes making final eligibility determinations, including resolving appeals, and terminating DHOP activities, which may require legal enforcement action. It also involves reassessment of the assistance provided both on a program-wide and case specific basis, which may include DHS Office of Inspector General audits or investigations. Program-wide, there will be lessons learned that may identify gaps and vulnerabilities that may lead to changes in policies. Case specific activity may include the recoupment (IA) or deobligation (PA or HMGP) of assistance already provided. Some events are so catastrophic or extraordinary (e.g., 2001 World Trade Center and Pentagon attacks and 2005 Hurricane Katrina) or the type of event so pervasive (1993 Midwest flooding) that, in their aftermath, they trigger major federal legislation, causing a retooling or even a paradigm shift in how the federal government will respond in the future to such events.

III. Conclusion

The all-hazards operational cycle emanates from more than 200 years of emergency management history and practice, and congressional reaction, particularly since 1950, to numerous disaster events. It reflects a present day statutory scheme that provides a flexible and dynamic construct for the federal government to respond to all hazards whenever state and local governments are overwhelmed. The following chapters of the Disaster Operations Legal Reference provide a much greater level of detail with respect to the legal parameters FEMA must operate within to execute its responsibilities within this life cycle. In addition, the appendices include practical tools for the emergency management practitioner to navigate the law and

authorities applicable to the life cycle, including a paper on best practices for providing legal advice under disaster conditions and a checklist for the provision of legal analysis in the emergency and disaster context.

CHAPTER 2
Disaster Readiness
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Disaster Readiness

Part One of this Chapter discusses FEMA's disaster related funding authorities and its readiness and pre-declaration activities. Part Two provides a Fiscal and Appropriations Prior for the Emergency Management Attorney.

Part One: Disaster Funding Authorities and Readiness Activity

I. Introduction

Under the Stafford Act, the President's declaration of a major disaster or an emergency triggers FEMA's authority to respond to the declared incident.¹ Readiness and pre-declaration activities, however, are critical in ensuring an effective disaster or emergency response and recovery, and they generally include three categories of activity:

- Non-disaster specific activities that are necessary to maintain FEMA's readiness to respond to threats as they arise;
- Disaster-specific activities that occur when there is an identified threat and a declaration is anticipated, such as pre-positioning and staging commodities and response personnel; and
- The provision of equipment or commodities to a (STTL) government, by sale, loan, or lease to respond to a hazard in the absence of a Stafford Act declaration.²

It is imperative that FEMA have personnel, contracts, and resources immediately available in anticipation of deployment so that it can

¹ Stafford Act §§ 401 and 501, 42 U.S.C. §§ 5170 and 5191.

² FD 075-02 Rev 01(2017)

https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/Attachments/248/508%20FEMA%20Policy%20Directive%20075-2%20Rev%201%20signed%2001.18.17.pdf

tactically pre-position assets as necessary in a proactive posture for a seamless transition to response if a declaration is issued.

This Part provides an overview of FEMA's disaster related funding authorities and its readiness activity including pre-declaration activity.

II. FEMA's Appropriations

A. FEMA Appropriations Structure

On May 5, 2017, the President signed the Consolidated Appropriations Act, 2018³, which funds the government for the rest of the fiscal year through September 30, 2018. The chart in Appendix E summarizes FEMA's appropriations. In an emergency or major disaster situation, the Disaster Relief Fund will be the primary fund source for those requirements in support of the particular operation. Please see Appendix E, *FY 2018 FEMA Appropriations Table*.

B. Disaster Relief Fund

The Stafford Act primarily establishes the programs and processes for the federal government to provide major disaster and emergency assistance to STTL governments, individuals, and qualified private nonprofit organizations.⁴ FEMA, within DHS, has responsibility for administering the Stafford Act.⁵ FEMA's statutory authorities and responsibilities include "assisting the President in carrying out the functions under the [Stafford Act] and carrying out all functions and authorities given to the Administrator under that Act."⁶

In the disaster operations context, the Disaster Relief Fund (DRF), Fund Code 06, is the most important FEMA appropriation.⁷ The DRF

³ Pub. L. No. 115-141, Division F, (2018)

⁴ *Department of Homeland Security--Transfer of Support Function for Principal Federal Officials*, B-316533, 2008 U.S. Comp. Gen. LEXIS 140 (Jul. 31, 2008); 42 U.S.C. 5121, *et seq.*

⁵ *Id.*

⁶ 6 U.S.C. § 314(a)(8).

⁷ For a list of FEMA Fund Codes, *See*

<https://intranet.fema.net/org/ocfo/bpa/Lists/Fund%20Codes%20FY16/AllItems.aspx>.

is available for necessary expenses in carrying out the Stafford Act.⁸ The DRF thus provides budget authority allowing FEMA to direct, coordinate, manage, and fund eligible response and recovery efforts associated with domestic major disasters and emergencies that overwhelm state, territorial and tribal resources pursuant to the Stafford Act.⁹ Through the DRF, FEMA can fund authorized Federal disaster support activities.¹⁰

The Stafford Act authorizes the President to provide Federal assistance to supplement STTL disaster response, recovery, readiness, and mitigation efforts. Under Section 504 of the Homeland Security Act, as amended, FEMA's Administrator has been delegated the responsibility for administering the Stafford Act's Federal assistance programs.¹¹ The DRF provides funding for the following Stafford Act declarations or activities: (1) major disaster; (2) emergency; (3) fire management assistance; (4) pre-declaration surge; and (5) Disaster Readiness and Support (DRS).¹²

⁸ *Department of Homeland Security Appropriations Act*, 2016, Pub. L. No. 114-113, Division F, Title III (2015).

⁹ FEMA, *Disaster Relief Fund Fiscal Year 2018 Congressional Justification* at 1. See https://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

¹⁰ *Id.* Note that the Budget Control Act of 2011 (BCA) created a new category of spending, "disaster relief," defined as activities carried out pursuant to a determination under Section 102(2) of the Stafford Act, which authorizes the President to make a major disaster declaration. The BCA, however, created a separate limited cap adjustment specifically for disaster relief, and says that funding designated as disaster relief is not eligible for the unlimited cap adjustment for emergency spending. Budget Control Act of 2011, Pub. L. No. 112-25 (2011), codified as amended at 2 U.S.C. § 900, *et seq.* As a consequence of this legislation, the DRF is now appropriated funds in two discrete categories, "the base," which are funds available for all Stafford Act functions, to include DRS, Surge, Emergency, and FMAG activities, and "major disaster" funding, which is available only to carry out activities related to major disasters. See *e.g.*, *Department of Homeland Security Appropriations Act*, 2016, Pub. L. No. 114-113, Division F, Title III (2015).

¹¹ FEMA, *Disaster Relief Fund Fiscal Year 2018 Congressional Justification* at 27.

¹² *Id.* Note that pre-declaration surge and DRS activities are not explicitly authorized under the Stafford Act. Instead, it has been determined that these activities materially contribute to carrying out those activities explicitly authorized under the Stafford Act such that they are a necessary expense of carrying out those functions and thus properly funded by the DRF. *Department of Homeland Security Appropriations Act*, 2016, Pub. L. No. 114-113, Division F, Title III (2015).

The DRF also funds:

- The repair and rebuilding of qualifying disaster-damaged infrastructure
- Eligible hazard mitigation initiatives
- Financial assistance to eligible disaster survivors
- Fire Management Assistance Grants (FMAG) for qualifying large wildfires.¹³

Major disasters and emergencies are declared by the President, typically in response to gubernatorial requests for assistance. States, territories, and tribes request Federal assistance to supplement their available resources and to certify that a given disaster is beyond their capacity or capability to respond.¹⁴ The DRF also supports fire management assistance activities for the mitigation, management, and control of fires on public and private lands.¹⁵

FEMA coordinates three major disaster assistance programs:

- Federal Assistance to Individuals and Households
- Public Assistance
- Hazard Mitigation assistance.¹⁶

Non-declaration specific readiness and support activities also are funded under the DRF. These activities provide indirect support across FEMA (and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

to our Federal partners) and are managed separately as DRS activities.¹⁷ Readiness and pre-declaration activities are critical in ensuring an effective disaster or emergency response and recovery, and they generally include three categories of activity:

- Non-disaster specific activities that are necessary to maintain FEMA's readiness to respond to threats as they arise;
- Disaster-specific activities that occur when there is an identified threat and a declaration is anticipated, such as pre-positioning and staging commodities and response personnel; and
- The provision of equipment or commodities to a STTL government, by sale, loan, or lease to respond to a hazard in the absence of a Stafford Act declaration.¹⁸

1. Disaster Readiness and Support (DRS) Costs

DRS funding was established to bolster FEMA's general steady-state effectiveness and readiness and includes a broad range of non-disaster

¹⁷ *Id.* Distinguishing between those costs properly chargeable to the DRF as DRS related costs and administrative expenses related to carrying out the Stafford Act that are properly chargeable to FEMA's Salaries and Expenses appropriation can be particularly difficult. The Agency could plausibly charge DRS type expenditures to the Salaries and Expenses appropriations, and vice versa, thus in determining how to source a particular expenditure will often depend how the Agency has previously elected to fund that particular item in the past. *See Department of Homeland Security--Use of Management Directorate Appropriations to Pay Costs of Component Agencies*, B-307382, 2006 U.S. Comp. Gen. LEXIS 138 (Sep. 5, 2006). ("Where one can reasonably construe two appropriations as available for an expenditure not specifically mentioned under either appropriation, [the agency may make] an administrative determination as to which appropriation to charge.") *See also Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General*, B-231445, 68 Comp. Gen. 337; (Mar. 20, 1989).

¹⁸ Provision of Personal Property (Commodities and Equipment) in the Absence of a Presidential Emergency or Major Disaster Declaration, FEMA Directive 075-2 (Mar. 01, 2013). Under Title VI of the Stafford Act, FEMA also has broad authority to provide non-monetary assistance (such as generators, food and water supplies, or emergency communications equipment) to states, territories tribes, or localities, in advance of imminent natural disasters such as hurricanes or ice storms. Title VI of the Stafford Act, 42 U.S.C. § 5195, *et seq.* *See also*, Homeland Security Act, Pub. L. No. 107-296, (2002), as amended at 6 U.S.C. §§ 101-1405, Post-Katrina Reform Act (PKEMRA), Pub L. No. 109-295 (2006).

specific FEMA organizational elements and activities that are critical to support FEMA's response and recovery mission.¹⁹

These activities may include, among others:

- FEMA Corps
- Salaries and Benefits for Federal Coordinating Officers
- Logistics Supply Chain Management System
- Temporary Housing Units National Site
- Emergency Evacuation Contracts
- Life cycle Commodities at Distribution Centers

2. Disaster Relief Fund (DRF) Surge Accounts

The FEMA Office of the Chief Financial Officer (OCFO) established the “surge account” within the DRF, which FEMA utilizes for pre-declaration activities.²⁰ FEMA may use the DRF surge account to fund certain costs prior to a declaration as a necessary expense when an identified threat could reasonably be expected to result in a declaration by the President.²¹ Surge costs are pre-declaration mobilization and readiness expenditures of time, money, and labor to mobilize or prepare to mobilize support when a major disaster or emergency is imminent, but not yet declared, and the disaster or emergency will clearly require federal resources and assets.²² The DRF pays the cost of surge activities, including:

¹⁹ See Disaster Relief Fund: FY 2017 Funding Requirements (February 9, 2016), available at https://www.dhs.gov/sites/default/files/publications/FEMA%20-%20Disaster%20Relief%20Fund%20-%20Annual%20Report%20-%20FY2017%20Funding%20Requirements_0.pdf.

²⁰ FEMA Directive (FD) 125-7, *Financial Management of the Disaster Relief Fund (DRF)* (October 1, 2016), available under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx

²¹ *Id.*

²² *Id.*

- Pre-positioning assets and commodities;
- Mission assignments for federal operational support for pre-event deployment (but not operational assistance to STTL governments until a declaration issued); and
- Certain surge-related personnel costs.²³

III. Readiness and Pre-Declaration Activity

A. Initial Response Resources (IRR)

FEMA maintains pre-positioned critical disaster relief assets and supplies, stored in FEMA distribution centers, called IRR,²⁴ in strategically located distribution centers within and outside the continental United States.²⁵ These IRR were initially created as a result of leftover commodities purchased through the DRF for disasters, and the DRF funds their periodic replenishment. The IRR contains two tiers of equipment.

Tier I life-saving and life-sustaining resources include water, tarps, meals, cots, blue roofing sheeting, blankets, hygiene kits, and generators intended to sustain lives and prevent further property damage during an emergency or disaster. Primary distribution centers for pre-positioned IRR are located in Atlanta, Georgia; Fort Worth, Texas; Cumberland, Maryland; Frederick, Maryland; Moffett Field, California; Puerto Rico; Hawaii; and Guam.

During catastrophic events, IRR may be distributed to as many as 60 forward sites for distribution. During complex disaster scenarios, IRR flows through specifically designed FEMA Incident Support Bases and Joint Field Office (JFO) Staging Areas, to Resource Staging Areas or points of distribution that STTL governments operate.

Tier II key operational support resources include JFO kits consisting of tables, chairs, computer support equipment, and cables for 100- to

²³ *Id.*

²⁴ See Joint Explanatory Statement for PKEMRA, Cong. Rec. H7813 at H7828 (2006).

²⁵ Logistics Management Directorate Fact Sheet (2011) [hereinafter Log Fact Sheet].
<https://www.fema.gov/pdf/media/factsheets/2011/lmd.pdf>.

250-person offices; temporary housing units (THUs); and mobile communications office vehicles (MCOVs), formerly called Mobile Disaster Recovery Centers (MDRCs). MHUs and MCOVs are discussed in more detail later in this chapter.

B. Advance Contracting

The Post-Katrina Emergency Management Reform Act (PKEMRA)²⁶ directed FEMA to identify and contract for recurring disaster response requirements.²⁷ FEMA currently has 49 advance contracts²⁸ with private companies, as well as purchase vehicles with nonprofit organizations, and other federal agencies that may be activated following a declaration to supply essential disaster-related supplies and services. Many of these vehicles are listed in the discussion of Disaster Readiness and Support costs above.

In awarding contracts, by law, FEMA must give preference “to the extent feasible and practicable” to firms and individuals in an area impacted by a disaster.²⁹ This provision applies not only to FEMA contracts but to *all* expenditures of federal funds for “debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities,”³⁰ including, for example, contracts

²⁶ See PKEMRA. Department of Homeland Security Appropriations Act, 2007, Title VI, Post-Katrina Emergency Management Reform Act [hereinafter PKEMRA], Pub. L. No. 109-295 § 637, (2006), codified as amended at, 6 U.S.C. § 725.

²⁷ *Id.* § 691; 6 U.S.C. § 791.

²⁸ Master Pre-positioned Contract List, Acquisition Operations Division, FEMA Office of Chief Procurement Officer (2018).

<https://intranet.fema.net/org/ms/ocpo/Documents/FY18%20Master%20Pre%20Positioned%20Contract%20List.pdf>

²⁸ Stafford Act, § 307(a)(1); 42 U.S.C. § 5150(a)(1); 44 C.F.R. § 206.10; Federal Acquisition Regulations [hereinafter *FAR*] 48 C.F.R. § 26.202.

²⁹ Stafford Act, § 307(a)(1); 42 U.S.C. § 5150(a)(1).

³⁰ Stafford Act, § 307(b)(2); 42 U.S.C. § 5150(b)(2). The Local Community Recovery Act of 2006, Public L. No. 109-218 (2006), amended the Stafford Act to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. The DHS Appropriations Act of 2007, No. 109-295 (2007), § 694, enacted requirements for transitioning work under existing contracts. An interim rule implementing this amendment to § 307 of the Stafford Act, 42 U.S.C. § 5150, is available at 71 Fed. Reg. 44,546 (2006). A second interim rule was necessary because of a later statutory amendment to this section. 72 Fed. Reg. 63,084 (2007).

that the U.S. Army Corps of Engineers awards for debris removal and other disaster-related work.

Since advance contracting cannot anticipate the location of an event in order to meet the required local preference, FEMA has arranged for national contracts to meet early expected demands for supplies and equipment. Unless FEMA determines that it is not feasible or practicable, however, FEMA must transition work performed under these national contracts for response, relief, and reconstruction that are in effect on the date of a declaration to entities residing in or doing business primarily in the affected area.³¹

A principal purpose of this requirement is to assist the economic recovery of communities affected by disasters. For example, FEMA established a Local Business Transition Team within the Office of the Chief Financial Officer and gained experience transitioning national contracts to local vendors following Hurricane Ike in 2008.

C. Advance Contracts for Manufactured Housing Units (MHUs)

The Stafford Act authorizes housing assistance for eligible applicants after a major disaster or emergency.³² When financial assistance is inadequate due to a lack of available housing resources, FEMA may provide direct housing assistance,³³ usually in the form of manufactured housing units (MHUs). To meet critical housing needs in the immediate aftermath of a disaster, FEMA is currently planning to maintain a baseline inventory of approximately 2,000 one-bedroom, two-bedroom, or three-bedroom MHUs, all of which meet

³¹ Stafford Act, § 307(b)(2); 42 U.S.C. § 5150(b)(2). The Local Community Recovery Act of 2006, Public L. No. 109-218 (2006), amended the Stafford Act to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. The DHS Appropriations Act of 2007, No. 109-295 (2007), § 694, enacted requirements for transitioning work under existing contracts. An interim rule implementing this amendment to § 307 of the Stafford Act, 42 U.S.C. § 5150, is available at 71 Fed. Reg. 44,546 (2006). A second interim rule was necessary because of a later statutory amendment to this section. 72 Fed. Reg. 63,084 (2007).

³² Stafford Act, §§ 408 and 502 (a)(6), 42 U.S.C. §§ 5174 and 5192 (a)(6). *Id.* at § 408(c)(1)(b), 42 U.S.C. § 5174(c)(1)(b)

³³ *Id.* at § 408(c)(1)(b), 42 U.S.C. § 5174(c)(1)(b).

the standards of the Department of Housing and Urban Development (HUD). See Chapter 6, *Individual Assistance*, for a more detailed discussion of FEMA's direct housing mission.

The MHUs are stored and maintained at temporary housing staging sites located in Selma, Alabama and Cumberland, Maryland. FEMA may acquire additional units as needed through multiple advance contracts with MHU manufacturers; most contracts require the contractor to reach production capacity of between 125 and 150 units per week within four weeks of FEMA's order. The contracts cover a mix of differently sized units, some of which must comply with the Uniform Federal Accessibility Standards (UFAS).³⁴

D. Mobile Communications Operation Vehicles (MCOVs)

FEMA maintains a fleet of 39 MCOVs³⁵ strategically located in Atlanta, Georgia; Cumberland, Maryland; Fort Worth, Texas; Moffett Field, California; Denver, Colorado; Bothell, Washington; and Holliston, Massachusetts. The MCOV provides a rapidly deployable, self-contained mobile office and communications platform. Depending upon a vehicle's primary mission, FEMA may equip it with a satellite voice/data system, computers, phones, and workstations. When used in the response and recovery phases, the MCOV is capable of providing a flexible office space to ensure individuals and families have timely access to FEMA's Individual Assistance programs and can provide communications and registration capability to support Disaster Recovery Centers. When an MCOV supports the National Processing Service Centers, it may become a Mobile Registration Intake Center (MRIC).

These MRICs can provide Internet and phone service for disaster survivors in areas where the disaster has interrupted the normal telecommunications infrastructure. FEMA internally transferred the

³⁴ Architectural Barriers Act, Pub. L. No. 90-480 (1968) (codified as amended at 42 U.S.C. §§ 4151- 4157); 36 C.F.R. Part 1190. See 49 Fed. Reg. 31, 528 (1984).

³⁵ See MCOVs – An Overview – Program Capabilities and Overview
<https://intranet.fema.net/org/orr/response/Pages/MCOV%20Support.aspx>.

MCOV program to the Response Disaster Emergency Communications Branch on October 1, 2011.

E. Pre-scripted Mission Assignments (PSMAS)

A mission assignment is a work order issued by FEMA to another federal agency, with or without reimbursement, directing the agency to complete a specific task.³⁶ Congress directed FEMA in the Post-Katrina Emergency Management Reform Act (PKEMRA)³⁷ to develop Pre-scripted Mission Assignments (Spas) with federal agencies having responsibilities under the National Response Framework in areas that include logistics, communications, mass care, health services, and public safety

Key examples of the over 250 Spas FEMA has issued include agreements with these agencies:

- Department of Health and Human Services, including the National Disaster Medical System (ND'S), for medical care and support;
- U.S. Army Corps of Engineers for debris removal, logistics, and emergency power restoration;
- Department of Defense for aero-medical patient evacuation;
- U.S. Coast Guard for search and rescue support.

See Chapter 4, Response, for a detailed discussion of mission assignments.

F. Provision of Commodities or Equipment Pre-Declaration

Titles IV and V of the Stafford Act permit FEMA to provide commodities and equipment to a STTL government following a major disaster or emergency declaration. Prior to a declaration, however, FEMA may pre-position commodities and equipment but may not

³⁶ 44 C.F.R. § 206.2(18).

³⁷ PKEMRA, § 653, 6 U.S.C. § 753.

transfer them to a STTL government except in accordance with *Provision of Personal Property (Commodities and Equipment) in the Absence of a Presidential Emergency or Major Disaster Declaration*, FEMA Directive 075-2 (Mar. 01, 2013). This directive is based upon Title VI of the Stafford Act, and sets forth the conditions under which FEMA may provide commodities or equipment to a state (territory or possession) and Indian tribal government in the absence of a Presidential declaration immediately before, during, and after a hazardous event.³⁸

- In accordance with FEMA Directive 075-2, when a hazard is imminent, a STTL government or local government may request the immediate transfer of commodities and equipment but must certify they cannot meet the need themselves and the property is necessary to save lives or protect property. The state and Indian tribal government must also agree to pay all costs, including transportation costs. If FEMA approves the request, FEMA may sell expendable property (e.g., MREs, water, tarps) and lease or loan non-expendable property (e.g. generators) to the state and Indian tribal government.³⁹ Any property provided under this authority must come from current FEMA inventory.
- A revocable license agreement must be completed for loans or leases of durable equipment. These agreements provide, among other things that the license is revocable at the will of the federal government at any time,⁴⁰ loaned or leased assets must be returned to FEMA in the same or similar condition as they were received, and the state and Indian tribal government must agree to repair or replace any damaged or missing property.

When providing commodities or equipment in the absence of declaration, employees should consult with the Office of Chief Counsel, because of the

³⁸ FD 075-2, Rev. 01 (2017) at <https://intranet.fema.net/org/occ/collab/Lists/Pilot%20Revised%20Tasker/DispForm.aspx?ID=2700>; Stafford Act Title VI.

³⁹ See for loans: 47 Comp. Gen 387 (1968) and 44 Comp. Gen 824 (1965).

⁴⁰ 47 Comp. Gen 387 (1968) and 44 Comp. Gen. 824 (1965).

possibility of violating the prohibition against FEMA providing assistance prior to a declaration and a signed FEMA-State/Tribe Agreement.⁴¹

G. Pre-positioned Personnel

Depending on the nature and scope of an incident, FEMA may preposition Incident Management Assistance Teams, Urban Search and Rescue teams and Mobile Emergency Response Support personnel in anticipation of a declaration of a major disaster or emergency. In certain circumstances, Nuclear Incident Response Team assets may be deployed from the Department of Energy. *See* Chapter 4, *Response*, for a more detailed discussion of these teams. Prepositioning is funded from the Surge Account of the Disaster Relief Fund, as discussed above.

FEMA also deploys a broad range of specialized staff, including damage assessment teams, who may be full-time or reservists ⁴² from Headquarter and Regional cadres, depending on the nature of the incident.

H. Mission Assignments for Federal Operations Support

In addition to the pre-scripted mission assignments discussed earlier, to facilitate pre-positioning, FEMA may issue ‘federal operations support’ mission assignments that are 100% federally funded and essential for FEMA to be ready for an imminent federal emergency or disaster declaration. A mission assignment FEMA issues in anticipation of a declaration that is essential for FEMA to be ready for an anticipated declaration is authorized by title VI of the Stafford Act. *See* Chapter 4, *Response*, for a detailed discussion of mission assignments.

⁴¹ 44 C.F.R. § 206.44(a).

⁴² A special type of federal employee allowed under the Stafford Act, § 306(b)(1), 42 U.S.C. § 5149. *See* Chapter 10, *Human Capital*, for a detailed discussion of reservists.

Readiness Activities

While FEMA may not mission-assign the U.S. Army Corps of Engineers (USACE) to set up and use the generators in advance of a declaration, FEMA did permit the USACE to move generators to Puerto Rico in preparation for a disaster in 2008 but did not actually “employ” or use them until the President made a declaration. Pre-positioning the generators necessary in order to be able to mount an effective response if the approaching hurricane resulted in a declaration.⁴³

I. Memoranda of Agreement (MOA), Memoranda of Understanding (MOU), and Interagency Agreements (IAA)

FEMA coordinates with numerous federal agencies and with nonprofit organizations in advance of disaster or emergency activity, often to establish a clear understanding, pre-declaration, of each agency’s roles and responsibilities. To memorialize these understandings, FEMA may execute with another agency or a nonprofit a Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU). MO As and MOUs are agreements between government agencies or nonprofits that state mutual goals, actions, and responsibilities.

These pre-declaration arrangements can improve relations substantially between agencies and nonprofits in field operations because these roles and responsibilities are resolved ahead of time. Often conflicts at an earlier event allow agencies and nonprofits to realize that these MOUs and MO As can be of enormous assistance in assuring that response and recovery activities proceed smoothly. Since they involve no exchange of government funds, they do not need a contracting officer’s review, but relevant program specialists in FEMA’s Office of Chief Counsel (OCC) should review them. A DHS

⁴³ See discussion of the “necessary expense” doctrine in Part Two of this Chapter and also in the GAO Red Book, Vol. I, at. 4-21 and 4-22 (3rd ed. 2004).

management directive addresses the format, contents, and procedural requirements for MO As and MOUs.⁴⁴

In the event that an agreement with another federal agency requires the transfer of appropriated funding, an Interagency Agreement (IAA)⁴⁵ will be required. An IAA is a written agreement between government agencies to acquire supplies or services as authorized by statute.⁴⁶ Because IAAs involve the payment of government funding, an OCC attorney from the Procurement and Fiscal Law Division must review them, and a contracting officer must sign them.

An IAA is distinct from a Mission Assignment. A Mission Assignment is only authorized under the Robert T. Stafford Act for short-term immediate disaster response efforts (generally less than 60 days) and recovery, and is issued by FEMA to another federal agency. IAAs may be utilized for both disaster response efforts as well as non-disaster related work, under various authorities, between federal agencies.

The FEMA Office of Chief Counsel Procurement and Fiscal Law Division has developed a Guide⁴⁷ to assist FEMA attorneys as they select and draft the appropriate agreement. The Guide provides a number of helpful tools to allow attorneys to quickly decide how to proceed, including:

- A process flow diagram that allow staff to quickly decide which type of agreement to use,

⁴⁴ DHS Management Directive No. 0450.1, Memoranda of Understanding (MOU) and Memoranda of Agreement (MOA) (2003), https://portalapps.fema.net/apps/employee_tools/forms/FEMA%20DirectivesNew/FM112-5-1.pdf

⁴⁵ DHS Office of the Chief Procurement Officer Interagency Acquisitions Guide, Version 1.0 (July 2013), [http://dhsconnect.dhs.gov/org/comp/mgmt/cpo/paw/Pages/AcquisitionPolicyLegislation\(APL\).aspx](http://dhsconnect.dhs.gov/org/comp/mgmt/cpo/paw/Pages/AcquisitionPolicyLegislation(APL).aspx).

⁴⁶ *Id.* at IV. C.

⁴⁷ See FEMA Manual 112-5-1, *Interagency and Intergovernmental Agreements*, dated October 1, 2015, at page 40 at https://portalapps.fema.net/apps/employee_tools/forms/FEMA%20DirectivesNew/This manual includes comprehensive information and templates for interagency agreements, memoranda of understanding and agreement, revocable license agreements, real property license and use agreements and intergovernmental service agreements.

- Commonly used statutory authority for entering into these agreements,
- Policies and procedures for preparing, reviewing, and approving such agreements, and
- Templates and Examples of each type of agreement.

IV. Incident Support Bases (ISBs)

An ISB is a designated site where uncommitted resources are temporarily received, pre-positioned, and held⁴⁸ until the Unified Command Group at the Joint Field Office orders their use.⁴⁹ These may be set up either before or after the President makes a Stafford Act declaration.

FEMA locates ISBs as close to the impacted area as practicable. ISBs may receive resources from FEMA Distribution Centers, commercial vendors, other federal agencies, and non-governmental organizations. While FEMA's distribution strategy is to direct ship resources to the requestor's site to the extent possible, early in the response phase, the strategy may require intermediate stops until FEMA staff receives specific requirements and ultimate destinations. For this reason, FEMA may establish ISBs as pre-positioning sites to expedite immediate delivery of resources once the state, territory or tribe requests them.

⁴⁸ See the Logistics Management Directorate Overview at <http://www.fema.gov/logistics-management-directorate>.

⁴⁹ The Unified Command Group leads the Joint Field Office (JFO) and consists of the Federal Coordinating Officer, the State/Tribal Coordinating Officer and, as appropriate, senior officials from other federal, STTL governments with primary jurisdictional or operational responsibility for an aspect of the incident. National Response Framework, Third Edition (June 2016) at 42 at https://www.fema.gov/media-library-data/1466014682982-9bcf8245ba4c60c120aa915abe74e15d/National_Response_Framework3rd.pdf

V. Staging

FEMA sends equipment, commodities, and personnel committed to an incident to staging areas convenient to the impacted area awaiting tactical assignment. The region or Joint Field Office Operations Section manages staging areas. FEMA consults with the affected STTL governments to select convenient locations for access to disaster relief supplies for distribution to the local population. In the past, FEMA has used military bases, athletic stadiums, and similar types of facilities near an impacted area as staging areas.

PART TWO: FISCAL AND APPROPRIATIONS LAW

I. Introduction

Sound fiscal and contract law principles apply to every facet of the FEMA Mission, especially the response to, and recovery from, a natural disaster, act of terrorism, or other man-made disaster.⁵⁰ Money and property must be accounted for at various levels. Goods and services must be procured using appropriate federal acquisition regulations or through the Mission Assignment (MA) process.

FEMA personnel tasked with handling expenditures in support of response and recovery operations should be familiar with the laws and regulations regarding funding, property accountability, contracting, and the annual appropriations acts. The purpose of this Part is to provide a general overview of fiscal law and provide the OCC Attorney a framework to address common fiscal law issues.

A. Fiscal Law and the Deployed OCC Attorney

Fiscal law touches everything FEMA does, whether at headquarters, in the regions, or in a field setting, such as a Joint Field Office (JFO). Behind every disaster operation, or even in a steady state, funds are required to pay for goods and services and the salaries of support staff. Your ability to scrutinize the fiscal aspects of the mission will assist FEMA in meeting the Federal Coordinating Officer's (FCO) intent and keep FEMA within the

⁵⁰ 6 U.S.C. § 313(b)(1).

boundaries of the law. Without understanding the fiscal law aspects of a decision, your clients may be committing a potential Antideficiency Act violation which may result in a ratification action or not being able to support the mission.

To identify fiscal legal issues, a deployed OCC attorney needs to understand:

- General fiscal law principles and
- Specific appropriations language for the funds being used.

To analyze a fiscal matter, the field attorney should answer the following questions:

- What is being funded?
- Which program is funding it?
- What funds are being used for the expense?
- What is the purpose for the funding?
- What is the availability of the funds being used for the expense?

Some situations are fairly straight-forward, (e.g. Can we use the disaster relief fund to pay for the purchase of water for disaster survivors? Answer: YES) but some are issues are more nuanced and rife with legal and policy implications (e.g. Can we buy water for federal employees? Answer: MAYBE.)

Although the U.S. Constitution grants the President certain authorities, the power to authorize and appropriate funds is vested exclusively with Congress. The U.S. Constitution states that no money shall be spent without a specific appropriation. *See* U.S. Const. art. I, § 9, cl. 7. That is the law! Although we recognize the importance of having funds to accomplish our mission, we often times do not appreciate the underlying

law that requires affirmative authority to spend the money in the manner the Field Coordinating Officer (FCO) intends. It is your responsibility to make sure FCOs use the appropriate funds for the purpose(s) for which they are given.

FEMA attorneys, especially deployed Counsel, often find themselves immersed in fiscal law issues. When this occurs, we must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets. To aid FEMA attorneys in this endeavor, this section affords a basic, quick reference guide to common fiscal law authorities. Fiscal matters are highly legislated, regulated, audited, and disputed; thus, this reference guide is not a substitute for thorough research and sound application of the law to specific facts or consultation with the FEMA OCC Procurement and Fiscal Law Division (PFLD).

B. Constitutional Framework

Under the Constitution, Congress raises revenue and appropriates funds for Federal agency operations and programs. *See U.S. Const., art. I, § 8.* Courts interpret this constitutional authority to mean that executive branch officials, e.g., FCOs and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.⁵¹ *See, e.g., U.S. v. MacCollom*, 426 U.S. 317, at 321 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”) Likewise, in many cases, Congress has limited the ability of Executive Branch officials to obligate and expend funds through annual authorization laws, appropriations acts, or in permanent legislation.

⁵¹An obligation arises when the government incurs a legal liability to pay for its requirements, e.g., supplies, services, or construction. For example, a contract award normally triggers a fiscal obligation. FCOs also incur obligations when they obtain goods and services from other U.S. agencies. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events. *See* 42 Comp. Gen. 733, 734 (1963).

C. Legislative Framework

The principles of federal appropriations law permeate throughout all Federal activity, as well as in disasters and emergencies. Thus, there are no “contingency” exceptions to the fiscal principles discussed throughout this chapter. However, Congress has provided FEMA with special appropriations and/or authorizations for use in support of disaster operations. Fiscal issues arise frequently during disaster operations. Failure to understand the fiscal nuances and the special appropriations and/or authorizations during disaster operations may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous OCC involvement in mission planning and execution is essential. Attorneys who participate actively and have situational awareness will gain a clear view of the FCO’s activities and a better understanding of what type of appropriated funds, if any, are available for a particular need.

OCC Attorneys should consider several sources that provide the Agency’s authority to fund and carry out programs and activities, to include:

- Title 31, U.S. Code; specifically 31 U.S.C. § 1301(a)
- Title 44 of the Code of Federal Regulations;
- Robert T. Stafford Act Disaster Relief and Emergency Assistance Act (Stafford Act), Pub. L. 93-288, as amended, (1988), 42 U.S.C. §§ 5121 *et seq*;
- The Homeland Security Act; Pub. L. 107-296, (2002), 6 U.S.C. §§ 101, *et seq*.
- Fire Prevention and Control Act; Pub. L. 93-498, (1974), 15 U.S.C. §§ 2201, *et seq*.
- National Flood Insurance Act of 1968; *as amended*, Pub. L. 90-488 (1968), 42 U.S.C. §§ 4001, *et seq*.

- Earthquake Hazards Reduction Act of 1977; Pub. L. 95-124 (1977), *as amended* by Pub. L. 108-360 (2004), 42 U.S.C. §§ 7701, *et seq.*
- Defense Production Act of 1950; Pub. L. 81-774, 50 U.S.C. Appx. §§ 4501, *et seq.*
- National Security Act of 1947, Pub. L. 80-253 (1947), §§ 102 and 303, 50 U.S.C. §§ 403, 405.
- Post-Katrina Emergency Management Reform Act of 2006, Pub. L. 109-295 (2006), 6 U.S.C. §§ 701, *et seq.*
- Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. 112-141, (2012), 42 U.S.C. §§ 4001, *et seq.*
- National Dam Safety Program Act, Pub. L. 109-460 (2006), 42 U.S.C. § 467(a-n).
- McKinney-Vento Homeless Assistance Act, Pub. L. 100-77 (1987), 42 U.S.C. §§ 11201, *et seq.*
- Opinions of the Department of Justice, Office of Legal Counsel (OLC),
See <http://www.justice.gov/olc/opinions>
- Comptroller General (GAO) Decisions;
See <http://www.gao.gov/legal/index.html>;
- FEMA’s annual and supplemental appropriations

Without an explicit statement of positive legal authority, the OCC Attorney should be prepared to articulate a rationale for an expenditure which is a “necessary expense” of carrying out an existing authority.

II. Basic Fiscal Controls

Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The three basic fiscal controls are as follows:

1. **Purpose**: Obligations and expenditures must be for a proper purpose;
2. **Time**: Obligations must occur within the time limits applicable to the appropriation (e.g., salaries and expense funds (Fund 90, formerly called S&E, now called Operations & Support)) are available for obligation for one fiscal year); and
3. **Amount**: Obligations must be within the amounts authorized by Congress.

The U.S. Comptroller General, head of the Government Accountability Office (GAO), audits executive agency accounts regularly, and scrutinizes compliance with the fund control statutes and regulations.

III. The Purpose Statute

A. In General

Although each fiscal control is essential, the “purpose” control is most likely to become an issue during disaster operations. The Purpose Statute, 31 U.S.C. § 1301(a), provides, “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”⁵² In other words, where an appropriation specifies the purpose for which the funds are to be

⁵² See 31 U.S.C. § 1301(a).

used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds to the specified purpose.⁵³

However, absent specific language in the appropriation, FEMA has reasonable discretion in determining how to carry out the objects of the appropriation through a concept, known as the “necessary expense doctrine.”⁵⁴

When applying the necessary expense doctrine, an expenditure may be justified after meeting a three-part test:

1. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
2. The expenditure must not be prohibited by law.
3. The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.⁵⁵

In examining the statutory language under the first step of the analysis, the necessary expense rule directs that an appropriation is available for those expenses which are necessary or incident to the proper execution or achievement of the object of the appropriation. In other words, Congress has charged FEMA with the responsibility for administering the Stafford Act and FEMA’s interpretation of how a proposed expenditure will contribute to accomplishing Stafford Act functions will be given considerable weight. This discretion, however,

⁵³ See U.S. Gov’t. Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 4-11 (3d. ed. 2004) *available at* <http://www.gao.gov/products/GAO-04-261SP> For example, an appropriation for topographical surveys in the United States was not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899).

⁵⁴ See U.S. Gov’t. Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 4-20 (3d. ed. 2004) *available at* <http://www.gao.gov/products/GAO-04-261SP>. 4-20.

⁵⁵ See *id.*, 4-22.

is not without limits. FEMA's interpretation must be reasonable and must be based on a permissible construction of the statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–238 (2001); *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See also B-286661, Jan. 19, 2001.

The second test under the necessary expense doctrine is that the expenditure must not be prohibited by law. As a general proposition, neither a necessary expense rationale nor the “necessary expense” language in an appropriation act can be used to overcome a statutory prohibition.⁵⁶

Regarding the third question as to whether there is another appropriation to which the expenditure should be charged, if counsel is confronted with two appropriations that are arguably available for the same purpose, she must determine which appropriation is the most specific and thus appropriate. If two appropriations are available for the same expenditure, the agency must determine which appropriation it will charge.⁵⁷ Once this election is made, the agency must continue to use that appropriation for that purpose.⁵⁸ The agency cannot change the appropriation for that purpose even if the funds are exhausted.⁵⁹ If the agency wishes to charge a different appropriation, it must notify Congress at the beginning of the fiscal year.⁶⁰

⁵⁶ See *id.*, 4-28; See e.g., *Matter of: Prohibition on Use of Appropriated Funds for Defense Golf Courses*, B-277905, Mar. 17, 1998 (expenditure for installation and maintenance of water pipelines to support a military base golf course not permissible because such expenditure is specifically prohibited by 10 U.S.C. § 2246, which prohibits the use of appropriated funds to “equip, operate, or maintain” a golf course).

⁵⁷ B-231445, 69 Comp. Gen. 337 (1989).

⁵⁸ See, *Funding for Army Repair Projects*, B-272191, Nov. 4, 1997.

⁵⁹ *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

⁶⁰ See U.S. Gov't. Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 4-12 (3d. ed. 2004) available at <http://www.gao.gov/products/GAO-04-261SP>

1. Purpose Statute Violations

As noted at the beginning of this chapter, the Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”⁶¹ Thus, if the FCO uses funds for an improper purpose, it must adjust the accounts by deobligating the funds used erroneously and seek the proper appropriation. Counsel should also consult the relevant appropriations act to determine whether there are any temporary restrictions or riders that would limit the expenditure of the appropriated funds.

2. Correcting Violations of the Purpose Statute

For example, if the FCO leases a facility for \$300,000 (funded costs) in support of a presidentially declared major disaster with the salaries and expenses (S&E) (or Fund Code 90, now called Operations & Support) funds, she has violated the Purpose Statute. Remember, S&E is normally proper only for FEMA’s salaries and operating expenses. To correct this violation, FEMA must deobligate the S&E funds and substitute (obligate) Disaster Relief Funds (DRF) funds, which are available for carrying out activities authorized under the Stafford Act.

This is an example of an internal account adjustment of the agency’s accounting records and does not demonstrate the recovery of the actual payment disbursed to the contractor or other payee. However, if there were disallowed costs or improper payments made to a contractor or recipient, appropriate debt collection actions should be taken. While this is a matter of adjusting agency accounts, FEMA must report a potential Antideficiency Act (ADA) violation if proper funds (in this example, the DRF) were not available: (1) at the time of the original obligation (e.g., lease), (2) at the time the adjustment is made, and (3) continuously at all times in-between. *See* discussion of the ADA, below.

Absent statutory authority to expend funds for a particular purpose, counsel may also employ the necessary Expense Doctrine to justify the expenditure of DRF funds if the expenditure meets the GAO three prong test, i.e. 1) the expenditure was logically and reasonably related to

⁶¹ *See* 31 U.S.C. § 1301(a).

carrying out activities authorized under the Stafford Act for disaster relief, 2) was not prohibited by law, and 3) was not otherwise provided for in some other appropriation or statutory funding.

Finally, government officials and agents cannot expend appropriated funds for known unconstitutional, or otherwise illegal, purposes.

IV. The Time Limitation

A. Period of Availability

Most appropriations are available for a finite period.⁶² For example, S&E funds (Fund Code 90, now called Operations & Support) (the appropriation most prevalent in an operational setting) are normally available for one fiscal year; conversely Disaster Relief Fund appropriations are no-year funds, meaning the funds are available without fiscal year limitation.

The GAO provides, “[T]he standard language used to make a no-year appropriation is ‘to remain available until expended.’”⁶³ If funds are not obligated during their period of availability, they “expire” and are unavailable for new obligations (e.g., new contracts and grants or changes outside the scope of an existing contract or grant).⁶⁴ Funds that are “expired” may be used, however, to adjust existing obligations (e.g., to pay for a price increase following an in-scope change to an existing contract or grant).⁶⁵ After five years, the “expired” account is closed and the balances remaining are canceled.⁶⁶

The “*Bona Fide Needs rule*.” This rule provides that funds are available only to satisfy requirements that arise during their period of

⁶² 31 U.S.C. § 1301(c).

⁶³ See U.S. Gov’t. Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 5-7 (3d. ed. 2004) available at <http://www.gao.gov/products/GAO-04-261SP>

⁶⁴ *Id* at 5-6.

⁶⁵ 31 U.S.C. § 1553(a).

⁶⁶ 31 U.S.C. § 1552(a). Any remaining balances that would have been properly charged to the cancelled account may be paid from the current appropriation account available for the same purpose. *Id*.

availability, and will affect which fiscal year appropriation one uses to acquire supplies and services.⁶⁷

1. Supplies

A *bona fide* need for supplies typically exists when the government actually uses the items in the same fiscal year in which the funds to purchase the items were obligated. Thus, one would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, one may not use current year funds for office supplies that are not needed until the next fiscal year.

Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a current need is documented. Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies.

The lead-time exception allows the purchase of supplies with current year funds at the end of a fiscal year, even though the time period required for manufacturing or delivery of the supplies may extend into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. In any event, “stockpiling” items is prohibited.⁶⁸

⁶⁷ See 31 U.S.C. § 1502(a).

⁶⁸ See, *Mr. H.V. Higley*, B-134277, Dec. 18, 1957 (unpub.).

Example: Purchase at the End of a Fiscal Year

For example, if a FEMA official determines that there is a need for fifty new computers at the end fiscal year 2014 but the computer provider notifies the official that the computers cannot arrive until the beginning of fiscal year 2015. The official may obligate 2014 funds to purchase the computers. If, upon receipt of the computers in 2015, the official determines that there is a need for 25 additional computers, she cannot obligate fiscal year 2014 funds for the additional computers—she must obligate fiscal year 2015 funds.

2. Services

Services provided to an agency are either “severable” or “non-severable.” The severability of the services is dispositive in determining which fiscal year funds should be obligated to purchase the services. Severable services include services that are complete whenever the service is rendered. Normally, severable services are *bona fide* needs of the period in which they are performed. Custodial services, equipment maintenance, and window-washing are examples of severable services because of the recurring “day-to-day” need. Continuing and recurring severable services are charged to the appropriation account for the fiscal year in which they are rendered.

As an exception to the *Bona Fide* Needs rule, however, federal law permits FEMA and any civilian agency to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services.⁶⁹

In contrast, non-severable services are incomplete when they are rendered. In other words, the agency does not receive a benefit until all of the services are performed. Non-severable services are those that contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. For example, if an agency hires a contractor to monitor an

⁶⁹ 41 U.S.C. § 3902; *See generally*, U.S. Gov’t. Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 5-11 (3d. ed. 2004) *available at* <http://www.gao.gov/products/GAO-04-261SP>

agency’s activities and provide a year-end report, the service would not be complete until the report was delivered. Non-severable services are charged against the appropriation current when the obligation (i.e. contract) was made.

Table 2-1: Severable v. Non-Severable Chart

Type of Service	Description	Which FY Funds?	Example
Severable	Services that are complete whenever the service is rendered.	Appropriation account in the fiscal year when services are rendered.	Janitorial services, equipment maintenance, & window washing.
Non-Severable	A single undertaking that cannot be feasibly sub-divided.	Appropriation account in the fiscal year when the obligation (i.e. contract) was made.	Studies, reports, overhaul of an engine, & painting a building.

V. The Amount Control

A. Augmentation of Appropriations and Miscellaneous Receipts

1. Augmentation of Appropriations:

A corollary to the Purpose Control is the prohibition against augmentation.⁷⁰ Augmentation occurs when an agency attempts to supplement its appropriated funds with money collected through varying means.

2. Miscellaneous Receipts Statute:

This statute is a tool to enforce the rule against augmentation of appropriations. It requires that a government official or agent who receives money for the Government, from any source, must deposit those

⁷⁰ See, *Nonreimbursable Transfer of Admin. Law Judges*, B-221585, 65 Comp. Gen. 635 (1986); cf. 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law).

funds into the U.S. Treasury as soon as practicable without deduction for any charge or claim.⁷¹

3. Exceptions.

There are, however, statutory exceptions to the Miscellaneous Receipts Doctrine:

- There are interagency acquisition authorities that allow augmentation or retention of funds from other sources.⁷² The Economy Act authorizes a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services.⁷³ An agency cannot, however, transfer funds to another agency in order to retain the funds for bona fide need arising in a subsequent fiscal year.⁷⁴ Consult agency regulations for order approval requirements.⁷⁵
- Similarly, Sec. 402 of the Stafford Act authorizes the President, through FEMA, to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of state and local assistance response and recovery efforts;...”⁷⁶

⁷¹ 31 U.S.C. § 3302(b).

⁷² See, e.g., Economy Act, Pub. L. 73-2 (1933), codified as amended at 31 U.S.C. § 1535; Homeland Security Act, Pub. L. 107-56 (2002), 6 U.S.C. § 189, Stafford Act, codified as amended, Pub. L. 100-707 (1988), 42 U.S.C. §§ 5170a, 5192.

⁷³ See, *Washington Nat’l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest).

⁷⁴ See *In the Matter of Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, Comp. Gen. B-308944 (2007).

⁷⁵ See, e.g., Federal Acquisition Regulation Subpart 17.5; Homeland Security Acquisition Regulation 3017.5.

⁷⁶ 42 U.S.C. 5170a.

The Stafford Act provides gift acceptance authority to FEMA so that it may receive and use donations, cash, property, or services to carry out the agency's duties.⁷⁷

Refunds are receipts related to previously recorded expenditures. A refund may occur as a result of an erroneous payment, overpayments, and adjustments for previous amounts disbursed. Refunds are credited back to the appropriation account against with the previous expenditure was obligated.

An agency can credit excess procurement costs that an agency recovers due to a defaulting contractor to the original appropriation and use the sums to complete or correct the contracted work. Any amount exceeding the costs to complete or correct the work shall be deposited into the Treasury.⁷⁸

B. The Antideficiency Act (31 U.S.C. §§ 1341(a), 1342, & 1517(a))

The Antideficiency Act (ADA) prohibits any government officer or employee from:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or funds in excess of the amount available in the appropriation or fund unless otherwise authorized by law, or obligation in advance of or in excess of an appropriation. 31 U.S.C. § 1341(a)(1)(A);
- Involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise authorized by law. 31 U.S.C. § 1341(a)(1)(B);
- Accepting voluntary services for the United States, or employing personal services not authorized by law, except in

⁷⁷ Stafford Act § 621(d); 42 U.S.C. § 5197(d).

⁷⁸ See 40 U.S.C. § 503 and 40 U.S.C. § 571 for additional exceptions to the Miscellaneous Receipts Statute.

cases of emergency involving the human life or protection of property. 31 U.S.C. § 1342; and

- Making obligations or expenditures in excess of an apportionment or reappropriation, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

C. Requirements When an ADA Violation Is Suspected

Any suspected violation of the ADA must be reported immediately to the OCFO and OCC. FEMA must investigate suspected violations to establish responsibility and discipline violators.⁷⁹ Specifically, DHS policy requires that, when a Component has some evidence that an ADA violation may have occurred, the Component must conduct a preliminary review of the applicable business transactions resulting in a Preliminary Review Report. The Preliminary Review Report is coordinated with the OCC. The Preliminary Review Report is then forwarded to the DHS Chief Financial Officer (CFO) along with a legal opinion. Attorneys, contracting officers, and resource managers all have been found responsible for violations. The ADA states that an officer or employee of the U.S. Government cannot do the following:

- Make or authorize expenditures or obligate funds in excess of the available amounts appropriated for such expenditures or obligations.
- Involve the government in contracts or obligations for payment of funds prior to an appropriation unless specifically authorized by law.
- Accept voluntary services or employ personal services for amounts exceeding those authorized by law except in the case of emergencies involving the safety of human life or protection of property, not including ongoing regular functions of government.

⁷⁹ See DHS Financial Policy Manual, Chapter 2: *Planning, Programming, Budgeting and Execution*, Section 2.5 – *Administrative Control of Funds, Antideficiency Act*, available online at: <http://cfo-policy.dhs.gov/default.aspx>

- Incur any obligation or make any expenditure in excess of an apportionment or reapportionment or in excess of other subdivisions established pursuant to 31 U.S.C. §§ 1517(a).
- Make or authorize an expenditure or obligation, or involve the government in a contract for payment of funds required to be sequestered.⁸⁰

VI. Conclusion

A. Active Participation

Congress limits the authority of FEMA and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time and Amount. These controls apply to FEMA's day-to-day operations and in response to and recovery from emergency and major disaster operations. The Comptroller General, Office of Management and Budget, and the DHS Inspector General monitor compliance with rules governing the obligation and expenditure of appropriated funds. Regional Administrators, FCOs, and staff rely heavily on OCC for fiscal advice. Active participation by attorneys in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that FEMA uses appropriated funds properly. Those found responsible for funding violations may face adverse personnel actions and possibly criminal sanctions.

B. Necessity for OCC to Get It Right

Not surprisingly, these operations are conducted under the bright light of the U.S. press and members of Congress, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Additionally, Congressional members will often have an interest in the location, participants, scope, and duration of the operation. Few response and recovery operations FEMA conducts escape Congressional interest. Thus, it is imperative that the FCOs and

⁸⁰ *Id.*

his or her staff be fully aware of the legal basis for the conduct of the operation.

OCC Attorneys bear the primary responsibility for ensuring that all players involved, and especially the FCO and his or her staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for FEMA in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the ADA, and possible reprimands or criminal sanctions for the responsible individuals.

Should you have any questions, please contact the Procurement & Fiscal Law Division, Office of the Chief Counsel.

CHAPTER 3
Declarations
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Declarations**I. Introduction**

A Presidential major disaster¹ or emergency² declaration under the Stafford Act initially triggers FEMA's broad statutory authorities³ to provide financial assistance and Direct Federal Assistance (DFA)⁴ from the Disaster Relief Fund (DRF)⁵ to affected state, tribal, and local governments for immediate aid and emergency services, and to provide assistance to individuals and households.⁶ In addition, in the case of a major disaster declaration, FEMA may provide assistance to repair, restore, or replace disaster damaged public facilities and eligible private nonprofit facilities;⁷ mitigate the risk from future hazard events;⁸ and provide, among other programs, crisis counseling,⁹ disaster unemployment,¹⁰ and disaster case management¹¹ to those who need more help recovering.

No state or territory has escaped the need for a major disaster or emergency declaration; on average, approximately 35 major disaster declarations have been issued annually since 1953.¹² The President

¹ Stafford Act § 401, 42 U.S.C. § 5170.

² *Id.* § 501, 42 U.S.C. § 5191.

³ *Id.* §§ 402, 403, 502, and 503, 42 U.S.C. §§ 5170a, 5170b, 5192, and 5193.

⁴ *Id.* § 402, 403, 407, and 502, 42 U.S.C. § 5170a, 5170b, 5173, and 5192; 44 C.F.R. § 206.208. FEMA may provide DFA through its own personnel, outside contractors, and/or through mission assignments to other federal agencies (OFAs). *See* Chapter 4, *Response*, for a more detailed discussion of mission assignments.

⁵ The DRF is the FEMA appropriation that funds Major Disaster and Emergency Declarations, Fire Management Grants, the Disaster Readiness and Support (DRS) account and the Surge accounts. *See* Chapter 2, *Disaster Readiness*, for a discussion of the DRS and Surge accounts.

⁶ Stafford Act § 408, 42 U.S.C. § 5174.

⁷ *Id.* § 406, 42 U.S.C. § 5172.

⁸ *Id.* § 404, 42 U.S.C. § 5170c.

⁹ *Id.* § 416, 42 U.S.C. § 5183.

¹⁰ *Id.* § 410, 42 U.S.C. § 5177.

¹¹ *Id.* § 426, 42 U.S.C. § 5189d.

¹² *See* <http://www.fema.gov/disasters/grid/year>. The annual number of major disasters for the last 15 years has been much greater.

authorizes an extraordinary array of direct and financial assistance in support of an impacted state or federally recognized tribe whenever he makes a major disaster or emergency declaration.¹³ Please note that the Sandy Recovery Improvement Act of 2013 (SRIA), which was signed into law on January 29, 2013, amended the Stafford Act to allow federally recognized tribes to seek Stafford Act assistance from the President directly in the event of an emergency or major disaster.¹⁴ Please refer to the discussion in Section XII of this chapter regarding this recent legislative change. The Stafford Act has broad authorities that allow the President to tailor the declaration (declaration type, incident type, programs designated, areas covered and forms of assistance) to meet the disaster or emergency-related needs of those affected.¹⁵

The statutory definitions of “major disaster” and “emergency” define not only the type of event or circumstances that the President may consider, but also the scale of the disaster-related needs that the Stafford Act authorizes FEMA to address.

A major disaster *is any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under [the Stafford] Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.*¹⁶

An emergency *is any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and protect property and public health*

¹³ Stafford Act § 401 and 501, 42 U.S.C. § 5170 and 5191.

¹⁴ Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, § 1110, Tribal Requests for a Major Disaster or Emergency Declaration under the Stafford Act (2013).

¹⁵ *Id.* § 101, 42 U.S.C. § 5121.

¹⁶ Stafford Act § 102(2), 42 U.S.C. § 5122(2); 44 C.F.R. § 206.2(a)(17).

*and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.*¹⁷

Emergency declarations are typically intended to address immediate threats that require direct federal assistance to address unmet needs that the state, tribal, and local governments cannot address themselves. If the threat has passed and state, tribal, and local governments are seeking reimbursement for emergency actions taken in response to the event, depending on the event, a major disaster request may be more appropriate.

Any request for an emergency authorizing reimbursement assistance will generally need to include a cost estimate. The cost estimate must be verified by the appropriate FEMA Region, so that FEMA can evaluate whether or not the event was beyond state/tribal and local capabilities. Emergencies are not intended to be a fallback for events that do not rise to the level of a major disaster declaration.

The emergency definition is broader than that for a major disaster. However, the assistance available for an emergency is narrower than for a major disaster. See Table 3-2, *Summary of Federal Activities and Programs: Emergency v. Major Disaster Declaration* later in this chapter.

The President has sole authority to issue major disaster and emergency declarations.¹⁸ FEMA provides the President with a recommendation to grant or deny the declaration request. In order to determine whether it is appropriate to recommend a declaration to the President, FEMA considers a variety of factors discussed in this chapter. These include the nature and scale of the impact of the incident; whether the need for assistance under the Stafford Act is present and not met by state, local, or tribal resources; and whether the response and recovery fall within the authorities or responsibilities of another federal department or agency.¹⁹

¹⁷ *Id.* § 102(1), 42 U.S.C. § 5122(1); 44 C.F.R. § 206.2(a)(9).

¹⁸ No Executive order has delegated Stafford Act §§ 401 and 501, 42 U.S.C. §§ 5170 and 5191 (a), which are the declaration sections, from the President to any agency or department.

¹⁹ 44 C.F.R. §§ 206.35, 206.37 and 206.48.

II. Requesting a Declaration

A. Requirements for Governor's Request

The governor²⁰ (or acting governor) of a state²¹ or the chief executive of an Indian tribal government²² must request a Presidential declaration of a major disaster or emergency, except in the case of an emergency declaration involving primary federal responsibility, which is discussed in section D. The request must be based on a finding that the major disaster or emergency is of such severity and magnitude that an effective response is beyond the capabilities of the state, tribe, and affected local governments and that federal assistance is necessary.²³

The governor or tribal chief executive submits a request and supporting documentation to the President, through the appropriate FEMA Regional Administrator (RA), who analyzes the state's request and makes a recommendation to the Associate Administrator, Response and Recovery,²⁴ who reviews all of the information and formulates a recommendation for the FEMA Administrator for submittal to the President.

A request must include OMB No. 1660-0009/FEMA Form 010-0-13: Request for Presidential Disaster Declaration, Major Disaster, or

²⁰ Defined as the chief executive of any state, which would include the Mayor for the District of Columbia. Stafford Act § 102(4) and (5), 42 U.S.C. § 5122(4) and (5).

²¹ Defined as any U.S. state, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Stafford Act § 102(4), 42 U.S.C. § 5122(4).

²² See Stafford Act §§ 102(6) and (12), 401(b) and 501(c), 42 U.S.C. §§ 5122(6) and (12), 5170(b) and 5191(c). For purposes of this chapter, consider any references to "governor" as including "chief executive" and references to "state" as including "Indian tribal government" as it relates to requests for a major disaster or emergency declaration. See also Stafford Act §§ 103, 42 U.S.C. § 5123.

²³ Stafford Act §§ 401 and 501(a), 42 U.S.C. §§ 5170 and 5191(a).

²⁴ Note that 44 C.F.R. § 206.37 states that the Regional Administrator submits the recommendation to the Assistant Administrator for the Disaster Assistance Directorate, which, as a result of organizational realignment, no longer exists.

Emergency.²⁵ The form includes the minimum necessary information and certifications legally required by the Stafford Act for a declaration request and must be signed by the governor or chief executive, in the case of an Indian tribal government. Omission of the form may result in failure to meet those requirements and may delay the processing of the declaration request. A cover letter in support of the request typically accompanies the form. FEMA has created a sample request package that includes a template cover letter.²⁶

1. Request Deadline

A request for an emergency declaration should be submitted within five days after need becomes apparent but no longer than 30 days after the incident.²⁷ A filing extension may be granted by FEMA if the governor or tribal chief executive submits a request for an extension within the 30-day period providing the reason for the delay.²⁸

A request for a major disaster declaration must be submitted within 30 days of the incident unless the governor or tribal chief executive submits, and FEMA approves, a request for an extension within the 30-day period, providing the reason for the delay.²⁹

2. Severity of Situation Finding

The request for an emergency declaration must include a finding that the situation is of such severity and magnitude that effective response is beyond the capability of the state or tribe and affected local governments, and that the state or tribe requires supplementary federal emergency assistance to save lives and to protect property, public health, and safety, or to lessen or avert the threat of a disaster.³⁰

²⁵ The Request form and accompanying template cover letter is available at <http://www.fema.gov/media-library-data/1402341399552-16061b126a559cc2f4f135576135d3e9/010-0-13.pdf>. This site also includes a webinar on use of the new form.

²⁶ *Id.*

²⁷ 44 C.F.R. § 206.35(a).

²⁸ *Id.*

²⁹ 44 C.F.R. § 206.36(a).

³⁰ Stafford Act § 501, 42 U.S.C. § 5191; 44 C.F.R. § 206.35(b).

The request for a major disaster declaration must include a finding that the situation is of such severity and magnitude that effective response is beyond the capability of state and affected local governments, and that federal assistance is necessary to supplement resources of states, local governments, disaster relief organizations, and available insurance.³¹

3. Required Actions by the Governor or Chief Executive

The request for emergency or major disaster declarations must include confirmation that the governor or tribal chief executive has taken appropriate action under state or tribal law and directed the execution of the state or tribal emergency plan.³² Additional information should include the date on which the action was taken and the areas covered.³³ The emergency plan is defined as that plan which is designated specifically for state or tribe level response to emergencies or major disasters and which sets forth actions to be taken by the state, tribal, and local governments, including those for implementing federal disaster assistance.³⁴

The request must include information describing state, tribal, and local resources committed to disaster relief.³⁵ This may include actions pending or taken by the state or tribal legislatures and governing bodies.

4. Specification of Incident Type

The request must indicate the type of incident (e.g., severe storms, flooding, and hurricane) and specific dates and time period establishing the basis for a declaration of an emergency or a major disaster.³⁶

³¹ Stafford Act § 401, 42 U.S.C. § 5170; 44 C.F.R. § 206.36(b).

³² 44 C.F.R. §§ 206.35(c) and 206.36(c).

³³ This may include whether and when a state of emergency has been issued and its coverage.

³⁴ 44 C.F.R. §§ 206.2 (24) and 206.4.

³⁵ 44 C.F.R. §§ 206.35(c)(2) and 206.36(c)(3).

³⁶ See 44 C.F.R. §§ 206.32(e) and (f), 206.35 and 206.36.

5. Nature of Assistance Required

A major disaster request must include information indicating the types and amount of federal assistance required.³⁷ On an emergency declaration request, the governor must include preliminary estimates of the types and amount of emergency assistance needed under the Stafford Act, and information concerning emergency assistance from other federal agencies under other statutory authorities.³⁸

In general, a statement that a joint federal, state, tribal, and local survey of the damaged areas was requested, a description of the types of facilities and damage, and the adverse effect the damage has on the public and private sectors is required for a major disaster declaration.³⁹ This will include preliminary estimates of types and amount of supplementary federal assistance needed under the Stafford Act, including the results of the joint preliminary damage assessments.

The request should include the specific FEMA programs requested and the counties for which each program is requested, for example, Individual Assistance (including the Individual and Households Program, Disaster Unemployment Assistance, Crisis Counseling); Public Assistance; Small Business Administration (SBA) disaster loans; and Hazard Mitigation (HM). Note that the Hazard Mitigation Grant Program (HMGP) may be used for disaster risks unrelated to the damage caused by the event and is typically requested and authorized statewide, but a state may opt to limit the request to specific counties.

6. Debris Removal

If debris removal is requested or anticipated, the state or tribe must agree to indemnify the United States from any claims arising from the removal of debris or wreckage, and the state must agree that debris removal from public and private property will not occur until the landowner signs an unconditional authorization for the removal of debris.⁴⁰

³⁷ 44 C.F.R. §§ 206.36(c)(4).

³⁸ 44 C.F.R. § 206.35.

³⁹ 44 C.F.R. §§ 206.33 and 206.36. See discussion of damage assessment.

⁴⁰ Stafford Act § 407(b) and 502(a)(5), 42 U.S.C. §§ 5173(b) and 5192(a)(5).

7. Direct Federal Assistance (DFA)

If DFA is requested, the following information and certifications must be provided before DFA can be provided:⁴¹

- i) The specific type of work requested;
- ii) The reasons the state, tribal, and local government cannot perform or contract for performance of the work;
- iii) That the state/tribe will provide, without cost to the United States, all lands, easements, and rights of way necessary to accomplish the approved work;
- iv) That the state/tribe agrees to indemnify the United States from damages and claims arising from the requested work;
- v) That the state/tribe will provide reimbursement for the non-federal share of the cost of work pursuant to the terms of the FEMA-State Agreement (FSA); and
- vi) That the state/tribe will assist the performing federal agency in all support and local jurisdictional matters.

8. Compliance with Non-Federal Cost Share Requirements

A governor's or tribal chief executive's certification that the state or tribe will comply with Stafford Act cost sharing requirements is specifically required for major disaster declaration requests.⁴² FEMA requires a certification for emergency declaration requests also to ensure timely provision of assistance. Cost share commitments are included in the FSA for both emergencies and major disasters⁴³ and are required for the provision of assistance.

⁴¹ 44 C.F.R. §§ 206.208

⁴² Stafford Act § 401, 42 U.S.C. 4170; 44 C.F.R. § 206.35(c)(5).

⁴³ 44 C.F.R. §§ 206.44(b) and 206.208(b)(1)(iii).

9. Designation of Primary Officials

Generally, there will be a designation of a State Coordinating Officer or Tribal Coordinating Officer (SCO or TCO) in the request.⁴⁴ See discussion in Section VII of this chapter.

10. Pre-Disaster Emergency Declarations

The Stafford Act requires FEMA to establish guidelines to assist governors in requesting an emergency declaration in advance of a natural or man-made event that may be declared a disaster.⁴⁵ FEMA provides guidance regarding the circumstances under which a state may request a pre-disaster emergency declaration in its Declaration Process Fact Sheet.⁴⁶ As explained in the Declaration Process Fact Sheet, requests must demonstrate that there are critical emergency protective measure needs prior to the impact of the event that are beyond the state and affected local governments and identify specific unmet emergency needs that can be met through DFA. Pre-positioning of assets does not generally require a declaration. The assistance authorized under an emergency declaration will typically be limited to DFA emergency protective measures. If other types of assistance are requested, FEMA may require damage assessments and cost estimates to determine if that additional assistance is warranted.

B. Expedited Request for Major Disaster

A governor or tribal chief executive may send an abbreviated written request for a major disaster declaration for catastrophes of such unusual severity and magnitude that field damage assessments are not necessary to determine the need for supplementary federal assistance.⁴⁷ All declaration requests, including expedited requests, must comply with minimum information and certification requirements set forth in regulations. Proper completion of FEMA

⁴⁴ 44 C.F.R. § 206.41(c), See description in Section VII of this chapter.

⁴⁵ Stafford Act § 502(c), 42 U.S.C. § 5192(c). The Post Katrina Emergency Management Reform Act of 2006 [hereinafter PKEMRA], Title VI of the Department of Homeland Security Appropriations Act, 2007, § 681, Pub. L. No. 109-295 (2006) added this requirement.

⁴⁶ <https://www.fema.gov/declaration-process-fact-sheet>.

⁴⁷ *Id.* § 206.36(d).

Form 010-0-13 will ensure that these requirements are met. FEMA describes the procedures for expedited major disaster declarations in the Declaration Process Fact Sheet.⁴⁸

The purpose of such an expedited request is generally to obtain emergency work as quickly as possible. Depending upon the specific request and the circumstances of the event, FEMA may recommend emergency work, Category A (debris removal), and/or Category B (emergency protective measures), which will generally be limited to DFA.⁴⁹

FEMA may also recommend authorization of Individual Assistance (IA), if there is a clear need. Some level of damage assessment (for example, flyovers or satellite imagery) may be required to verify this need. HMGP will also generally be authorized initially, as there are no underlying criteria to evaluate need.

Generally, FEMA will withhold a recommendation regarding permanent work categories of Public Assistance (PA) until the results of Preliminary Damage Assessments (PDAs) are available. (This reference book discusses PA, IA, and HM in chapters 5, 6, and 7, respectively.)

If FEMA determines that the event is not so catastrophic that the need is clear, FEMA may hold its recommendation regarding the declaration until PDAs have been completed.

III. Preliminary Damage Assessment (PDA)

The PDA is a tool to quantify the magnitude of damage that an incident caused and the resulting unmet needs of individuals, businesses, the public sector, and the community. The state requests PDAs and teams consisting of federal, state, local, and tribal officials to

⁴⁸ <https://www.fema.gov/declaration-process-fact-sheet>.

⁴⁹ See Chapter 5, *Public Assistance*, for a more detailed discussion of these and other Categories.

conduct them. PDA results form the basis of a request for a declaration and are usually submitted with the request.⁵⁰

When an incident occurs or is imminent, the state or tribe should determine whether its initial damage is sufficient to request a joint PDA. Not every incident requires federal assistance. When the state or tribal official responsible for disaster operations determines the incident is beyond the state, tribal, and local government capabilities to respond, they then request the appropriate FEMA RA to perform a joint PDA.⁵¹

Damage assessment teams, composed of at least one representative of the federal government and one representative of the particular state or tribe involved, carry out PDAs. The state should also include, if possible, a local or tribal government representative on its team who is familiar with the specific extent and location of damage. The state or tribe and FEMA may also ask other governmental representatives and voluntary relief organizations to participate in the PDA process, if needed. The state or tribe is responsible for coordinating state and local participation in the PDA and ensuring that the participants receive timely notification concerning the schedule. A FEMA official will brief team members on damage criteria, the kind of information to be collected for the particular incident, and reporting requirements.⁵²

When the PDA is completed, FEMA and the state or tribe discuss findings and reconcile any discrepancies. FEMA funds 75% of the cost of the PDAs, and the state or tribe pays 25% unless there is a determination that no declaration is appropriate, in which case each party pays its own costs.

FEMA may waive the requirement for a joint PDA when the incident is of such unusual severity and magnitude that field damage

⁵⁰ 44 C.F.R. § 206.33 describes the PDA process.

⁵¹ *Id.* § 206.33(a). The state is expected to verify its initial information, and FEMA may decline a request to participate in a PDA under circumstances that realistically cannot result in an assessment that can support a request for a declaration.

⁵² *Id.* § 206.33(b).

assessments are not necessary to determine whether supplemental federal assistance is appropriate.⁵³

Even where the need for supplemental federal assistance is obvious, however, FEMA may request a damage assessment to evaluate unmet needs to be able to better manage the nature of its supplemental assistance. For example, if many disaster survivors are economically living below the federally determined poverty line, currently \$22,050 for a family of four,⁵⁴ FEMA may seek assistance early from other federal agencies (OFAs), such as the Department of Housing and Urban Development (HUD) and the local public housing authority.

IV. Processing Requests for Declarations

The FEMA RA reviews the request for a declaration and the joint PDAs,⁵⁵ and submits a report with a formal recommendation to the FEMA Administrator.⁵⁶ FEMA Headquarters (HQ) staff, that is, personnel from IA, PA, HM, and Office of Chief Counsel (OCC), review the request and the Region's report.

The Region and FEMA HQ independently review the governor's request and supporting documentation for compliance with the requirements in the Stafford Act and FEMA's regulations. The Administrator reviews the recommendations of the Region and FEMA HQ⁵⁷ and formulates FEMA's final recommendation to the President.⁵⁸

⁵³ See discussion at II. C. *Expedited Request for Major Disaster*.

⁵⁴ Department of Health and Human Services, Administration for Children and Families, 2011/2012. See <http://liheap.ncat.org/profiles/povertytables/FY2011/popstate.htm>.

⁵⁵ 44 C.F.R. § 206.48. No Executive order delegated Stafford Act § 401 and 501, 42 U.S.C. § 5170 and 5191(a) from the President to any agency or department.

⁵⁶ 44 C.F.R. § 206.37(b).

⁵⁷ For example, evaluation factors include the amount of insurance available to cover losses, but there is no stated percentage of insurance coverage that will trigger or disallow either the IA or PA program. Similarly, there is no required minimum percentage of access and functional needs population necessary to trigger program implementation.

⁵⁸ 44 C.F.R. § 206.37(c).

A. Need for Stafford Act Assistance

Under the Stafford Act, in order for the federal government to assist, an incident must be of such severity and magnitude that effective response is beyond the capabilities of the state and affected local governments.⁵⁹ Disaster assistance, however, is also part of the mission of many OFAs, including the Department of Health and Human Services, the Environmental Protection Agency, the U.S. Coast Guard (USCG), the SBA, and the U.S. Army Corps of Engineers (USACE).⁶⁰

Generally, FEMA will not recommend an emergency or major disaster declaration when the authority to respond to an incident is within the existing statutory authority of another federal agency, unless there are significant unmet needs that other federal assistance does not address and that the Stafford Act could address.⁶¹ See subsequent Section VI(E), *Designation of the Federal Coordinating Officer*, for further discussion.

Non-Stafford Act Event

In 2010, the federal government responded to the Deepwater Horizon Oil Spill in the Gulf of Mexico pursuant to the Oil Pollution Act and the National Contingency Plan. FEMA provided support through the USCG National Incident Commander but the President did not declare an emergency or major disaster under the Stafford Act.

In order to recommend an emergency to the President, FEMA evaluates whether emergency assistance under the Stafford Act is necessary “to supplement the State and local efforts to save lives,

⁵⁹ Stafford Act §§ 401 and 501, 42 U.S.C. §§ 5170 and 5191.

⁶⁰ The USACE has authority and resources to carry out what is traditionally called “floodlighting,” which includes, among other things, sandbagging at low places and at river edges to prevent flooding.

⁶¹ 44 C.F.R. § 206.37(d).

protect public health and safety, or lessen or avert the threat of a catastrophe.”⁶²

B. Minimum Requirements of a Request

Under the statute and regulations, the following are the minimum requirements for a request for a major disaster declaration:⁶³

- The request must indicate that the situation is of such severity and magnitude that it is beyond the capabilities of the state, tribal, and local governments, and that supplemental assistance under the Stafford Act is necessary;⁶⁴
- The request must state that federal assistance is necessary to supplement efforts and resources of state, tribal, and local governments, disaster relief organizations, and insurance;
- The state or tribe must submit the request within 30 days of the occurrence of the incident unless an extension was requested within the 30-day time period, and that extension was approved by FEMA;
- The request must be for an event that is appropriate for a major disaster declaration (e.g., a natural catastrophe or, regardless of cause, fire, flood or explosion); if not, FEMA may still consider whether an emergency declaration would be appropriate;
- The request must be signed by the governor or the tribal chief executive or, in the absence of that official, the acting governor or acting tribal chief executive, who should provide written evidence of authority to act for the governor or tribal chief executive;

⁶² Stafford Act § 502, 42 U.S.C. § 5192; 44 C.F.R. §§ 206.37(c)(2) and (d).

⁶³ *Id.* § 401, 42 U.S.C. § 5170; 44 C.F.R. §§ 206.48 and 206.37(c)(1).

⁶⁴ *Id.* § 401, 42 U.S.C. § 5170.

- The request must certify that the governor or tribal chief executive has taken appropriate action under state law and directed execution of the state emergency plan;
- The request must contain preliminary estimates of the amount and severity of disaster damage and/or losses, including the impact of disaster damage on affected individuals and the public and private sectors;
- The request must include a description of the nature and amount of available resources of the state and local governments and disaster relief organizations, such as, but not limited to, cots, food, clothing, and shelter facilities, that have or will be committed to the incident;
- The request must include preliminary estimates of the types and amounts of supplemental federal disaster assistance needed;
- The request must state whether there are imminent threats to public health and safety;
- The requesting state or tribe must have an approved hazard mitigation plan as a condition of receiving funds for PA Categories C through G and HMGP,⁶⁵ but FEMA does not normally consider other relevant mitigation measures to make this determination;
- The governor or chief tribal executive must certify that the state, tribal, and local government obligations and expenditures for the current incident will comply with all cost share requirements;
- If debris removal is requested, the request should contain indemnification and hold harmless clauses; and if the governor is requesting debris removal on private property, the request must

⁶⁵ 44 C.F.R. §§ 201.4 and 201.7.

state whether there is an assurance of needed access authorizations beforehand; and

- If there is a request for DFA, it should include the necessary certifications, including hold harmless, rights of way, payment of non-federal cost share, and coordination.⁶⁶
- FEMA will consider any other relevant information.

FEMA will recommend the issuance of a major disaster declaration if it finds the nature and level of impacts warrant supplemental assistance under the Stafford Act from either the PA program or the IA program, or both.⁶⁷ Given that the factors do not set forth tests or bases, the FEMA Administrator's final agency recommendation for a declaration may not always reflect the original RA's recommendation.

This disparity can be the result of additional realities at play, including an interest in National consistency in the application of these factors as well as other policy considerations. Sometimes FEMA receives additional information after the region has submitted its recommendation to HQ that also may alter the outcome.

C. Evaluation Factors - Public Assistance (PA) Program

FEMA considers six primary factors in evaluating the need for PA.⁶⁸ Cost is a primary factor, since federal disaster assistance is contingent on a finding that state and local resources are inadequate and require supplemental assistance under the Stafford Act. FEMA estimates the per capita impact of the disaster by dividing the total estimated cost of eligible federal and non-federal assistance under the Stafford Act by the statewide population.⁶⁹

⁶⁶ 44 C.F.R. § 206.208.

⁶⁷ Since FEMA provides the HMGP as a percentage of IA and PA funds under the President's major disaster declaration, the HMGP alone is not a basis for recommending a declaration. See Stafford Act §§ 322(e) and 404(a), 42 U.S.C. §§ 5165(e) and 5170c(a).

⁶⁸ 44 C.F.R. § 206.48(a)(1)-(6). This list of evaluation factors illuminates the first two factors for determining whether FEMA should recommend a disaster declaration to the President.

⁶⁹ As of July 2016, FEMA uses 2010 Census population data.

That figure is then compared to a regulatory figure as an indicator that a disaster is of such size that it may warrant federal assistance. FEMA annually adjusts the regulatory state per capita indicator based on the Consumer Price Index.⁷⁰ For disasters occurring during Fiscal Year⁷¹ 2017, the per capita indicator was \$1.43.⁷² For disasters during Fiscal Year 2018, the per capita indicator was \$1.46⁷³

FEMA also has established a minimum threshold of \$1 million in total estimated public assistance disaster damage because FEMA expects that all states, regardless of size, can cover this level of damage using state resources.⁷⁴ The Stafford Act prohibits preventing a geographical area from receiving assistance based solely on an arithmetic formula or sliding scale based on income or population. In total, FEMA considers the following factors:⁷⁵

- The estimated costs of assistance;
- Localized impacts at county, city, and tribal government levels;
- Insurance coverage in force;
- Hazard mitigation measures that contributed to the reduction of damages;
- Recent multiple disasters within the prior 12 months at the state and local level; and

⁷⁰ See <http://www.bls.gov/cpi/cpifaq.htm>.

⁷¹ The federal fiscal year (FY) begins on Oct. 1 of the previous year and extends to Sept. 30 of the named year.

⁷² 81 Fed. Reg. 70430 (October 12, 2016). FEMA also established a county per capita indicator which for FY 2018 is \$3.68. *Id.* FEMA publishes the thresholds annually in the *Federal Register* and on the FEMA Declaration website at: http://www.fema.gov/media-library-data/1456773892426-f8baecbf072014425dd4b70a790d8d02/FY_2016_PA_Thresholds_FR.PDF.

⁷³ <https://intranet.fema.net/org/orr/PDD/declarations/Pages/default.aspx>

⁷⁴ 44 C.F.R. § 206.48(a)(1).

⁷⁵ 44 C.F.R. § 206.48(a).

- Available assistance programs of OFAs.

In addition to these primary factors, FEMA may consider other relevant factors.⁷⁶

Localized Impact Example

2010 Arizona Flooding Disaster (FEMA-1950-DR-AZ)

Declaration Date: December 21, 2010

Incident: Severe Storms and Flooding

In 2010, the President signed a declaration providing assistance to the isolated Havasupai tribe in the Grand Canyon, which had been impacted by flooding. Even though the state per capita indicator was well under \$1.30, the President authorized a declaration for PA where the per capita impact on the tribe was over \$3,000.

D. Evaluation Factors – Individual Assistance (IA) Program⁷⁷

FEMA considers the following factors in evaluating the need for the IA program:⁷⁸

1. Concentration of damage, such as a tornado that destroys an entire town;
 - Trauma;
 - Presence of particular populations, such as persons with low income;
 - Voluntary agency assistance availability;
 - Insurance coverage; and

⁷⁶ *Id.*

⁷⁷ Pursuant to section 1109 of the Sandy Recovery Improvement Act (Pub. L. 113-2), FEMA is in the process of revising the Individual Assistance factors. These will be updated through notice and comment rulemaking.

⁷⁸ *Id.* § 206.48(b)(1)-(6).

- Average amount of individual assistance provided by small, medium, and large states in prior disasters.

Similar to the process of evaluating the level of need for public assistance, extent and estimated cost of damage to residences is a primary consideration used to assess whether the event is beyond state and local capabilities. As such, PDAs generally focus on the types and extent of damage to primary residences, which are currently categorized as: destroyed, major damage, minor damage, or affected. Level and extent of insurance coverage is extremely important when evaluating requests for IA.

FEMA regulations contain a chart depicting the average amount of assistance provided from July 1994 to July 1999, including the average number of homes identified as having received major damage or having been destroyed, and the average amount of IA provided by size of state.⁷⁹

As stated in the regulations, this chart was provided as information that could prove “useful to States and voluntary agencies as they develop plans and programs to meet the needs of disaster victims.”⁸⁰ There is no threshold number of damaged or destroyed homes that must be met in order to receive a disaster declaration. FEMA evaluates all relevant factors when making a recommendation to the President.

⁷⁹ *Id.* § 206.48(b)(6).

⁸⁰ *Id.*

Localized Impact Example

2007 Kansas Tornado Disaster (FEMA-1699-DR-KS)

Declaration Date: May 6, 2007

Incident: Severe Storms, Tornadoes, and Flooding

In 2007, a tornado destroyed the community of Greensburg, Kansas, leaving only one building standing. The nearest rental housing was about 100 miles away. In these circumstances, a major disaster was declared even though the number of houses destroyed was less than the average from other disasters.

E. Other Considerations

Typical major disaster requests involve weather (severe storms, tornados, flooding, hurricane, etc.) or geologic (earthquake) events, which FEMA has extensive experience with and which fit well within the Stafford Act framework and within FEMA's disaster assistance programs. Occasionally, a state or Indian tribal government may inquire about or submit a request for a Stafford Act declaration for an event that is more unusual or that does not fit as well within the Stafford Act framework.

Because such events are unusual by their nature, it is impossible to identify all of the possible considerations that may be relevant in evaluating whether or not a Stafford Act declaration is warranted or appropriate. However, some baseline considerations are usually relevant.

First, does the event meet the definition of a major disaster or an emergency? While the underlying event for an emergency may be "any occasion or instance,"⁸¹ major disasters are restricted to *natural* catastrophes or, regardless of cause, fires, floods or explosions.⁸² This means any man-made events, intentional or accidental, must involve a

⁸¹ Stafford Act § 102(1), 42 U.S.C. § 5122(1); 44 C.F.R. § 206.2(a)(9).

⁸² *Id.* § 102(2), 42 U.S.C. § 5122(2); 44 C.F.R. § 206.2(a)(17)

fire, flood, or explosion in order to meet the baseline definition of a major disaster.

Chemical Spill⁸³

In 2014, the Governor of West Virginia requested a major disaster as result of a chemical spill. Ultimately, FEMA determined that the event did not meet the definition of a major disaster, because it was not a natural catastrophe and did not involve a fire, flood, or explosion. The request was denied.

Just because an event could fall within the definition of a major disaster or emergency does not necessarily mean the Stafford Act is the appropriate avenue for assistance. Another important consideration is whether FEMA's disaster assistance programs can actually address the needs resulting from the event.

Drought, for example, is explicitly included in the Stafford Act definition of major disaster. However, drought declarations have been rare. This is largely because the types of disaster assistance available under the Stafford Act do not readily address the damage or unmet needs that are generally the result of severe drought conditions. Stafford Act authority is primarily focused on addressing immediate threats (sections 403, 407 and 502) and repairing or replacing damaged structures (sections 406 and 408).

Physical damage as a result of drought is limited, when it occurs at all, and while immediate threats to public health and safety are possible, they generally only occur in extremely isolated areas.⁸⁴ The most significant impact of severe drought is generally economic.

⁸³ The state had previously requested and received an emergency declaration as a result of this event. The emergency authorized Category B, emergency protective measures, both DFA and reimbursement. Even if the event met the definition of a major disaster, the state did not identify any unmet needs that would be addressed under a major disaster that could not be addressed under the emergency.

⁸⁴ There have been four Stafford Act declarations for drought in the last 30 years, all of which were for Pacific island territories where isolation and lack of fresh water actually threatened life safety. Those declarations were: EM-3903, Federated States of Micronesia, 1992; DR-1210, Republic of the Marshall Islands, 1998; DR-1213, Federated States of Micronesia, 1998; and EM-3276, Federated States of Micronesia, 2007.

The Stafford Act has only two limited programs which may ameliorate the adverse economic impacts of an event: Disaster Unemployment Assistance (DUA)⁸⁵ and the Disaster Supplemental Nutrition Assistance Program (D-SNAP).⁸⁶ Both programs are only available under major disaster declarations.⁸⁷ FEMA provides the funding for DUA from the Disaster Relief Fund, but has delegated the authority to run the program to the Department of Labor.

DUA provides financial assistance to individuals whose employment or self-employment has been lost or interrupted as a result of a major disaster. Similarly, D-SNAP is funded by FEMA, but operated by the Department of Agriculture, and it provides one month of food assistance to eligible households affected by a major disaster.

A related consideration to whether or not the Stafford Act can address the unmet needs resulting from an event is evaluating whether other federal agencies have authority, programs and expertise that may be more appropriate for addressing the event. This is another reason that Stafford Act declarations for drought have been rare: a number of other federal agencies, in particular the U.S. Department of Agriculture (USDA), have substantial expertise and programs which address the needs created by severe drought.⁸⁸

Similarly, while FEMA does provide guidance regarding possible assistance that could be made available under an emergency declaration for infectious disease,⁸⁹ such declarations are extremely rare, in part, because the authority and expertise to provide the federal response to such events lies primarily with the Department of Health and Human Services (HHS) and the Centers for Disease Control and Prevention (CDC).⁹⁰

Another example that has arisen in recent years is response to civil unrest. State and local governments may expend significant amounts of money in response to such events and may look to a Stafford Act declaration to

⁸⁵ 42 U.S.C. § 5177.

⁸⁶ 42 U.S.C. § 5179.

⁸⁷ 42 U.S.C. §§ 5177 and 5179 (requiring need to arise “as a result of a major disaster”).

⁸⁸ http://www.usda.gov/wps/portal/usda/usdahome?contentid=usda_drought_programs.html&contentidonly=true

⁸⁹ FEMA Fact Sheet FP-104-009-001, *Infectious Disease Event*, (2016).

⁹⁰ <https://www.fema.gov/media-library-data/1464717519589-ba4712cb1eab5dfb47636b8a2a108676/InfectiousDiseaseFactSheetORR05132016.pdf>.

⁹⁰ <http://www.phe.gov/emergency/pages/default.aspx>.

provide reimbursement. Again, there are other avenues through which federal assistance may be available and which may be more appropriate.

The Department of Justice's Emergency Federal Law Enforcement Assistance Program (EFLEA) provides necessary assistance to provide adequate response to an uncommon situation that requires law enforcement or threatens to become of serious or epidemic forces, and in which state and local resources are inadequate to protect lives and property, or to enforce the law.⁹¹ In addition, grant funds awarded through FEMA's State Homeland Security Grant Program and Urban Area Security Initiative may be utilized, and reprogrammed if necessary, to respond to these types of events.

2015 Baltimore Civil Unrest

In 2015, the Governor of Maryland submitted a request for a major disaster declaration as a result of civil unrest occurring in the City of Baltimore. The request identified over \$19 million in emergency protective measures, nearly all of which related to law enforcement and security. The request was denied.

V. Presidential Action on the Request for Declaration

When a state or Indian tribal government requests a major disaster declaration, the President may issue either a major disaster or an emergency declaration, or deny the governor or chief executive's request.⁹² When a state requests an emergency declaration, however, the President may *only* grant the emergency declaration or deny it.⁹³

⁹¹ <https://www.cfda.gov/index?s=program&mode=form&tab=core&id=d7785e57dfee86da923253f0baf9d03f>.

⁹² To the extent the Administrator's recommendations to the President in connection with disaster declarations being pre-decisional and deliberate in nature, they are exempt from disclosure, in part or in full, pursuant to the Freedom of Information Act, 5 U.S.C. 552(b)(5). If this information were to be released, it would have a chilling effect in the future for the necessary discussions of FEMA officials to be completely frank, as well as cause unnecessary confusion to the public.

⁹³ 44 C.F.R. § 206.38.

The rationale for this result is that although all assistance available under an emergency declaration is available under a major declaration, the reverse is not true. Thus, it is not appropriate for the federal government to determine unilaterally the state's broader potential involvement and commitment than the governor did in the request.⁹⁴

If the state or Indian tribal government requests both an emergency and a major disaster declaration, FEMA will make a recommendation to the President for either a major disaster or an emergency. FEMA promptly notifies the governor or tribal chief executive as soon as the President grants or denies the declaration request. The agency publishes Presidential declarations in the *Federal Register*.

VI. The Declaration

A Presidential declaration of an emergency or major disaster generally contains the following elements.

A. Description of the Incident Type

The incident type is such things as tornado, hurricane, flooding, or earthquake.⁹⁵ An event that is likely to result in a declaration under the Stafford Act generally consists of a single event or storm system.⁹⁶ FEMA, generally, does not consider storms that result from a pattern, pressure, or troughs to be a single event for Stafford Act purposes.

⁹⁴ Similarly, FEMA will not designate areas of the state or types of assistance beyond those the governor requests.

⁹⁵ Incident is defined as any condition that meets the definition of major disaster or emergency that causes damage or hardship that may result in a Presidential declaration. 44 C.F.R. § 206.32(e).

⁹⁶ See *Guide for Federal Coordinating Officers Post Declaration Actions* (2011) [hereinafter *FCO Guide*]. See also Elizabeth Zimmerman, Memorandum on Governor's Request, Regional Summary, Analysis, and Recommendation and Stafford Act Declarable Event (Oct. 1, 2009).

Fire, Flood, or Explosion Regardless of Cause

A major disaster is defined as “any natural catastrophe ... or, regardless of cause, any fire, flood, or explosion.” Stafford Act §102(2), 42 U.S.C. § 5122(2). The President’s declaration for the 2001 New York World Trade Center Terrorist Attack (FEMA-1391-DR-NY) was for fires and explosions.

Stafford Act assistance will not be approved unless the damage or hardship to be alleviated resulted from the disaster-causing incident.⁹⁷ Damage type and incident type are two separate concepts, and issues may arise regarding whether damages can be related back to the declared incident. In some instances, it may be necessary to expand the incident type, which is described in more detail in section VII(D) of this chapter.

Flood to Fire

1997 North Dakota Red River Flooding Disaster (FEMA-1174-DR-ND)

The declaration was a particularly detailed incident description that was originally for damages resulting from “severe flooding, severe winter storms, heavy spring rain, rapid snowmelt, high winds, ice jams, and ground saturation due to high water tables...” The flooding triggered a massive fire in downtown Grand Forks. The incident type was expanded to include damage resulting from fires.

⁹⁷ 44 C.F.R. § 206.32(f).

Typhoon Incident Included Explosion and Fire

2002 Guam Super Typhoon Pongsona Disaster (FEMA-1446-DR-GU)

The declaration was for damages resulting from Super Typhoon Pongsona. While the typhoon raged, an explosion and fire erupted at commercial port tank farm in Guam due to a buildup of static electricity caused by extremely high winds rushing through the ventilation system. FEMA provided direct and financial assistance for emergency assistance under the declaration for the explosion and fire that arose from the typhoon without amending the incident type.

In contrast, the following is an example of an extremely narrow incident type.

Specific Incident Designation

2012 Colorado Wildfires (FEMA-4067-DR-CO)

Declaration Date: June 28, 2012

This disaster was declared for the High Park and Waldo Canyon wildfires. While they had already been designated for Fire Management Assistance Grants, the fires reached the severity and magnitude to warrant a major disaster declaration. As the incident was restricted to these two named fires, damage related to other wildfires occurring in Colorado was not eligible for assistance.

B. The Incident Period

The incident period is the time interval during which the incident occurs.⁹⁸ In addition, work undertaken in anticipation of the incident is eligible for Stafford Act assistance.⁹⁹ As provided for in Paragraph 1 of the standard FSA terms, this means: “reasonable expenses that were incurred in anticipation of *and immediately preceding* such event may be eligible” (emphasis added).

⁹⁸ 44 C.F.R. § 206.32(f).

⁹⁹ Stafford Act § 424; 42 U.S.C. § 5189b.

FEMA generally interprets this to be a narrow time frame. Whether 24, 48, or 72 hours or more, the further out in time, the less likely that FEMA can directly tie activities to the declared disaster in question rather than for seasonal or general preparedness for events that may occur at some time in the future. There is a distinction between general preparedness and activities specifically undertaken in anticipation of and immediately before an event.

An open or “continuing” incident period is not necessary to capture damage that may occur in the future so long as the damage results from the declared incident. For example, a flood event need not have an open incident period in order to capture rising flood waters that will not crest for some days or weeks. The damage that might occur when the floodwaters crest would still result from the declared flooding incident and therefore need not be accounted for and need not occur during the incident period.

Although not legally necessary, FEMA’s practice in flooding events is initially to indicate the incident period as “continuing” where, for example, flooding is moving downstream to an area and flood waters continue to rise there after the storm ends. Once flood levels peak, FEMA closes the incident period by amending the original declaration and the FSA. Most events, however, identify the close of the incident period in the original declaration and the FSA.

An Incident Period of Long Duration

1990 Hawaii Disaster for lava flow (FEMA-DR-864-DR-HI)

Declaration Date: May 18, 1990

Incident: Lava Flow, Kilauea Volcano

Incident Period: January 24, 1983, to January 27, 1997 (14 years for the lava flow)

C. Designation of the Affected Geographical Areas

The affected geographical areas are those eligible for Stafford Act assistance, such as counties, parishes, or tribal lands. The declaration may designate any area, typically a county, tribal land, independent city, or parish that sustained sufficient damage from an eligible event. The declaration designates each area by type of assistance; these areas are generally those based on eligible damage amounts.

In addition to considering localized impacts when reviewing whether to recommend a declaration,¹⁰⁰ for the PA program, FEMA also uses a county per capita indicator to determine whether the impact of a disaster on a county is of sufficient magnitude that it might warrant inclusion of the county in the PA program for that disaster.¹⁰¹

There is no similar indicator at the county level for the IA program, but FEMA will consider the concentration of damage in a given area.¹⁰² For the HMGP, the governor may request it for particular counties or statewide, regardless of where damage may have occurred.

After the issuance of the Presidential declaration, new information about damage in additional areas may become available, and FEMA may designate additional areas to the original declaration. FEMA will not, however, designate areas of the state or types of assistance beyond those that the governor requests.

There is no statutory or regulatory requirement that a designated geographic area encompass an entire local government jurisdiction. Areas eligible for assistance may be more narrowly or specifically designated. Declarations are typically, however, designated on a county basis.

¹⁰⁰ 44 C.F.R. § 206.48(a)(2).

¹⁰¹ 81 Fed. Reg. 70430 (October 12, 2016).

¹⁰² *Id.* § 206.48(b)(1).

Sub Area Designation

2007 California Wildfires Disaster (FEMA-1731-DR-CA)

Declaration Date: October 24, 2007

The original declaration was for wildfires for certain designated counties. The declaration was amended to expand the incident type to include flooding, mud flows, and debris flows directly related to the wildfires. The expanded incident type was limited to those areas within the previously designated counties specifically determined by the Federal Coordinating Officer (FCO) to be damaged or adversely affected as a direct result of the compromised watershed conditions and fire-generated debris caused by the wildfires.

D. Designation of Stafford Act Programs Available for Assistance and the Federal-State Cost Share

FEMA's regulations provide that the Assistant Administrator for the Disaster Assistance Directorate¹⁰³ has the authority to determine and designate:

- The types of assistance to be made available initially;¹⁰⁴
- The areas initially eligible for assistance;¹⁰⁵ and
- Both area and program add-ons after the initial declaration.¹⁰⁶

In practice, the President initially determines and includes in his declaration the types of Stafford Act assistance to be made available, applicable cost shares, and the geographical areas to be designated. A declaration may be for limited assistance within the major assistance programs.¹⁰⁷

¹⁰³ As a result of reorganization, this position no longer exists, and the authority is now with the Associate Administrator for the Office of Response and Recovery.

¹⁰⁴ 44 C.F.R. § 206.40(a).

¹⁰⁵ *Id.* § 206.40(b).

¹⁰⁶ *Id.* § 206.40(c).

¹⁰⁷ 44 C.F.R. § 206.40(a).

PA may, for example, be designated in its entirety, limited to PA emergency work,¹⁰⁸ or designated in stages: first emergency work and then Permanent Repair Work.¹⁰⁹ Following the President's declaration, the governor or governor's authorized representative (GAR) may request additional areas or types of assistance¹¹⁰ for which the relevant RA may provide a recommendation. Pursuant to FEMA regulation, the Office of Response and Recovery (ORR) may approve additional areas.¹¹¹ As with PA, there may also be limited designations of IA programs.

Requests for additional areas or types of assistance after a declaration has been issued must be submitted within 30 days from the termination date of the incident, or 30 days after the declaration, whichever is later. The 30-day period may be extended provided that a written request is made during this 30-day period.¹¹²

2006 Hawaii Earthquake Disaster (FEMA-1664-DR-HI)

Declaration Date: October 17, 2006

Maui County declared for IA limited to DUA. DUA was then further limited to the communities of Kaupo, Kipahulu, and Hana (already designated for PA, including DFA).

¹⁰⁸ Stafford Act § 403 and 502, 42 U.S.C. § 5170(b) and § 5192.

¹⁰⁹ *Id.* § 406, 42 U.S.C. § 5172.

¹¹⁰ 44 C.F.R. § 206.40(c).

¹¹¹ *Id.* § 206.40(b). While the regulation also provides for ORR making determinations with respect to program request, as a matter of practice, FEMA currently submits requests to add IA or PA to a declaration to the White House for review.

¹¹² 44 C.F.R. § 206.40(d).

2007 California Severe Freeze Disaster (FEMA-1689-DR-CA)

Declaration Date: March 13, 2007

Assistance Designated: *DUA and Food Commodities* in the designated areas and any other forms of assistance under the Stafford Act deemed appropriate. Amendment No. 1 authorized both DUA and Food Commodities for Kings, Madera, and Merced Counties; DUA only for Stanislaus County; and HMGP statewide.

E. Designation of the Federal Coordinating Officer (FCO)

The Stafford Act requires the designation of an FCO immediately upon declaration.¹¹³ Current practice is for FEMA to recommend an FCO to the President, who then designates the FCO in the declaration. The FCO is the lead federal official at the incident site and is responsible for assuring that federal assistance is provided in accordance with the declaration, laws, regulations, and the FSA.¹¹⁴ The FCO makes an initial appraisal of types of relief most urgently needed, establishes necessary field offices, and coordinates the relief activities of state and local governments, and nonprofit and relief organizations.¹¹⁵

F. Delegation of Authority to Regional Administrators (RAs)

Pursuant to the Homeland Security Act, FEMA is divided into 10 regional offices, each headed by a Regional Administrator (RA).¹¹⁶ Appointed by the FEMA Administrator, in consultation with state, local and tribal government officials in that region, the appointee must be a member of the Senior Executive Service (SES).¹¹⁷ RAs report directly to the Administrator and have statutory responsibilities

¹¹³ *Id.* § 302(a), 42 U.S.C. § 5143(a). See Department of Homeland Security (DHS) Management Directive 9001 (2004).

¹¹⁴ 44 C.F.R. § 206.41(a). See also National Response Framework at 67 (2008); FEMA Directive FD 008-1, Section 8 K (2008). For a complete reference to all of the statutory and regulatory authorities of FCOs, See the FEMA OCC booklet, *Federal Coordinating Officers Statutory and Regulatory Authority*, issued Dec. 18, 2010.

¹¹⁵ Stafford Act § 302(b), 42 U.S.C. § 5143(b), 44 C.F.R. § 206.2(a)(11).

¹¹⁶ 6 U.S.C. § 317.

¹¹⁷ *Id.*

analogous to the Administrator's, but at the regional level.¹¹⁸ By regulation, the RA is vested with the authority of the Disaster Recovery Manager (DRM).¹¹⁹

In addition to their inherent responsibilities, the RAs have been delegated a number of the Administrator's authorities.¹²⁰ These delegations are found in scattered memoranda and instructions.¹²¹ In a major effort to consolidate these delegated authorities into a single comprehensive document, the Administrator issued FEMA Delegation of Authority 0160-1, *Delegation of Authority to the Regional Administrators*, on March 2, 2016, superseding the earlier delegations.¹²²

The delegated authorities to the RAs are set forth in a relatively brief delegation and then extensively delineated in the supporting Appendices A-H. The primary grants of authority, however, are contained in Appendices A-D. The remaining appendices essentially list the sources of the authorities delegated.

Specifically, Appendix A addresses the delegation of management, financial, gift, personnel, travel, public and congressional affairs, Freedom of Information Act, and tribal coordination authorities.¹²³ Appendix B deals with Response and Recovery, delegating specific

¹¹⁸ *Id.* and 6 U.S.C. § 314

¹¹⁹ 44 C.F.R. § 206.2(a)(21).

¹²⁰ See Memorandum from the Administrator re: Delegation of Authority (2008); Memorandum from the Administrator re: Delegating Authorities to Regional Administrators (2009); FEMA Instruction No. 1030.2, chg. 3, Delegations of Authority for Personnel Administration (2005); and Memorandum from the FEMA Administrator re: Delegation of Authority to Certain Officers to Approve Gifts of Travel Offered by Non-Federal Entities (2009);

¹²¹ *Id.*

¹²² Delegation of Authority to Regional Administrators, FDA 01601 (2016). FDA 0160-1, p.A-4, §10.

https://portalapps.fema.net/apps/employee_tools/forms/FEMA%20DirectivesNew/FDA_0106-1.pdf. The earlier documents are superseded only as applicable to RAs; delegations within the documents to other officials are unaffected.

¹²³ *Id.* at pp. A-7 through A-14.

authorities regarding Pre-Declaration activities, Title III, Title IV, Title V, and Title VI in the Stafford Act.¹²⁴

Appendix C is dedicated to Federal Insurance and Mitigation authorities.¹²⁵ These include authorities related to national flood insurance, environmental and historic preservation, dam safety, flood hazards, and earthquake hazards reduction.¹²⁶ Appendix D delegates authorities under an array of preparedness-related statutes, executive orders, regulations, and grant programs.¹²⁷ These programs include, among others, the National Hurricane Program, National Terrorism Alert System Agency Implementation, destruction of stockpiled lethal chemical agents and munitions, and radiological emergency preparedness at commercial nuclear power plants.¹²⁸

The delegated authorities are limited to use of regional assets, whether equipment or personnel, within the RA's region.¹²⁹ All delegations may be redelegated by the RA unless otherwise prohibited by law, executive order, regulation, or the terms of the delegation.¹³⁰ There are general and specific reservations and limitations spread throughout the delegation and appendices.

The Administrator has directed that, going forward, FEMA directives, instructions, memoranda, and other internal issuances regarding delegations to RAs should be designated as interim pending their incorporation into this delegation.¹³¹ The Chief Counsel is charged with performing an agency-wide annual review of the delegation and, as necessary, incorporating any changes and submitting the updated document for the Administrator's signature.¹³²

¹²⁴ *Id.* at pp. B-1 through B-9.

¹²⁵ *Id.* at pp. C-1 through C-7.

¹²⁶ *Id.*

¹²⁷ *Id.* at pp. D-1 through D-7.

¹²⁸ *Id.*

¹²⁹ *Id.* at p. A-1, 2 § 3.

¹³⁰ *Id.* at p. A-3, §3.

¹³¹ *Id.* at p. A-5, §11.

¹³² *Id.*

G. Delegation of Authority to the Disaster Recovery Manager (DRM)

The RA designates a DRM to exercise the Administrator’s authority in a major disaster or emergency,¹³³ including expenditure authority from the DRF.¹³⁴ In delegating DRM authority, the RA has broad discretion in determining which authorities the DRM may perform; the DRM may also hold back certain authorities and set conditions on the exercise of certain authorities, and communicates management expectations.

Normally, for a declared emergency or disaster, the RA designates the FCO as the DRM. Following the designation as the DRM and delegation of authority, the FCO possesses not only the independent authority to “coordinate” disaster relief, but also the RA’s authority to expend funds from the DRF, and thus is able to approve PA, IA, and HM, and issue “mission assignments” to OFAs.¹³⁵

The regulations do not prevent other officials from receiving DRM authority.¹³⁶ Other employees may be provided DRM authority by the RA or FCO if the FCO has been provided the authority to redelegate DRM authority.

For example, the Infrastructure Branch Director at the Joint Field Office (JFO) may be provided DRM authority for PA, and the Human Services Branch Director may be provided DRM authority for IA. In addition, the RA may designate a Federal Disaster Recovery Coordinator as the DRM in addition to, or independent of, the FCO (see discussion in the following section, *Delegation of Authority to the Federal Disaster Recovery Coordinator*). When a JFO closes, DRM

¹³³ *Id.* § 206.41 (b); FEMA Directive FD 008-1, Section VIII L (2008); FEMA Instruction 8600.4, § 7, *Roles and Responsibilities of the Disaster Recovery Manager* (Oct. 10, 1986) [hereinafter *FEMA Instruction 8600.4*].

¹³⁴ The DRF is the FEMA appropriation that funds Major Disaster and Emergency Declarations, Fire Management Grants, the Disaster Readiness and Support (DRS) account, and the Surge accounts. See Chapter 2, *Disaster Readiness*, for a discussion of the DRS and Surge accounts. DRM authority is an inherently governmental function that cannot be exercised by a contract employee.

¹³⁵ See Chapter 4, *Response*, for a discussion of mission assignments.

¹³⁶ 44 C.F.R. § 206.41 (b).

authority is usually provided to a staff member at the Regional Office for closeout purposes (typically, the Response or Recovery Division Director).

H. Delegation of Authority to the Federal Disaster Recovery Coordinator (FDRC)

The focus of the Federal Disaster Recovery Coordinator (FDRC) is on long-term recovery.¹³⁷ The concept of the FDRC was initially introduced by the National Disaster Recovery Framework (NDRF) in 2011.¹³⁸ Facilitating disaster recovery coordination and collaboration between federal, tribal, state, and local governments; the private sector; and voluntary, faith-based, and community organizations is a primary FDRC responsibility.¹³⁹ The FDRC becomes a juncture for incorporating recovery and mitigation considerations into the early decision-making processes of a large-scale disaster or catastrophic incident, taking on the role of a deputy to the FCO in these areas.¹⁴⁰

The FDRC, unlike the FCO, is not a statutorily required appointment when a declaration is made and has no inherent powers upon appointment. The official must be delegated whatever authorities are deemed necessary to the particular disaster or incident.

FDRC authority is derived from at least two sources: the statutory authority granted to the FCO under the Stafford Act¹⁴¹ and the authority of the DRM established by federal regulations.¹⁴² Additional authorities found in the Post Katrina Emergency Management Reform Act (PKEMRA) may also be delegated at the Administrator's discretion (e.g., recovery and mitigation actions and administration of grant programs).¹⁴³

¹³⁷ National Disaster Recovery Framework 29 (2011); available at <http://www.fema.gov/pdf/recoveryframework/ndrf.pdf>.

¹³⁸ *Id.* at 1.

¹³⁹ *Id.* at 29.

¹⁴⁰ *Id.*

¹⁴¹ 42 U.S.C. §5143

¹⁴² 44 C.F.R. §206.41(b)

¹⁴³ 6 U.S.C. §314

The FDRC's reporting chain and scope of authorities is entirely a policy matter, provided the FDRC acts within the scope of the Administrator's and/or RA's delegated authorities for disaster recovery. As described in the NDRF, the FDRC may serve, for example, as one of the FCO's deputies until the FCO is demobilized. If the FCO is demobilized and a continued need for an FDRC is identified, the RA may appoint the FDRC to continue coordinating disaster recovery, including approving expenditures from the DRF, provided the RA delegates DRM authority to the FDRC.

VII. FEMA-State Agreement/FEMA-Tribe Agreement (FSA/FTA)

The FSA¹⁴⁴ or FEMA-Tribe Agreement (FTA)¹⁴⁵ states the understandings, commitments, and conditions under which FEMA will provide and coordinate federal disaster assistance. The governor or tribal leader and the RA, or designee, sign the agreement that imposes legally enforceable obligations on FEMA, the state, local governments, tribes, and/or private nonprofit organizations.¹⁴⁶

The FSA contains the following terms and conditions:

- The incident period;
- Areas designated;
- The type and extent of federal assistance the declaration is making available;
- The cost sharing provisions;
- The Governor's (or the tribe's Chief Executive's) Authorized Representative (GAR/CEAR), who is the

¹⁴⁴ All references to the FSA apply equally to FTAs when an Indian tribal government has such an agreement as a direct recipient.

¹⁴⁵ 44 C.F.R. § 206.201(e) and 206.431. Although a tribe cannot directly request a declaration, once the state has received a declaration, tribes within designated geographic designations may act as a recipient for PA and/or HMGP Stafford Act assistance.

¹⁴⁶ 44 C.F.R. § 206.44.

corresponding state official to the federal DRM and who the governor authorizes to sign all needed documents in order to receive federal assistance, including subgrants; and

- Any special terms and conditions consistent with the declaration, such as the fact that assistance is contingent upon having an approved mitigation plan.

In the FSA, the State or Indian tribal government agrees to comply with, and will require all subrecipients to comply with, the requirements of all applicable laws and regulations, including the Stafford Act and Title 44 of the Code of Federal Regulations (C.F.R.) (*Emergency Management and Assistance*), 2 C.F.R. Part 3002 (implementing 2 C.F.R. Part 200 (*Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*)), and applicable FEMA policies and guidance.

The standard FSA and FTA templates may not be altered or amended in the field. States and tribal governments frequently request changes in standard terms, but neither agreement is open to negotiation. The OCC in FEMA HQ in Washington must review and recommend appropriate action concerning any request to change or alter a provision in the FSA or FTA.

FEMA may not provide funding or DFA through a mission assignment to any applicant¹⁴⁷ or other recipient until the state or the tribe signs the FSA or FTA, except where it is necessary to provide essential emergency services or housing assistance under the Individual and Households Program.¹⁴⁸

An additional implication for a state or a federally recognized tribe is that if either does not have an approved mitigation plan, it may decide not to sign the FSA or FTA until it is within 30 days of having an approved mitigation plan so as not to jeopardize its eligibility for certain categories of FEMA's PA program (Categories C through G; see Chapter 5, *Public Assistance*, for a discussion of these categories) and the HMGP (see Chapter 7, *Hazard Mitigation Assistance*, for a discussion of mitigation issues).

A. State Coordinating Officer or Tribal Coordinating Officer (SCO or TCO)

After a declaration, the President will request the specific governor or tribal chief executive to designate an SCO or TCO to coordinate state, tribal and local disaster assistance efforts with those of the FCO, who is acting for the federal government.¹⁴⁹ Sometimes, the governor or

¹⁴⁷ The applicant applies for assistance; a subrecipient receives a subaward from the recipient. The PA regulations may refer to applicant or subgrantee, depending on the context. The PA appeals regulations found at 44 C.F.R. §206.206 refer to applicant, subgrantee, and grantee. 44 C.F.R. Part 13: Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments uses the terms grantee and subgrantee. **Note:** On Dec. 26, 2014, DHS and FEMA adopted the government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Common Rule). The Common Rule, which is at 2 C.F.R. Part 200, replaces 44 C.F.R. Part 13, as well as 2 C.F.R. Part 215, Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Learning, Hospitals, and Other Nonprofit Organizations. All grants awarded under emergency or major disaster declarations issued on or after Dec. 26, 2014, will be subject to the requirements of 2 C.F.R. Part 200. Although grants and agreements made prior to Dec. 26, 2014, are still subject to the old regulations in most cases, contact OCC with questions regarding the new regulations under 2 C.F.R. Part 200. The new rule uses the terms "recipient" and "subrecipient" to refer to the grantee and subgrantee, respectively.

¹⁴⁸ *Id.* § 206.44(a).

¹⁴⁹ Stafford Act § 302(c), 42 U.S.C. § 5143(c).

tribal chief executive indicates the designated SCO or TCO in his or her request for a declaration.

Typically, the SCO or TCO and the FCO sit near one another at the JFO and consult frequently on virtually all disaster-related issues affecting state and local governments. See next section for a discussion of the duties of the other state official, the governor's (or tribe's) authorized representative¹⁵⁰ (GAR or TAR), which may be the same person as the SCO and the corresponding state official to the federal DRM.

B. Governor's or Tribal Authorized Representative (GAR or TAR)

In the FSA, the governor or chief tribal executive will designate a GAR or TAR, who will be empowered to execute all necessary documents for disaster assistance on behalf of the state.¹⁵¹ Likewise, in the FTA, the Tribe's Chief Executive may appoint a Chief Executive's Authorized Representative (CEAR) with the same authorities.¹⁵²

The FSA will also include designations of one or more alternate GARs or TARs. While the GAR or TAR is generally empowered to act on behalf of the governor or chief tribal executive, there are a number of actions that, under the Stafford Act or FEMA regulations, must be carried out by the governor or chief executive. Table 3-1 outlines which Stafford Act declaration and post-declaration actions must be carried out by the GAR or TAR.

¹⁵⁰ 44 C.F.R. § 206.41(d).

¹⁵¹ 44 C.F.R. §206.2(a)(13).

¹⁵² *SRJA*, P.L.113-2, § 1110 (2013); Stafford Act §§ 102(12), 42 U.S.C., § 5122, 401(b), 42 U.S.C. § 5170, § 501(c), 42 U.S.C. § 5191.

Table 3-1: Governor/GAR or TAR Declaration Authorities

Stafford Act Declaration Action Authorities		
Action	Governor or Chief Executive	Governor's or Chief Executive's Authorized Representative (Y/N)
Request a declaration	§ 401 and § 501 of the Stafford Act	No, governor or chief Executive only per § 401 and § 501 of the Stafford Act
Request an extension of time to request a declaration	44 C.F.R. 206.35(a) and 44 C.F.R. 206.36(a)	No, governor or Chief Executive only per 44 C.F.R. 206.35(a) and 44 C.F.R. 206.36(a)
Execute the FSA	44 C.F.R. 206.44(a)	No, governor or chief executive only under 44 C.F.R. 206.44(a)
Execute amendments to the FSA	44 C.F.R. 206.44(a)	Yes, per 44 C.F.R. 206.44(c) except for amendments to Exhibit A: State Certification Officers, see 44 C.F.R. 206.41(c) and (d)
Request add-on assistance and areas	44 C.F.R. 206.40(c)	Yes, per 44 C.F.R. 206.40(c)
Request an extension of time to request add-on assistance and areas	44 C.F.R. 206.40(d)	Yes, per 44 C.F.R. 206.40(d)
Request an adjustment of the cost share	44 C.F.R. 206.47 provides the circumstances under which FEMA may recommend a PA cost share adjustment, without specifying requirements for a state cost share adjustment request.	Yes. 44 C.F.R. 206.47 provides the circumstances under which FEMA may recommend a PA cost share adjustment, without specifying requirements for a state cost share adjustment request.

Stafford Act Declaration Action Authorities

Action	Governor or Chief Executive	Governor's or Chief Executive's Authorized Representative (Y/N)
Request amendment of (close, expand, reopen, etc.) the incident period	There is no statute or regulation on requests to amend a declaration's incident period; however, 44 C.F.R. 206.44(c) refers to amendments to the FSA to include inter alia amending the incident period. Such modification would be triggered by an amendment to the declaration.	Yes. There is no statute or regulation on requests to amend a declaration's incident period; however, 44 C.F.R. 206.44(c) refers to amendments to the FSA to include inter alia amending the incident period. Such modification would be triggered by an amendment to the declaration.
Request amendment of the incident type	There is no statute or regulation on requests to amend a declaration's incident type; however, 44 C.F.R. 206.44(b) and (c) refer to the terms and conditions of the FSA, including the incident and modifications to those terms. Such modification would be triggered by an amendment to the declaration.	Yes. There is no statute or regulation regarding requests to amend a declaration's incident type; however, 44 C.F.R. 206.44(b) and (c) refer to the terms and conditions of the FSA, including the incident, and modifications to those terms. Such modification would be triggered by an amendment to the declaration.
Request a state share loan	44 C.F.R. 206.45(a)	No, governor or chief executive only per 44 C.F.R. 206.45(a)
Appeal: major disaster or emergency declarations	44 C.F.R. 206.46(a)	No, governor or chief executive only per 44 C.F.R. 206.46(a)
Appeal: partial denial of add-on assistance or areas requested	44 C.F.R. 206.46(b)	Yes, 44 C.F.R. 206.46(b)

Stafford Act Declaration Action Authorities		
Action	Governor or Chief Executive	Governor's or Chief Executive's Authorized Representative (Y/N)
Appeal: denial of advance of state share	44 C.F.R. 206.46(c)	No, governor or chief executive only under 44 C.F.R. 206.46(c)

C. Amending the Declaration and the FSA

The Declarations Unit in FEMA HQ handles all amendments to the declaration. Amendments to the FSA generally follow amendments to the declaration but not always.¹⁵³ The governor or tribal chief executive or the GAR or TAR or the Alternate GAR or TAR may sign amendments to the FSA on behalf of the state, except for an amendment naming a new GAR or TAR. The governor or tribal chief executive must sign the latter because only the governor or tribal chief executive has the authority to sign the delegation appointing a new GAR or TAR to the position. Thus, in addition to the governor or tribal chief executive, the GAR or TAR can request an extension of the incident period, an amendment to the cost share, and the addition of an incident type.

Use of the correct format and contents of amendments to the FSA and the declaration are critical to avoid inadvertent substantive changes to the original agreement. For example, when the state or tribe requests, and FEMA agrees, to add new geographic areas such as counties, parishes, or tribal lands to the original declaration, FEMA personnel restate all of the disaster areas to avoid inadvertently eliminating the eligibility of the areas previously declared in the amendment. The

¹⁵³ The declaration names the FCO; however, the FCO is not named in the FSA and therefore does not need to be amended when an FCO's appointment is terminated and another person is appointed. The GAR is not appointed in the declaration but is appointed in the FSA (Attachment A) by the governor. Changes to the GAR appointment are reflected in the FSA but not the declaration.

FEMA Declarations Unit website contains FSA amendment templates.¹⁵⁴

D. Common Amendments to the Declaration and the FSA

1. Requests for Additional Programs, and Additional Eligible Areas

The governor or tribal chief executive or the GAR or TAR may request additional Stafford Act programs or the addition of areas based on verified damage assessments of unmet needs beyond state and local capabilities.¹⁵⁵ Requests must be submitted within 30 days from the termination date of the incident or 30 days after the declaration, whichever is later.¹⁵⁶

2. Amending the Incident Period

The declaration and the FSA establish the incident period based on official information the appropriate federal agency provides, such as the National Weather Service (NWS) for a weather-related event or the United States Geological Survey (USGS) for an earthquake.

When the effects of the incident are ongoing, the initial declaration and the FSA may state that the incident period is “continuing.” If so, the FCO is responsible for monitoring and evaluating weather conditions to determine when to recommend closing the incident period. FEMA will consult with the state or tribe and establish the closing date in an amendment to the FSA and the declaration and publish the amended date in the *Federal Register*.¹⁵⁷

If there is sufficient justification based on official data, FEMA may reopen the incident period. Requests to reopen an incident period, or to include new damage under an existing declaration in which the incident period is still open, can be controversial. In either case, FEMA bases its

¹⁵⁴ <https://intranet.fema.net/org/orr/pdd/declarations/Pages/default.aspx>.

¹⁵⁵ 44 C.F.R. § 206.40(c).

¹⁵⁶ *Id.* § 206.40(d).

¹⁵⁷ *Id.* § 206.44(c).

determination on whether a meteorologically connected event, that is, one that is part of the same storm system, caused the subsequent damage.¹⁵⁸

The NWS has previously explained to FEMA that a discrete weather system will generally affect the same geographic area for a period of no more than two or three days, whereas broader meteorological phenomena, such as weather patterns, troughs, and pressures, might result in multiple storm systems over a longer period of time, from days to weeks.

Understanding Storm Events

A series of severe storms may impact an area over three successive days resulting in tornadoes, heavy rain, and flooding. If the NWS determines that these storms were part of the same meteorological system, then the storms may be combined into one disaster declaration. The declaration may be initially made with a “continuing” incident period.

Ten days later another storm system in the same area causes additional damage, and the state requests that FEMA cover the new damage under the existing declaration. Without further analysis, the existing declaration cannot simply include the new damage where the incident period is still open or “continuing,” nor could new damage reopen a closed incident period. FEMA must determine whether the new storm system causing damage was a continuation of the initial event, or a separate, unrelated event. Given that the storm conditions occurred 10 days apart, it is extremely unlikely that the later storm system was part of the same meteorological system. If the determination is that the second storm is a separate event, the state must request and qualify for a new declaration based solely on the damage from the new event

¹⁵⁸ *FCO Guide* states that “There must be a finding that the events are connected meteorologically (same storm system), damage from the new event is of the severity and magnitude that warrants a separate declaration, the same areas are impacted again, and there are three days or less between storms.”

3. Request to Adjust Cost Share

This chapter discusses cost shares and the request to adjust a cost share¹⁵⁹ in section IX, *Federal and State Cost Share and Adjustments*.

4. Expansion of Incident Type

A governor or tribal chief executive may request an expansion of the incident type based on sufficient justification from an incident-appropriate agency (e.g., official reports from the NWS or the USGS, and supporting damage assessments). The request should be addressed to the President and submitted through the RA or FCO.¹⁶⁰

Expansion of the incident type is rare but may be necessary when an expedited governor's request results in a declaration prior to the completion of PDAs and the identification of all applicable damage types. The initial request for declaration may contain one incident type, such as "severe storms and flooding," but subsequent PDAs may reflect damage that mudslides or landslides caused during the storm. In order for damage that mudslides or landslides caused to be eligible for assistance, FEMA must expand the incident type specified in the initial declaration to include them.

¹⁵⁹ 44 C.F.R. § 206.47. Stafford Act § 319, 42 U.S.C. § 5162, also authorizes loans of the non-federal share to eligible applicants. See 44 C.F.R. § 206.45.

¹⁶⁰ *FCO Guide*.

Fires to Flooding/Mudslides

2003 California Wildfires Disaster (FEMA -1498-DR-CA)

Declaration Date: October 27, 2003

Original Incident Type: Wildfires

Amendment 3 dated January 14, 2004: The incident period was reopened from December 2, 2003, through and including February 2, 2004, and the incident type expanded specifically for flooding, mudflow, and debris flow directly related to the wildfires. During the expanded incident period, only those areas within the designated areas specifically determined by the FCO to be damaged or adversely affected as a direct result of the compromised watershed conditions and fire-generated debris caused by the wildfires could be considered eligible for assistance.

Disaster Facts: On October 27, 2003, the President declared a major disaster for California for wildfires. The incident period, which was initially established as October 21, 2003, and continuing, was subsequently closed effective December 2, 2003, after all the fires were 100% contained. On December 25, 2003, flash floods and mudflows from one day's rain along Lyle Creek and Waterman Canyon caused the loss of 15 lives. The rain amounts were not particularly heavy or unusual; however, they occurred in an area that had suffered a loss of vegetation and created hydrophobic soil conditions from the wildfires, which made the soil conditions very vulnerable in a rain event. Insufficient time had lapsed from the wildfires themselves to allow for vegetative growth.

Similar amendments were made to wildfire disasters FEMA-1005-DR-CA (1994) FEMA-1731-DR-CA (2006), and FEMA-4353-DR-CA (2018).

VIII. Federal Assistance under Major Disaster and Emergency Declarations

The Stafford Act authorizes very broad actions under either a major disaster¹⁶¹ or an emergency¹⁶² declaration, but there are significant differences in the activities and programs available under the different types of declarations. Table 3-2 provides a summary.

Table 3-2: Summary of Federal Activities and Programs: Emergency v. Major Disaster Declaration

Purpose of Declaration Type	Emergency Declaration	Major Disaster Declaration
Immediate versus Longer Term and Broader Assistance	Intended for immediate and short-term assistance essential to save lives and to protect public health, safety, and property; ¹⁶³ may include IA under section 408 ¹⁶⁴	Includes broad range of response and recovery assistance. May include IA, PA, and HM, or a combination.¹⁶⁵
Emergency Work and Permanent Work in Public Assistance	Provide PA grants to state and local governments for debris removal and emergency work only – Section 502 ¹⁶⁶ : - Debris removal - Emergency protective measures - Cost share: 75% federal, 25% state; state may request increase	- Provide PA grants to state and local governments, which may include only debris removal – Sections 403¹⁶⁷ and 407¹⁶⁸ and emergency protective measures – Section 403¹⁶⁹; may also include permanent work – Section 406¹⁷⁰ - Cost share: 75% Federal, 25% state; state may request increase

¹⁶¹ Stafford Act § 402, 42 U.S.C. § 5170a.

¹⁶² *Id.* § 502, 42 U.S.C. § 5191.

¹⁶³ 44 C.F.R. § 206.63.

¹⁶⁴ Stafford Act § 502, 42 U.S.C. § 5192 (a) (6).

¹⁶⁵ *Id.* §§ 401 - 427, 42 U.S.C. §§ 5170-5189e.

¹⁶⁶ *Id.* § 502, 42 U.S.C. § 5192.

¹⁶⁷ *Id.* § 403, 42 U.S.C. § 5170b.

¹⁶⁸ *Id.* § 407, 42 U.S.C. § 5173.

¹⁶⁹ *Id.* § 403, 42 U.S.C. § 5170b.

¹⁷⁰ *Id.* § 406, 42 U.S.C. § 5172.

Purpose of Declaration Type	Emergency Declaration	Major Disaster Declaration
Hazard Mitigation	HMGP is <i>not authorized</i> under an emergency declaration	• HMGP – Section 404¹⁷¹ is usually included in all major disaster declarations to provide grants to reduce risk from future hazards • Amount available is based on percentage of total eligible IA and PA under the declaration • Cost share: up to 75% federal contribution

¹⁷¹ *Id.* § 404, 42 U.S.C. § 5170c; 44 C.F.R. Part 206, subpart N (44 C.F.R. §§ 206.430-206.440).

Purpose of Declaration Type	Emergency Declaration	Major Disaster Declaration
Other Stafford Act Disaster Assistance	Food Commodities – Section 413 Emergency Communications – Section 418 Transportation Assistance to Individuals and Households – Section 425	• Disaster Unemployment Assistance – Section 410¹⁷² • Benefits and Distribution – Section 412¹⁷³ • Food Commodities – Section 413¹⁷⁴ • Disaster Legal Services – Section 415¹⁷⁵ • Crisis Counseling Assistance – Section 416¹⁷⁶ • Community Disaster Loans – Section 417¹⁷⁷ • Emergency Communications – Section 418¹⁷⁸ • Emergency Public Transportation – Section 419¹⁷⁹ • Transportation Assistance to Individuals and Households – Section 425¹⁸⁰ • Disaster Case Management – Section 426¹⁸¹

¹⁷² *Id.* § 410, 42 U.S.C. 5177.

¹⁷³ *Id.* § 412, 42 U.S.C. 5179.

¹⁷⁴ *Id.* § 413, 42 U.S.C. 5180.

¹⁷⁵ *Id.* § 415, 42 U.S.C. 5182.

¹⁷⁶ *Id.* § 416, 42 U.S.C. 5183.

¹⁷⁷ *Id.* § 417, 42 U.S.C. 5184.

¹⁷⁸ *Id.* § 418, 42 U.S.C. 5185.

¹⁷⁹ *Id.* § 419, 42 U.S.C. 5186.

¹⁸⁰ *Id.* § 425, 42 U.S.C. 5189c.

¹⁸¹ *Id.* § 426, 42 U.S.C. 5189d.

Purpose of Declaration Type	Emergency Declaration	Major Disaster Declaration
Amount of Funding and Notifications	Assistance under Emergency Declaration limited to \$5 million but may be increased when needed, and FEMA must report increase to Congress. ¹⁸²	No caps on funding although subject to availability of funds

IX. Federal and State Cost Share and Adjustments

Cost shares under the Stafford Act vary by program.

Pursuant to the Stafford Act, PA funds, including emergency work,¹⁸³ debris removal,¹⁸⁴ and permanent work,¹⁸⁵ are at least 75% federal cost share. PA is generally funded at a 75% federal share.¹⁸⁶

Housing assistance under the Stafford Act is 100% federally funded.¹⁸⁷

Other Needs Assistance (ONA) is set at a 75% federal cost share and may not be increased; the state is required to provide the funds for the non-federal share.¹⁸⁸

For HMGP, FEMA can provide up to 75% of the total eligible costs.¹⁸⁹

The Stafford Act is silent on how the non-federal cost share for PA and the HMGP should be addressed.¹⁹⁰ States may provide all, some, or none of these non-federal cost shares for its subrecipients. However, states must certify that state and local government obligations and

¹⁸² *Id.* § 503(b), 42 U.S.C. 5193(b).

¹⁸³ Stafford Act § 403(b) and (c)(4), and 503(b), 42 U.S.C. §§ 5170b(b) and (c)(4) and 5193(b).

¹⁸⁴ *Id.* § 407(d), 42 U.S.C. § 5173(d).

¹⁸⁵ *Id.* § 406(b), 42 U.S.C. § 5172(b).

¹⁸⁶ 44 C.F.R. 206.47.

¹⁸⁷ *Id.* § 408 (g)(1), 42 U.S.C. § 5174 (g)(1); 44 C.F.R. § 206.110(i)(1).

¹⁸⁸ *Id.* § 408 (g)(2), 42 U.S.C. § 5174 (g)(2); 44 C.F.R. § 206.110(i)(2).

¹⁸⁹ *Id.* § 404(a), 42 U.S.C. § 5170c (a).

¹⁹⁰ *See* 48 U.S.C. § 1469a(d); 44 C.F.R. § 206.47(c-d), 206.48(b); FEMA Recovery Policy 9523.9 (June 9, 2006) for guidance.

expenditures will comply with all applicable cost sharing requirements of the Stafford Act.¹⁹¹

FEMA will recommend an increase in the federal share to 90% for PA programs when disaster damage in the state is so severe that federal obligations under the Stafford Act meet or exceed the statewide per capita threshold.¹⁹² The statewide per capita threshold for calendar year 2018 is \$143.¹⁹³

Rare Use of Less Than Statewide Impact

It is extremely rare to consider a per capita indicator for anything other than statewide impact. However, on two occasions, the President has considered per capita impacts on tribes when making cost share adjustments. In 2010, the Chippewa Cree tribe of the Rocky Boy Reservation received a 100% federal share adjustment for a disaster in which the estimated per capita impact on the tribe was over \$7,000. Similarly, in 2011, the President adjusted the cost share to 90% for the Havasupai tribe for a disaster in which the per capita impact on the tribe, based upon actual obligations, was over \$790. In both situations, state law prevented the tribes from receiving financial assistance from their respective states.

If the severity of the disaster so warrants, FEMA may recommend up to 100% in federal funding for emergency work and debris removal for a limited period in the initial days of a major disaster.¹⁹⁴ Generally, a limited period in the initial days of the disaster means FEMA will limit the period of 100% funding to the first 72 hours

¹⁹¹ *Id.* § 401, 42 U.S.C. § 5170.

¹⁹² 44 C.F.R. § 206.47(b).

¹⁹³ *Id.* 44 C.F.R. § 206.47(b)(4);

<https://www.federalregister.gov/documents/2017/02/01/2017-02071/notice-of-adjustment-of-statewide-per-capita-indicator-for-recommending-a-cost-share-adjustment>

¹⁹⁴ *FEMA Public Assistance Program and Policy Guide*, p. 37,

http://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf.

Policy_Guide_2-21-2016_Fixes.pdf. FEMA Recovery Policy 9523.9, *100% Funding for Direct Federal Assistance and Grant Assistance*, (2006) [formerly FEMA RP 9523.9];

following the disaster declaration, or an applicant's selected 72-hour period.¹⁹⁵

The President may extend this period based on the gravity and scope of the disaster.¹⁹⁶ FEMA considers the impact of major disaster declarations in the requesting state in the prior 12-month period to determine whether to recommend a cost share adjustment.¹⁹⁷ Such 100% cost share adjustments are exceedingly rare.

The governor or tribal chief executive or GAR or TAR should address the cost share adjustment request to the President and submit it through the RA. Only the President may adjust the cost share. FEMA will review the request and supporting documentation and make a recommendation based on the particular circumstances. A cost share adjustment may also be required by an act of Congress.¹⁹⁸

As described previously, under the Stafford Act, only the PA program federal cost share can be adjusted above 75%. However, if the declaration is for an insular area (American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands), the cost share for PA, Other Needs Assistance, and the HMGP are mandatorily waived if the respective non-federal share is under \$200,000.¹⁹⁹ Whenever the cost share in any cost sharing context in an insular area is more than \$200,000, any cost sharing arrangement becomes discretionary.²⁰⁰

As a matter of policy in such areas, FEMA has used the threshold established for state PA cost share adjustments to guide its discretion

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 44 C.F.R. § 206.47(c) and (d).

¹⁹⁸ See US Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Pub. L. 110-28), Sec 4501: "... the Federal share of assistance, including direct Federal assistance, provided for the States of Alabama, Florida, Louisiana, Mississippi, and Texas in connection with Hurricanes Katrina, Wilma, Dennis, and Rita under sections 403, 406, 407, and 408 of the Stafford Act shall be 100% of the eligible costs under such sections..."

¹⁹⁹ 48 U.S.C. § 1469a(d) note. See also Pub. L. 96-205, Title VI, §601, 94 Stat. 90; as amended (1980); Pub. L. 98-213 system § 6, 97 (1983); Pub. L. 98-454, Title VI, § 601(b), (1984).

²⁰⁰ *Id.*

in making recommendations for adjustments to IA, ONA, and HMGP, as well PA. As such, when the actual obligations (including PA, IA, and HMGP) for an event have hit that threshold, FEMA has recommended, and the President has approved, adjusting the federal share to 90% for PA, IA, ONA, and HMGP for that event.

**Insular Areas Cost 90% Share and
100% Floating Cost Share Adjustment**

**2009 American Samoa Earthquake and Tsunami Disaster
(FEMA-1859-DR-AS)**

Declaration Date: September 29, 2009

Incident: Earthquake, Tsunami, and Flooding

Amendment dated January 15, 2010:

The declaration was amended to authorize federal funds for all categories of PA, HM, and the ONA at 90% of total eligible costs, and further authorize PA (Categories A and B), including DFA, at 100% of total eligible costs for 30 consecutive days.

Application:

For DFA for Categories A and B, the 30 consecutive day period for 100% was established as starting on September 29, 2009, the declaration date.

For grant assistance, each applicant could establish a consecutive 30-day time period that could be different for Category A and Category B work and could begin no sooner than September 29, 2009, the commencement date of the Incident Period.

Each applicant was required to provide its designated commencement dates to the GAR in writing by a specified date or be subject to a 30 consecutive day period of September 29, 2009, through October 28, 2009, for Category A and Category B work.

Eligible work outside the designated 30 consecutive day periods was subject to the 90% federal, 10% non-federal cost share.

Another Floating Cost Share Example

Please note the differences from the previous example, which was a no-notice event declared immediately:

2008 Iowa Flooding Disaster (FEMA-1763-DR-IA)

Declaration Date: May 27, 2008

Incident: Severe Storms, Tornadoes, and Flooding

Incident Period: May 25, 2008, to August 13, 2008

Amendment dated June 11, 2009:

The declaration was amended to authorize federal funds for debris removal and emergency protective measures (Category A and B), including DFA, under the PA program, at 100% of the total eligible costs for 14 consecutive days.

Application:

For DFA, for Categories A and B, the 14 consecutive day period for 100% was established as starting on May 27, 2008, the declaration date.

For grant assistance, each applicant could establish a consecutive 14-day time period that could be different for Category A and Category B work, and that could begin no sooner than the date of the state, county or local declaration of emergency for the affected area.

Eligible work outside the designated 14 consecutive day periods was subject to a previously established 90% federal cost share.²⁰¹

X. Appeals

A. Denial of Declaration Request

The governor or tribal chief executive may appeal the denial of a request for a declaration within 30 days after the date of the denial letter. The governor or tribal chief executive should submit this one-

²⁰¹ See *Public Assistance Program and Policy Guide*, pp. 39-40; http://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf (formerly FEMA Recovery Policy 9523.9, *%100 Funding for Direct Federal Assistance and Grant Assistance*, (2006)).

time appeal to the President through the RA. The appeal must include additional information supporting the request for declaration.²⁰²

B. Denial of Requested Areas or Types of Assistance Requested

When the President denies the type of assistance or geographical areas requested for declaration, the governor or tribal chief executive or the GAR or TAR may appeal. On some occasions, the President does not designate or authorize areas or assistance while additional PDAs are pending. An appeal right is not triggered until the assistance or area is formally denied. This one-time appeal, including any justification or additional supporting information, must be submitted within 30 days of the date of the denial letter. The governor or tribal chief executive or GAR or TAR submits the appeal through the RA to FEMA's Associate Administrator for Response and Recovery.²⁰³

C. Denial of Advance of Non-Federal Share

The governor or tribal chief executive may appeal the denial of a request to advance the non-federal share within 30 days of the date of the denial letter. The governor must submit this one-time appeal in writing through the RA to the Associate Administrator for Response and Recovery.²⁰⁴

FEMA may extend any of the 30-day appeal deadlines, provided the governor or tribal chief executive submits a written request within the original 30-day time period and there exists legitimate reasons for the delay.²⁰⁵

D. State and Tribal Hazard Mitigation Plans

Hazard mitigation measures are actions taken to reduce the risk or potential for loss of life or damage to property due to natural disasters.

²⁰² 44 C.F.R. § 206.46(a).

²⁰³ *Id.* § 206.46(b); *Id.* § 206.37.

²⁰⁴ *Id.* § 206.46(c).

²⁰⁵ *Id.* § 206.46(d).

We discuss the details of the Hazard Mitigation program in detail in Chapter 7.

The Stafford Act requires states to have an approved Standard or Enhanced State Hazard Mitigation Plan in place at the time of a disaster to be eligible for all non-essential assistance.²⁰⁶ Thus, if FEMA has not approved a state plan, FEMA may not authorize Stafford Act permanent repair or HM funding.²⁰⁷ In the event a state's HM plan lapses during an ongoing disaster, with the exception of emergency work, FEMA may not provide any further assistance for PA permanent repair work and HM projects until it approves an updated plan.

An Indian tribal government that is requesting a declaration or acting as a direct applicant or recipient under the PA or HM program in a state declaration must have an approved Tribal Mitigation Plan to receive non-emergency assistance under the Stafford Act.²⁰⁸ All states currently have mitigation plans, but not all federally recognized Indian tribes have such a plan.

States and tribal governments applying directly to FEMA for assistance that do not have a FEMA approved plan in effect at time of declaration have a limited number of days in which to develop a state or tribal mitigation plan, respectively, and to obtain FEMA approval of the plan, in order to have HMGP and PA categories C through G authorized under the declaration.²⁰⁹

Local governments also must have an approved mitigation plan in order to receive HMGP project grants.²¹⁰ RAs may grant an exception,

²⁰⁶ Emergency work, the IA programs, and Community Disaster Loans are exempt from this restriction. 44 C.F.R. § 201.4(a).

²⁰⁷ *Id.* § 206.434(b). *See also Id.* § 201.4, *Standard State Mitigation Plans* and § 201.5, *Enhanced State Mitigation Plans*.

²⁰⁸ Tribal Mitigation Plan requirements are set forth in 44 C.F.R. § 201.7.

²⁰⁹ *See* 44 C.F.R. § 201(c)(6); *See also* <https://www.fema.gov/hazard-mitigation-planning-laws-regulations-policies> for FEMA policy. Please coordinate with HQ OCC concerning current policy.

²¹⁰ 44 C.F.R. §§ 201.6(a)(1) and 206.434(b).

however, in extraordinary circumstances, such as for small and impoverished communities.²¹¹

XI. Fire Management Assistance Declarations

Entirely distinct from the President's emergency or major disaster declarations, the Stafford Act authorizes FEMA to make Fire Management Assistance declarations.²¹² The Stafford Act authorizes federal assistance²¹³ for the "mitigation, management, and control of any fire or fire complex on public or private forest land or grassland that is burning uncontrolled and threatens such destruction as would constitute a major disaster."²¹⁴

The Administrator has authorized RAs to approve requests for fire management assistance declarations.²¹⁵ A state may request a Fire Management Assistance Grant (FMAG) declaration from an RA at any time (24 hours a day); decisions are frequently made based on facts the RA receives by telephone. Requests must be submitted while the fire is burning uncontrolled.²¹⁶

The Stafford Act authorizes fire management assistance for fires "on public or private forest land or grassland."²¹⁷ FEMA will approve declarations for fire management assistance when the RA determines that a fire or fire complex threatens such destruction as would constitute a major disaster.²¹⁸

This authority is not available for typical structure fires; if, however, in spite of the FMAG's fire control and response measures, the fire ultimately causes damage that warrants assistance under the PA and/or

²¹¹ *Id.* § 201.6(a)(3).

²¹² Stafford Act § 420, 42 U.S.C. § 5187.

²¹³ Assistance may include certain grants, equipment, supplies, personnel, and essential assistance under 42 U.S.C. § 5170b. *See* 44 C.F.R. Part 204, especially, § 204.42.

²¹⁴ 44 C.F.R. § 204.22.

²¹⁵ Memorandum to the Regional Administrators from the FEMA Administrator (2012). *See also* DHS Management Directive 9001.1.

²¹⁶ 44 C.F.R. § 204.22.

²¹⁷ Stafford Act § 420, 42 U.S.C. § 5187. FEMA regulations inaccurately do not contain this limiting language. *See* 44 C.F.R. Part 204.

²¹⁸ 44 C.F.R. § 204.24.

the Individuals and Households Program, a major disaster declaration request may follow an FMAG declaration. FEMA must carefully evaluate such requests to ensure additional supplemental assistance under the Stafford Act is appropriate, where emergency protective measures and response costs are already available under an FMAG declaration.

Presidential emergency declarations are generally not appropriate for fires on grasslands or forest lands, as noted previously, because the FMAG emergency declaration provision in the Stafford Act is tailored specifically to address those fires and because of the unique state and federal framework for wildfire response. FEMA issued a new guide on fire management assistance in February 2014.²¹⁹

²¹⁹ <http://www.fema.gov/media-library/assets/documents/92379>.

FMAG Declaration Hypothetical Case Example: Wildfires start in one jurisdiction but threaten a second jurisdiction

There is a fire burning out of control entirely within State A, but it is near the border with State B and the primary threat is to a town in State B. Which state can request an FMAG and what costs are eligible?

Answer: Either state could potentially request and receive an FMAG depending on the criteria:

1. Threat to lives and improved property, including threats to critical facilities and/or infrastructure, and critical watershed areas;
2. Availability of state and local firefighting resources;
3. High fire danger conditions, as indicated by nationally accepted indices such as the National Fire Danger Ratings System;
4. Potential major economic impact.

The threat does not have to be to the state requesting the FMAG. So, State A can receive an FMAG declaration based on the threat to lives and property in State B. This would allow State A to receive reimbursement for its fire suppression costs. State B could also receive an FMAG declaration based on the threat to its citizens and property. State B doesn't have fire suppression costs because the fire hasn't entered its jurisdiction yet, but State B could still receive reimbursement of Category B emergency protective measures such as evacuation, sheltering, and security. Each state would have to meet its respective fire cost thresholds before it could receive reimbursement.

XII. Tribal Requests for a Major Disaster or Emergency Declaration under the Stafford Act

The Sandy Recovery Improvement Act of 2013 (SRIA)²²⁰ amended the Stafford Act to allow federally recognized tribes to seek Stafford Act assistance from the President directly in the event of an emergency or major disaster.²²¹ This was an important change in the law that corrected a long-standing anachronism within the Stafford Act, which defined federally recognized tribes only as local governments, ignoring the sovereignty of tribes and standing in the way of government-to-government relations between tribes and the federal government.

SRIA:

- Amends the Stafford Act to provide for an option for the chief executive of a federally recognized Indian tribe to make a direct request to the President for a major disaster or emergency declaration. The amendment provides that tribes may elect to receive assistance under a state's declaration, provided that the President does not make a declaration for the tribe for the same incident.²²²
- Authorizes the President to establish criteria to adjust the non-federal cost share for an Indian tribal government consistent to the extent allowed by current authorities.²²³
- Requires FEMA to consider the unique circumstances of tribes when it develops regulations to implement the provision.²²⁴
- Amends the Stafford Act to include federally recognized Indian tribal governments in numerous references to state and local governments within the Stafford Act.²²⁵ Immediately upon

²²⁰ Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, Pub. L. No. 112-2 (2013).

²²¹ Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, § 1110, Tribal Requests for a Major Disaster or Emergency Declaration under the Stafford Act (2013).

²²² *Id.* at § 1110(a) and (b). *See also* Stafford Act §§ 401(b) and 502 (c), 42 U.S.C. 5170(b) and 5192 (c).

²²³ *Id.* at § 1110(a). *See also* Stafford Act § 401(c), 42 U.S.C. 5170(c).

²²⁴ *Id.* at § 1110(e).

²²⁵ *Id.* at § 1110(d). *See also* Stafford Act §103, 42 U.S.C. 5123.

passage of SRIA, FEMA began to implement this important provision. As such, FEMA developed Tribal Declarations Pilot Guidance, which was published on January 10, 2017.²²⁶

The Guidance describes the process for, and how FEMA evaluates, Indian tribal government requests for assistance under the Stafford Act. The Guidance also summarizes the disaster assistance that may be authorized and details the administrative and planning requirements that tribal governments must meet in order to request and receive assistance.

In the development of this Guidance, FEMA undertook three rounds of consultation with tribal governments, the first in the spring of 2013; a second, more extensive round in working meetings throughout the country during the spring, summer, and fall of 2014; and a final, extensive round in the winter and spring of 2016. During this tribal consultation, FEMA asked tribal governments for their thoughts and comments on the working draft of the Tribal Declarations Pilot Guidance.

The Guidance may be found at: <https://www.fema.gov/media-library/assets/documents/128307>.

XIII. Other Programs and Authorities Triggered by a Major Disaster or Emergency Declaration

FEMA's disaster assistance programs are not the only federal programs or authorities that are tied to the declaration of a major disaster or an emergency. Some authorities are only available when there is a declaration; others may also be made available through another agency's discretionary authority. Table 3-3 identifies some of the important authorities that may be triggered or authorized by a Stafford Act declaration.

²²⁶ <https://www.fema.gov/media-library/assets/documents/128307>

Table 3-3: Select Programs and Authorities Triggered or Authorized by Stafford Act Declarations

Agency	Authority/ Program	Citation	Trigger	Can the OFA authorize independently?
Small Business Administration (SBA)	Disaster Loans ²²⁷ – Low interest loans to disaster impacted individuals and small businesses.	15 U.S.C. § 636(b) (2)(A)	DR	Yes
Federal Transit Administration	Emergency Relief Program ²²⁸ – Broad authority to provide assistance to disaster impacted transit agencies. Rarely funded.	49 U.S.C. § 5324(a) (2)(B)	DR or EM	Yes
Federal Highway Administration (FHWA)	FHWA Emergency Relief Program ²²⁹ – Provides funding for the repair of Federal aid roads that have been seriously damaged by natural disasters.	23 U.S.C. § 125	Requires either a governor's emergency proclamation or a DR	Yes. May be authorized with only governor declared emergency.

²²⁷ For more information, see: <https://www.sba.gov/category/navigation-structure/loans-grants/small-business-loans/disaster-loans>

²²⁸ For more information, see: http://www.fta.dot.gov/map21_15025.html

²²⁹ For more information, see: <https://www.fhwa.dot.gov/programadmin/erelief.cfm>

Agency	Authority/ Program	Citation	Trigger	Can the OFA authorize independently?
Health and Human Services (HHS)	1135 Waivers ²³⁰ - The Secretary of HHS has the authority to waive or modify certain requirements under health services acts, including Medicaid and Medicare.	42 U.S.C. § 1320b-5	DR or EM ²³¹ and Public Health Emergency by HHS S1	No. Both Stafford Act declaration and a Public Health Emergency are required.
FHWA	MAP-21, Section 1511 Special Permits ²³² - States may issue special permits for vehicles and loads that exceed federal weight limitations on the interstate system to deliver relief supplies to declared areas.	23 U.S.C. § 127(i)	DR or EM	No. Although no extra action is required by DOT or FHWA, special permits may be issued by states for any declared EM or DR.

²³⁰ For more information, see: <http://www.phe.gov/Preparedness/legal/Pages/1135-waivers.aspx>

²³¹ Also may be authorized by a declaration of a Public Health Emergency and a Presidential declaration of emergency or disaster under the National Emergencies Act, 50 U.S.C. §1601-1651.

²³² For more information, see: <https://www.fhwa.dot.gov/map21/guidance/guideemergency.cfm>

CHAPTER 4
Response
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RESPONSE

I. Introduction

An effective, coordinated response is crucial to saving lives and protecting property. Response operations must be proactive, scalable, and nimble. The failure or perceived failure to respond immediately and effectively will also set a negative tone for the life of the operations and adversely impact the public's trust in government across the board. The FEMA statutory mission includes a mandate that it “develop a Federal response capability that, when necessary and appropriate, can act effectively and rapidly to deliver assistance essential to saving lives or protecting or preserving property or public health and safety in a natural disaster, act of terrorism, or other man-made disaster.”¹

FEMA coordinates with state, territorial, tribal, and local governments, as well as other federal partners, non-governmental organizations (NGOs), and the private sector to fully utilize the Nation's resources. In addition to taking immediate action to save lives, protect property, and meet basic needs in presidentially declared Stafford Act major disasters and emergencies,² FEMA also increasingly helps coordinate these same organizations for non-Stafford Act events. Effective coordination with such diverse entities requires the use of standard operating frameworks, organizational constructs, and planning and reporting protocols. This chapter discusses FEMA's disaster response authorities and its role in federal emergency management operations, national doctrine/frameworks, organizational structures, response partners and teams, response operations, and the response interface with recovery operations.

¹ 6 U.S.C. § 313(b)(2)(C); *See also* Stafford Act §§ 403(a) and 502(a), 42 U.S.C. § 5170b(a) and § 5192(a); 44 C.F.R. §§ 206.201(b) and 206.225.

² 6 U.S.C. § 313(b)(2)(B).

II. FEMA Response Authorities

FEMA has significant legal authorities and responsibilities under a framework of statutes, executive orders, and national policy documents.

A. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)³

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) authorizes the programs and processes by which the federal government provides major disaster and emergency assistance to state, territorial, tribal, and local governments (STTL);⁴ eligible private nonprofit organizations; and individuals and households affected by a declared major disaster or emergency. Stafford Act authority is vested in the President, with the exception of Title VI, Emergency Preparedness, which is provided to the FEMA Administrator. The President delegated most Stafford Act authority to the Secretary of the U.S. Department of Homeland Security (DHS), who in turn delegated those responsibilities to the FEMA Administrator.⁵

The Stafford Act authorizes the President to provide assistance essential to meeting immediate threats to life and property for either major disasters or emergencies.⁶ These actions may include any activity “essential to saving lives and protecting and preserving property or public health and safety.”⁷ FEMA may provide direct

³ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (as amended primarily at 42 U.S.C. §§ 5121-5207), at <http://www.fema.gov/robert-t-stafford-disaster-relief-and-emergency-assistance-act-public-law-93-288-amended>.

⁴ While Stafford Act provisions, regulations, and policy may refer to state and/or local, per Stafford Act § 103, 42 U.S.C § 5123, tribal governments are included. When we refer to territories, we are referring to U.S. territorial possessions that are defined as states in Stafford Act § 102(4), 42 U.S.C § 5122(4): Puerto Rico, the (U.S.) Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. The District of Columbia is also defined as a state for Stafford Act purposes.

⁵ DHS Delegation 9001.1 Delegation to the Administrator of the Federal Emergency Management Agency December 10, 2010.

⁶ Stafford Act §§ 403(a) and 502(a), 42 U.S.C. §§ 5170b(a) and 5192(a).

⁷ Stafford Act § 403(a)(3) for major disasters, 42 U.S.C. § 5170b (a)(3). See §502(a)(1) for emergencies, 42 U.S.C. § 5192(a)(1).

disaster assistance to STTLs through in-house resources, contracted services, directives or taskings to other federal agencies (i.e., mission assignments), or financial assistance in the form of reimbursements through Public Assistance grants to STTLs and to certain nonprofits to carry out disaster response activities under the Stafford Act.⁸

FEMA administratively categorizes these response activities as “emergency work,” which includes “debris removal” and “emergency protective measures.”⁹ This includes a non-exhaustive list of actions that can include provision of emergency equipment, personnel, and supplies; evacuation of survivors; search and rescue; provision of food, water, shelter, and emergency medical care; removal of debris; and restoration of critical public services.

FEMA may expend funds to provide assistance to STTLs only after a Presidential declaration of a major disaster or emergency in accordance with Stafford Act Sections IV and V, respectively. However, FEMA may expend funds to pre-position personnel, commodities, and equipment, and to prepare to meet an imminent threat through the necessary expense doctrine.¹⁰

FEMA, as the coordinator of the federal response to Stafford Act incidents, seeks to engage the capabilities of the entire federal government in providing assistance to STTLs. FEMA accomplishes this

⁸ Stafford Act § 403(a)(4), 42 U.S.C. § 5170b(a)(4) for major disasters. FEMA historically interpreted § 502 (42 U.S.C. § 5192) as also authorizing grant assistance for emergency assistance. The Sandy Recovery Improvement Act of 2013 (SRIA), Pub. L. No 113-2, amended Stafford Act 403(d) (42 U.S.C. § 5170b(d)) to authorize payment (grant assistance) for salaries and benefits under both major disasters and emergencies and authorized alternative procedures for grant assistance for debris removal under emergencies as well as under major disasters in Stafford Act Section 428 (42 U.S.C. § 5189f).

⁹ Public Assistance Guide, FEMA 322 (hereinafter PA Guide) at 29, 2 (June 2007), “Debris removal and emergency protective measures are considered ‘emergency work.’” See also, *id.* at 67, which describes the emergency work categories. For incidents declared issued on or after January 2016, refer to the Public Assistance Program and Policy Guide (PAPPG), FP 104-009-2, January 1, 2016, page 18 at <https://www.fema.gov/media-library/assets/documents/111781>.

¹⁰ See FEMA Directive 125-7, *Financial Management of the Disaster Relief Fund (DRF)* (October 1, 2016), available under Directives at <https://portalapps.fema.net/apps/policy/Lists/MasterInventory/AllItems.aspx>.

by a variety of means, including directing other federal agencies to use their resources to assist STTLs.¹¹ (See the following chapter for more detail.) These directives are known as mission assignments. FEMA also coordinates with relief organizations and the private sector to ensure all available resources are used efficiently.

Primary Stafford Act Response Authorities for FEMA

Section 402 (42 U.S.C. § 5170a) – General Federal Assistance – Includes authority to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law.”

Section 403 (42 U.S.C. § 5170b) – Essential Assistance – Provides a non-inclusive list of actions the President may take to “provide assistance essential to meeting immediate threats to life and property resulting from a major disaster” on both private and public land. Assistance under this authority is subject to a non-federal cost share.

Section 407 (42 U.S.C. § 5173) – Debris Removal – Provides more expansive authority for debris removal than that found in Section 403. Assistance under this authority is subject to a non-federal cost share.

Section 502 (42 U.S.C. § 5192) – Federal Emergency Assistance – Makes available by direct reference the authority found in Section 407 for declared emergencies and through implication and long-standing federal practice the authorities under Section 403. Assistance under this section is subject to a non-federal cost share set forth in Section 503, 42 U.S.C. § 5193.

FEMA’s regulations to carry out the primary response provisions of the Stafford Act are found at Title 44, Part 206 of the Code of Federal Regulations (C.F.R.).

¹¹ Stafford Act § 402, 42 U.S.C. § 5170a and § 502, 42 U.S.C. § 5192. *See also* 44 C.F.R. § 206.5. However, under long-standing practice, FEMA does not mission assign agencies to carry out work under their existing authorities. *See* the discussion on mission assignments for further detail on this subject.

B. Homeland Security Act of 2002

The Homeland Security Act of 2002¹² establishes the FEMA Administrator as the principal advisor to the President, the Homeland Security Council, and the Secretary for all matters related to emergency management in the United States, and charges the Administrator with leading, managing, and coordinating the federal response.¹³

The Homeland Security Act also requires the Administrator to be prepared to carry out “emergency operations to save lives and property through positioning emergency equipment, personnel, and supplies, through evacuating potential victims, through providing food, water, shelter, and medical care to those in need, and through restoring critical public services.”¹⁴ It also charges the Administrator with assisting the President in carrying out the Stafford Act.¹⁵

In addition to the authorities given to the FEMA Administrator, the DHS Secretary is tasked within the Homeland Security Act to oversee the statutory duties of DHS, which include “carry[ing] out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and man-made crises and emergency planning.”¹⁶ As discussed later, Homeland Security Presidential Policy Directive 5 (PPD-5) further clarifies this responsibility.

C. Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA)

The Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA, Pub. L. 109-295, 2006) was passed by Congress in the aftermath of Hurricane Katrina. Primarily, it amended the Homeland

¹² Homeland Security Act of 2002, Pub. L. No. 107-296 (codified as amended at 6 U.S.C. §§ 101-1405).

¹³ 6 U.S.C. §§ 313(c)(4); §§ 313(a). Under the Obama Administration, the National Security Council is utilized in the role of the Homeland Security Council.

¹⁴ 6 U.S.C. § 314(a)(9)(C).

¹⁵ 6 U.S.C. § 314(a)(8).

¹⁶ 6 U.S.C. § 111(b)(1)(D).

Security Act by returning many of FEMA’s previous functions and preserving FEMA as a distinct entity within DHS. PKEMRA established FEMA’s primary mission and the duties of the FEMA Administrator now found in the Homeland Security Act.

FEMA’s Primary Mission¹⁷

The primary mission of the Agency is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.

The Administrator is responsible for leading national efforts for preparing for, protecting against, responding to, recovering from, and mitigating against the risk of a natural disaster, act of terrorism, or other man-made disaster.¹⁸ The Administrator is to partner with state and local governments and other emergency providers to build a national system of emergency management.¹⁹ The Administrator is responsible for building a federal response capability to deliver essential assistance to save lives and protect or preserve property or public health and safety²⁰ and is to integrate the Agency’s emergency preparedness, protection, response, recovery, and mitigation responsibilities to confront the challenges of a natural disaster, act of terrorism or other man-made disaster.²¹

¹⁷ 6 U.S.C. § 313(b).

¹⁸ 6 U.S.C. § 313(b)(2)(A).

¹⁹ 6 U.S.C. § 313(b)(2)(B).

²⁰ 6 U.S.C. § 313(b)(2)(C).

²¹ 6 U.S.C. § 313(b)(2)(D).

Additional Administrator responsibilities include but are not limited to the following:

- Build a comprehensive national incident management system;²²
- Help ensure the acquisition of operable and interoperable communications capabilities by federal, state, local, and tribal governments and emergency response providers;²³
- Help ensure the effectiveness of emergency response providers in responding;²⁴
- Administer the National Response Plan (which has been replaced with the National Response Framework) ;²⁵
- Maintain and operate the National Response Coordination Center;²⁶ and
- Assist the President in carrying out functions of the Stafford Act, and carry out the mission to protect the Nation from all hazards by leading and supporting a risk-based, comprehensive emergency management system.²⁷

Principal Advisor on Emergency Management²⁸

The Administrator is the principal advisor to the President, the Homeland Security Council, and the Secretary of DHS for all matters relating to emergency management in the United States.²⁹ The Administrator may also be designated by the President to serve as a member of the Cabinet in the event of natural disasters, acts of terrorism, or other man-made disasters.³⁰

²² 6 U.S.C. § 314(a)(5)

²³ 6 U.S.C. § 314(a)(7)

²⁴ 6 U.S.C. § 314(a)(11)

²⁵ 6 U.S.C. § 314(a)(13)

²⁶ 6 U.S.C. § 314(a)(17)

²⁷ 6 U.S.C. § 314(a)(19).

²⁸ 6 U.S.C. § 313(c)(4).

²⁹ 6 U.S.C. § 313(c)(4)(a).

³⁰ 6 U.S.C. § 313(c)(5)(A). This should not be construed as affecting the authority of the DHS Secretary under the Homeland Security Act. 6 U.S.C. § 313(c)(5)(B).

D. Presidential Directive Documents³¹

Two primary Presidential directive documents provide direction for FEMA and other federal agencies when carrying out federal responsibilities for incident management, including disaster response.

1. Homeland Security Presidential Directive-5 (HSPD-5)³²

HSPD-5, *Management of Domestic Incidents*, which was issued on February 28, 2003, designates the Secretary of DHS as “the principal Federal official for domestic incident management... The Secretary shall coordinate the Federal Government's resources utilized in response to or recovery from terrorist attacks, major disasters, or other emergencies if and when any one of the following four conditions applies: (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate state and local authorities; (3) more than one Federal department or agency has become substantially involved in responding to the incident; or (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the President.”

³¹ Presidential directives are signed or authorized by the President and are issued by the National Security Council. Some may be classified. They have been named differently by the various administrations. National Security Presidential Directives (NSPDs) and Homeland Security Presidential Directives (HSPDs) were issued by the G.W. Bush Administration (2001-2009), and PPDs were issued by the Obama Administration. <https://www.loc.gov/rr/news/directives.html>.

³² <https://www.gpo.gov/fdsys/pkg/PPP-2003-book1/pdf/PPP-2003-book1-doc-pg229.pdf>.

National Incident Management System (NIMS)

HSPD-5 required the Secretary to develop and administer a National Incident Management System (NIMS).³³ NIMS provides a systematic, proactive approach to guide departments and agencies at all levels of government, NGOs, and the private sector to work seamlessly to prevent, protect against, respond to, recover from, and mitigate the effects of incidents, regardless of cause, size, location, or complexity, to reduce the loss of life and property and harm to the environment. NIMS works hand in hand with the National Response Framework (NRF). NIMS provides the template for the management of incidents, while the NRF provides the structure and mechanisms for national level policy for incident management.³⁴

2. Presidential Policy Directive 8 (PPD-8), National Preparedness³⁵

Presidential Policy Directive 8 (PPD 8), *National Preparedness*, was issued March 30, 2011.³⁶ It captures the PKEMRA requirements to create a comprehensive national preparedness system and establish a national preparedness goal.³⁷

PPD 8 directs the creation of “a series of integrated national planning frameworks” covering:

- Prevention (National Prevention Framework, June 2016) related to the prevention of terrorism,³⁸

³³ *Id.* HSPD-5, Tasking item 14 at page3.

³⁴ The National Integration Center, which is within FEMA’s National Preparedness Directorate, is responsible for ongoing management and maintenance of NIMS and the NRF under PKEMRA. See 6 U.S.C. § 319(b).

³⁵ ³⁵ See <https://www.dhs.gov/presidential-policy-directive-8-national-preparedness>. PPD -8 replaced HSPD-8, *National Preparedness*, issued December 17, 2003, and HSPD-8 Annex I, *National Planning*, issued December 4, 2007. These documents are rescinded except for paragraph 44 of HSPD-8 Annex 1. Individual Plans developed under HSPD-8 and Annex 1 remain in effect until rescinded or otherwise replaced.

³⁶ *Id.* See also <http://www.fema.gov/learn-about-presidential-policy-directive-8>.

³⁷ 6 U.S.C. §§ 741-754.

³⁸ See <http://www.fema.gov/media-library/assets/documents/117762>

- Protection (National Protection Framework, June 2016, 2nd edition) related to protection against acts of terrorism, natural disasters, and other threats or hazards,³⁹
- Mitigation (National Mitigation Framework, June 2016, 2nd edition) related to mitigation and risk management of the impact of disasters,⁴⁰
- Response (National Response Framework, June 2016, 3rd edition) related to the response and management of all types of incidents,⁴¹ and
- Recovery (National Disaster Recovery Framework, June 2016, 2nd edition) related to recovery support for disaster impacted jurisdictions.⁴²

PPD 8 also requires each of these frameworks to be supported by an interagency operational plan.

E. National Response Framework (NRF)⁴³

Under PKEMRA, the FEMA Administrator was required to consolidate federal response plans into a single, coordinated national response plan, which is now known as the National Response Framework (NRF).⁴⁴ The NRF, which is a guide to how the Nation responds to all types of disasters and emergencies, is an essential component of the National Preparedness System mandated in PPD 8. Responsibility for

³⁹ See <http://www.fema.gov/national-protection-framework-0>.

⁴⁰ See <http://www.fema.gov/national-mitigation-framework>.

⁴¹ See <https://www.fema.gov/national-response-framework>, (3rd Ed., 2016) also required by 6 U.S.C. § 314(a)(13).

⁴² See <http://www.fema.gov/national-disaster-recovery-framework>.

⁴³ See <http://www.fema.gov/national-response-framework>, (3rd Ed., 2016)

⁴⁴ 6 U.S.C. § 314(a)(6). The first National Response Plan (NRP) was issued in December 2004 and it expanded upon the Federal Response Plan, which FEMA first developed in 1992. The NRP was then superseded by the NRF in 2008. The NRF was last updated in June 2016 (3rd ed.).

management and maintenance of the NRF falls under the FEMA National Integration Center.⁴⁵

The NRF is intended to be used by the whole community and focuses on an all-inclusive concept in which a full range of stakeholders—individuals; families; communities; the private and nonprofit sectors; faith-based organizations; and state, local, tribal, territorial, insular area, and federal governments—participate in national preparedness activities and engage as full partners in incident response.⁴⁶

The NRF “is built on scalable, flexible, and adaptable concepts identified in NIMS to align key roles and responsibilities across the Nation.”⁴⁷ The plan supporting the NRF is called the Response Federal Interagency Operational Plan (May 2017).⁴⁸

The NRF is designed to be scalable for use in incidents or events of all sizes, by organizing response resources and capabilities into Emergency Support Functions (ESFs).⁴⁹ These ESFs, listed in Table 4-1, provide support in specified practical areas. Each ESF has a coordinating agency with management oversight and one or more primary and support agencies with significant authorities, roles, resources, or capabilities to support particular tasks.

FEMA coordinates the ESFs through the National Response Coordination Center (NRCC) and the applicable Regional Response Coordination Center (RRCC) and the Joint Field Office (JFO).⁵⁰ Not all incidents requiring federal support, however, result in the

⁴⁵ 6 U.S.C. § 319(b)(1).

⁴⁶ NRF at page 4.

⁴⁷ NRF, at page 1. NIMS (Dec. 2008) provides a unifying system of definitions for local, county, state, tribal, and federal governments. Thus, all levels of government use the same term for the same type of equipment, location, or team in an incident so that all levels of government can communicate with one another more effectively, http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf.

⁴⁸ Found at

https://intranet.fema.net/org/orr/PDD/Doctrine/DL/Documents/Response_FIOP.pdf.

⁴⁹ NRF at page 2.

⁵⁰ The Secretary of DHS may also activate ESFs for non-Stafford Act incidents to implement their authority to coordinate federal actions under HSPD-5.

activation of ESFs. Nor do all incidents requiring federal support involve use of the Stafford Act.

1. Emergency Support Functions (ESF) and ESF Annexes

ESFs provide the structure for coordinating federal interagency support for a federal response to an incident. They are mechanisms for grouping functions most frequently used to provide federal support to states and federal-to-federal support, both for declared disasters and emergencies under the Stafford Act and for non-Stafford Act incidents. There is a corresponding annex for each ESF.⁵¹

Table 4-1: ESFs, Annexes, and Coordinating Departments

ESF ⁵²	Coordinator	Activities
ESF #1– Transportation	Department of Transportation (DOT)	• Transportation modes management and control • Transportation safety • Stabilization and reestablishment of transportation • Movement restrictions • Damage and impact assessment
ESF #2 – Communications	DHS/National Communications System	• Coordination with telecommunications and information technology industries • Reestablishment and repair of telecommunications infrastructure • Protection, reestablishment, and sustainment of national cyber and information technology resources • Oversight of communications within the federal response structures

⁵¹ See <http://www.fema.gov/national-preparedness-resource-library>.

⁵² The ESF annexes are available at <http://www.fema.gov/media-library/assets/documents/25512>.

ESF⁵²	Coordinator	Activities
ESF #3 – Public Works and Engineering	Department of Defense (DOD)/ U.S. Army Corps of Engineers (USACE)	• Infrastructure protection and emergency repair • Critical infrastructure reestablishment • Engineering services and construction management • Emergency contracting support for lifesaving and life-sustaining services
ESF #4 – Firefighting	U.S. Department of Agriculture (USDA)/U.S. Forest Service (USFS) and DHS/FEMA/U.S. Fire Administration	• Support to wildland, rural, and urban firefighting operations
ESF #5 – Emergency Management	DHS/FEMA	• Incident action planning • Information collection, analysis and dissemination
ESF #6 – Mass Care, Emergency Assistance, Temporary Housing, and Human Services	DHS/FEMA	• Mass care • Emergency assistance • Disaster housing • Human services
ESF #7 – Logistics	General Services Administration (GSA) and DHS/FEMA	• Comprehensive, national incident logistics planning, management, and sustainment capability • Resource support (e.g., facility space, office equipment and supplies, contracting services)
ESF #8 – Public Health and Medical Services	Department of Health and Human Services (HHS)	• Public health • Medical surge support, including patient movement • Behavioral health services • Mass fatality management
ESF #9 – Search and Rescue (SAR)	DHS/FEMA	• Structural collapse (urban) SAR • Maritime/coastal/waterborne SAR • Land SAR

ESF⁵²	Coordinator	Activities
ESF #10 – Oil and Hazardous Materials Response	Environmental Protection Agency (EPA)	• Environmental assessment of the nature and extent of oil and hazardous materials contamination • Environmental decontamination and cleanup
ESF #11 – Agriculture and Natural Resources	U.S. Department of Agriculture (USDA)	• Nutrition assistance • Animal and agricultural health issue response • Technical expertise, coordination, and support of animal and agricultural emergency management • Meat, poultry, and processed egg products safety and defense • Natural and cultural resources and historic properties protection
ESF #12 –Energy	Department of Energy (DOE)	• Energy infrastructure assessment, repair, and reestablishment • Energy industry utilities coordination • Energy forecast
ESF #13 – Public Safety and Security	Department of Justice (DOJ)/ Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)	• Facility and resource security • Security planning and technical and resource assistance • Public safety and security support • Support to access, traffic, and crowd control
ESF #15 – External Affairs	DHS	• Public affairs and the Joint Information Center (JIC) • Intergovernmental (local, state, tribal, and territorial) affairs • Private sector outreach • Community relations

2. Support and Incident Annexes

NRF supporting documents also include Support and Incident Annexes. These are expected to be moved to the Response Federal Interagency Operational Plan eventually.

a. Support Annexes⁵³

The Support Annexes describe how federal departments and agencies; local, state, tribal, territorial, and insular area entities; the private sector; volunteer organizations; and NGOs coordinate and execute the common functional processes and administrative requirements necessary to ensure efficient and effective incident management. During an incident, numerous procedures and administrative functions support incident management.

The actions described in the Support Annexes are not limited to particular types of events but are overarching in nature and applicable to nearly every type of incident. In addition, they may support several ESFs.

The Support Annexes address the following areas:

- Critical Infrastructure and Key Resources
- International Coordination
- Public Affairs
- Volunteer and Donations Management
- Financial Management
- Private-Sector Coordination
- Tribal Relations
- Worker Safety and Health

⁵³ See <http://www.fema.gov/national-preparedness-resource-library>.

b. Incident Annexes ⁵⁴

The Incident Annexes address contingency or hazard situations requiring specialized application of the NRF addressing the following situations:

- Biological Incident
- Cyber Incident
- Mass Evacuation Incident
- Terrorism Incident Law Enforcement and Investigation
- Catastrophic Incident
- Food and Agriculture Incident
- Nuclear/Radiological Incident

III. FEMA Response Components

A. Headquarter Response Components

To accomplish its response mission, FEMA maintains operational facilities in Washington, D.C. (Headquarters), in the 10 Regional Offices,⁵⁵ and at Joint Field Offices (JFOs) that a Federal Coordinating Officer (FCO) may establish near active major disaster or emergency sites.⁵⁶ The FEMA response organizational structure is designed to ensure support for the subordinate levels, i.e., the NRCC in Headquarters (HQ) supports the RRCC; and the RRCC supports the JFO; however, in larger events, the NRCC may work directly with JFOs. While only the FCO at the JFO is managing the incident, the role of the National Resource Coordination Staff (NRCS) is to support the Regional Resource Coordination Staff (RRCS) and the FCO if

⁵⁴ *Id.*

⁵⁵ 6 U.S.C. § 317(a). *See* <http://www.fema.gov/regional-contact-information> for information on the 10 regional offices. In addition, FEMA maintains a Pacific Area Office (Reg. IX), a Caribbean Area Office (Reg. II), and an Alaska Area Office (Reg. X) per 6 U.S.C. § 317(b).

⁵⁶ Stafford Act § 302(b)(2), 42 U.S.C. § 5143(b)(2). FEMA may also establish longer term recovery offices when needed.

directly supporting the JFO, and the role of the RRCS is to support the FCO.⁵⁷

1. Office of Response and Recovery (ORR)

FEMA's Office of Response and Recovery (ORR) is responsible for FEMA's response, recovery, logistics, and field operations programs and operations. ORR's Response Directorate provides the leadership, organization, and operational resources necessary to deliver core federal disaster response operational capabilities needed to save lives, minimize suffering, and protect property in a timely and effective manner in communities overwhelmed by acts of natural disasters, acts of terrorism and other emergencies. It ensures the coordinated federal operational response capability and program activities of all federal emergency management response operations, response planning, and integration of federal, state, local, and tribal disaster programs. It provides situational awareness and coordinates the integrated interagency response in support of the affected state(s), tribes, or territories.

This coordination ensures the efficient delivery of immediate emergency assistance to individuals and impacted communities. Response coordinates closely with the ORR Logistics Directorate on the in-house and FEMA contracted provision, transport, and staging of equipment and commodities. It also coordinates with the ORR Recovery Directorate on the direct assistance of mass care services and emergency protective measures, which are authorized under the Public Assistance Program.

The ORR Field Operations Directorate (FOD) ensures the operational readiness of FEMA disaster response teams and its workforce to coordinate disaster response activities and resources. It deploys specialized emergency response teams to provide leadership in the identification and provision of federal assistance to disaster survivors. It also coordinates the deployment, tracking, and credentialing of all response teams and works directly with federal and STTL partners to provide the necessary supplemental federal support to stabilize an incident quickly.

⁵⁷ FEMA National Incident Support Manual, issued September 2011, page 10 at <http://www.fema.gov/media-library/assets/documents/24921>.

2. National Watch Center (NWC)

The National Watch Center (NWC) is a component of the Response Directorate's Operations Division and operates 24 hours a day to maintain continuous situational awareness of situations that may require a federal response. Situational awareness is maintained by collecting and distributing information to the DHS National Operations Center (NOC)⁵⁸ for the development of a national common operating picture. The NOC collects and coordinates information from federal and STTL agencies and the private sector to provide situational awareness for the Secretary and to help deter, detect, and prevent terrorist attacks and to manage domestic incidents.

3. National Response Coordination Center (NRCC)

The Homeland Security Act requires the FEMA Administrator to maintain and operate the NRCC.⁵⁹ The NRCC is the national coordinating center for FEMA's operations and the focal point for national resource coordination during an incident.⁶⁰ When activated, the NRCC is staffed by the NRCS. The NRCS's mission is to maintain situational awareness of ongoing operations and emerging events with the potential to require coordination and delivery of federal resources; to identify, mobilize, deploy, and coordinate federal resources in support of STTLs and federal governments responding to incidents regardless of cause; and to review and adjudicate competing resource requirements.⁶¹

The NRCC conducts operations at different activation levels reflecting increasing threat levels as described in Table 4-2. NRCS staffing levels vary by activation level. When no incident is anticipated, the NRCC, through the NWC, operates in a watch steady state until an event occurs or begins to develop that may require supplemental federal assistance to aid in a response.

⁵⁸ See § 6 U.S.C. § 321d(b), which mandated the establishment of the NOC.

⁵⁹ 6 U.S.C. § 314(a)(17). See also the NRCC Fact Sheet at http://www.fema.gov/media-library-data/1440617086835-f6489d2de59dddeba8bebc9b4d419009/NRCC_July_2015.pdf.

⁶⁰ NISM, February 2011, available at <https://www.fema.gov/media-library/assets/documents/24921>.

⁶¹ *Id.*

The NRCS is organized into four functional sections led by the NRCS Chief. These sections are Situational Awareness, Planning Support, Resource Support, and Center and Staff Support as depicted in Table 4-3.

Emergency Food for NRCC and RRCC Staff

Under certain, extremely rare circumstances, FEMA may use appropriated funds to pay an employee's expenses for food within the employee's official station despite the general prohibition against paying such expenses. Such payments for food can only be authorized in extreme emergencies that meet the following conditions:

1. The President has declared or is expected to imminently declare an emergency or major disaster under the Stafford Act in the geographical area where an employee performs Stafford Act response duties;
2. The emergency or major disaster presents an immediate threat to life and property, and FEMA is carrying out its statutory response authorities under the Stafford Act to address those threats;
3. The employee's physical presence at the duty location is essential for FEMA operations necessary to respond to the emergency or major disaster;
4. The extreme conditions render it impossible or perilous for the employee to travel between his or her home and place of duty, raising significant risk that the employee would not be able to return to the place of duty after returning home; and
5. Other sources of food are not available within sufficient proximity of the employee's duty location.

If all of the foregoing conditions are present, the Associate Administrator for Response and Recovery (or Deputy), the Assistant Administrator for Response (or Deputy), or the applicable Regional Administrator (or Deputy) may authorize emergency food by issuing a written authorization that certifies the presence of the emergency conditions and identifies the employees for whom food is authorized. The official who issued the authorization must review and reassess the authorization every 24 hours. Authorizations for emergency food must not exceed the

minimum cost necessary to sustain response operations and must not extend beyond the duration of the emergency conditions.

FEMA’s procedures for approving emergency lodging are based, in large part, on a Comptroller General decision on this issue in a case involving the question of “whether it is appropriate for [FEMA] to reimburse, from the President’s Disaster Relief Fund, the hotel costs of 17 workers whose services were essential to performing urgent disaster relief duties pursuant to the Stafford Act.”⁶² Details on this case can be found in Chapter 10, *Human Capital*.

FEMA’s Travel Policy Manual, FEMA Manual 121-1-1, Chapter 7, “Emergency Food & Lodging,” describes FEMA’s policy and procedures for providing emergency lodging and emergency food for employees directly supporting FEMA’s response to emergencies or major disasters declared by the President pursuant to the Stafford Act and for providing an allowance to reimburse employees for any lodging and food costs they incur directly.⁶³

FEMA may not use appropriated funds to provide food or beverages to employees operating in the National Response Coordination Center (NRCC) or a Regional Response Coordination Center (RRCC) under conditions other than those described above.

Table 4-2: NRCC and NRCS Activation Levels⁶⁴

NRCC Activation Level	Scope of Activation	Incident Conditions
Level 1	• Full staffing, • All ESFs and interagency liaisons	• Due to its severity, size, location, and actual or potential impact on public health, welfare, and infrastructure, requires an extreme amount of direct federal assistance for response and recovery efforts for which the capabilities to support it do not exist at any level of government.
Level 2	• Mid-level staffing	• An incident which, due to its severity, size, location, and actual

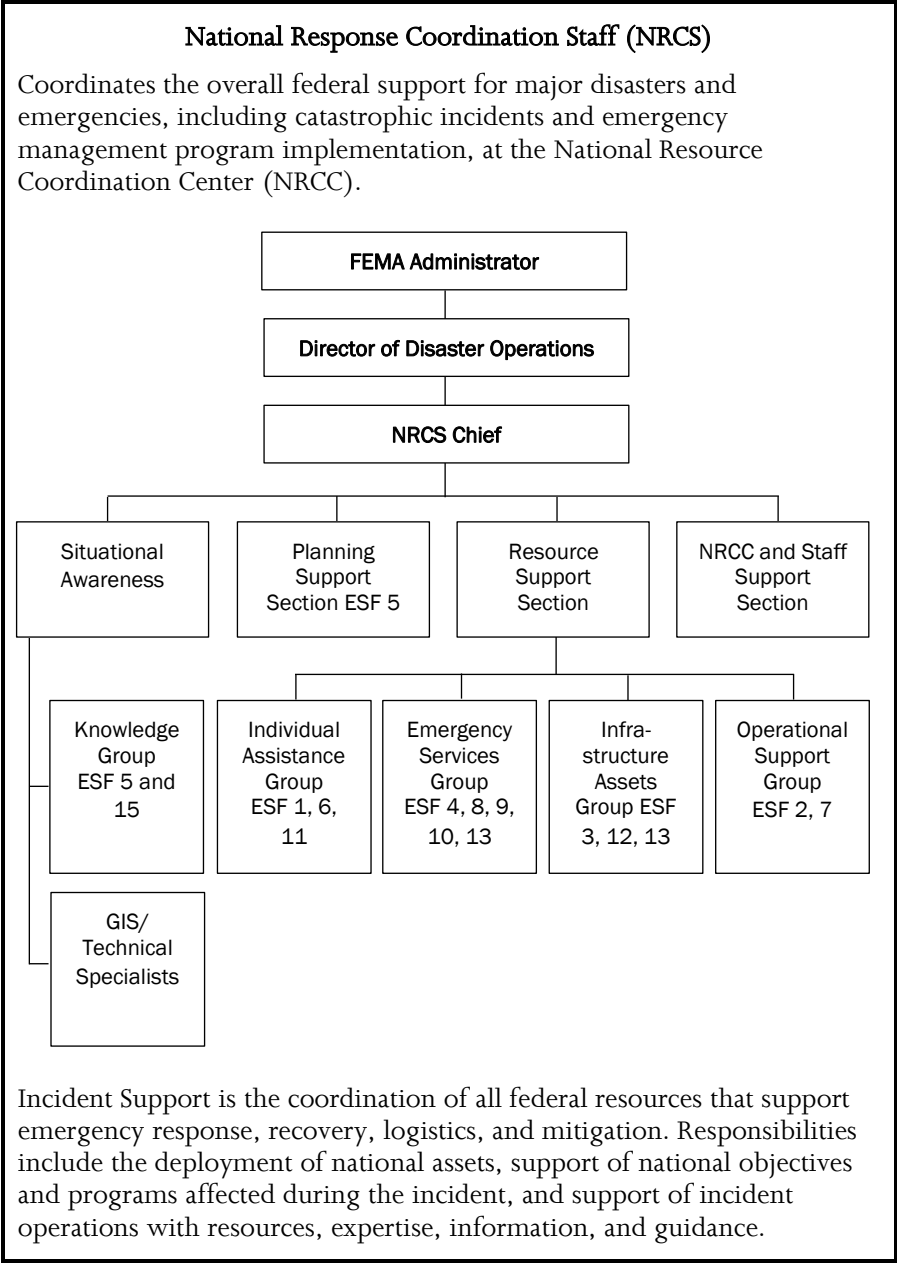
⁶² *In re Carey*, B-271666, 1996 U.S. Comp. Gen. LEXIS 235 (Apr. 24, 1996).

⁶³ FM 121-1-1, Travel Policy Manual (Sept. 23, 2015).

⁶⁴ NRCC Fact Sheet available at <http://www.fema.gov/media-library/assets/documents/96850>.

NRCC Activation Level	Scope of Activation	Incident Conditions
	• Most but not all ESFs and liaisons	or potential impact on public health, welfare, and infrastructure, requires a high amount of direct federal assistance for response and recovery efforts.
Level 3	• Moderate staff • Only Select ESFs and interagency liaisons	• An incident which, due to its severity, size, location, and actual or potential impact on public health, welfare, and infrastructure, requires a moderate amount of direct federal assistance.
Enhanced Watch	• Anticipation of federal assistance and/or immediate response to disaster	• NWC and select members of the NRCC Activation team maintain situation awareness. The NRCC is not activated.
Watch Steady State	• Normal office staff	• No event or incident anticipated. • 24 hours per day/7 days a week or 12 hours per day/5 days a week operation in the NRCC. • NWC maintains situational awareness.

Table 4-3: Incident Support Coordination Constructs Chart



B. Regional Response Components

FEMA has 10 regional offices,⁶⁵ each headed by an RA.⁶⁶ The regional field structures are FEMA's permanent presence for STTLs across the Nation. These offices support development of all-hazards operational plans and generally help STTLs become better prepared, and they mobilize federal assets and evaluation teams to work with STTL agencies.

1. Regional Administrator (RA)

The RA is the primary FEMA representative to state governors and tribal chief executives, other federal departments and agencies, and STTL authorities during day-to-day operations.⁶⁷ After a Stafford Act declaration, the RA of the affected region has control of FEMA resources within the region. The RA delegates authority for incident management and control of assigned federal resources to the FCO when the FCO has established operational capability.⁶⁸

2. Regional Watch Center (RWC)

Similar to the NWC, Regional Watch Centers (RWCs) operate 24 hours a day to provide the RA and staff with situational awareness regarding potential, developing, or ongoing situations that may require federal support.⁶⁹ The RWCs link the RRCC, State Emergency Operations Center, Regional DHS components, Regional ESOs, State Fusion Centers, Joint Terrorism Task Forces, and other key STTL operational centers, while it also collects and distributes information to the NWC for development of national situational awareness.⁷⁰

⁶⁵ 6 U.S.C. § 317(a).

⁶⁶ 6 U.S.C. § 317(b). *See also* FEMA Delegation No. FDA 0106-1, *Delegation of Authority*, issued March 2, 2016, under Delegations at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx.

⁶⁷ *See* 6 U.S.C. § 317(c).

⁶⁸ *See* 44 C.F.R. §206.41(b) regarding RA designation of Disaster Recovery Manager (DRM) authority.

⁶⁹ Regional Watch Center Fact Sheet, available at <http://www.fema.gov/media-library/assets/documents/96850>.

⁷⁰ *Id.*

3. Regional Response Coordination Centers (RRCCs)

The Homeland Security Act requires each FEMA RA to maintain and operate a Regional Response Coordination Center (RRCC).⁷¹ Similar to the NRCC, an RRCC, when activated, functions as a multi-agency coordination center staffed by ESFs in anticipation of, or immediately following, an incident.⁷² RRCCs coordinate federal regional response efforts and maintain connectivity with FEMA HQ and with STTL EOCs, state and major urban area fusion centers, federal executive boards, and other operations and coordination centers that potentially contribute to the development of situational awareness.⁷³

A FEMA Regional Office activates its RRCC to coordinate regional response efforts, establish federal priorities, and implement federal program support. The RRCC establishes communications with the affected state, territorial, or tribal emergency management agency; deploys regional teams to assess the impact of the event, gauge immediate STTL needs, and makes preliminary arrangements to set up field facilities; and provides information to the NRCC on the disaster situation and federal response. The NRCC supports the RRCC efforts by deploying national assets when needed.

C. Field Response Components

1. Federal Coordinating Officer (FCO)

With a Stafford Act declaration of a major disaster or emergency, “the President shall appoint a Federal Coordinating Officer (FCO) to operate in the affected area.”⁷⁴ The Stafford Act charges the FCO with performing an initial appraisal of the types of relief most needed, establishing field offices, coordinating the administration of relief, and taking other such

⁷¹ 6 U.S.C. § 317(c)(2)(H).

⁷² NRF, at 41-42. *See also* the Regional Response Coordination Fact Sheet available at <http://www.fema.gov/media-library/assets/documents/96850>.

⁷³ *Id.* at 42.

⁷⁴ Stafford Act, § 302(a), 42 U.S.C. § 5143(a).

action consistent with his or her delegation and authority to provide assistance.⁷⁵

While the President is not limited in choosing an FCO from FEMA, traditionally, FEMA provides FCOs for Stafford Act major disasters and emergencies.⁷⁶ All FEMA FCOs are members of a national FCO cadre with cadre management performed by the FOD within ORR at FEMA HQ.

FEMA FCOs are assigned to the regions and, when appointed to a major disaster or emergency, are delegated Disaster Recovery Management (DRM) Authority⁷⁷, which is the authority to expend Disaster Relief Funds (DRFs),⁷⁸ from the RA who has responsibility for the state, territory, or tribe in which the emergency or major disaster occurred. *See* Chapter 3, *Declarations*, for a discussion of delegation of DRM authorities to the FCO and the Federal Disaster Recovery Coordinator, respectively.

2. Field Offices

a. Joint Field Offices (JFOs)

Following a major disaster or emergency declaration, the Stafford Act charges the FCO with establishing field offices.⁷⁹ The primary field office is the JFO—a temporary federal facility that provides a central location for the coordination of response efforts by the private sector, NGOs, and all levels of government.⁸⁰ The FCO, operating out of the JFO, has responsibility for incident oversight, direction, and/or assistance to effectively coordinate and direct response and recovery actions. The JFO is typically located at or near the incident area of operations. At the JFO, the Unified Coordination Group (UCG), consisting of senior leaders representing federal, state, territorial, and tribal interests (and, in certain

⁷⁵ *Id.* § 302(b), 42 U.S.C. § 5143(b).

⁷⁶ 44 C.F.R. § 206.41(a). *See also* 44 C.F.R. § 206.42, which lists the responsibilities of FCOs following a Stafford Act declaration.

⁷⁷ DRMs are appointed to exercise all the authority provided to Regional Administrators (RAs). *See* Chapter 3, *Declarations* for a discussion of this DRM authority. *See also* 44 C.F.R. §206.2(8) and 44 C.F.R. § 206.41.

⁷⁸ *See* Chapter 2, *Disaster Readiness*, for a discussion on the DRF.

⁷⁹ Stafford Act § 302(b)(2), 42 U.S.C. § 5143(b)(2).

⁸⁰ NRF at 40.

circumstances, local jurisdictions and the private sector) leads the UCG staff. UCG members must have significant jurisdictional responsibility and authority.⁸¹

In a large disaster, the FCO may also establish satellite Area Field Offices (AFOs) to provide a federal, state, territorial, and tribal presence—essentially mini-JFOs—in local areas that the disaster hit especially hard. For example, after Hurricanes Ike and Gustav, when FEMA established the JFO in Austin, Texas, FEMA also established an AFO in the Port Arthur and Beaumont, Texas, area, to assure that the local citizens had sufficient state, territorial, tribal, and federal support personnel.

b. Disaster Recovery Centers (DRC)⁸²

A Disaster Recovery Center (DRC) is a readily accessible facility or mobile office where survivors may go for information about FEMA programs or other disaster assistance programs, and to ask questions related to their case. FEMA establishes these offices in disaster designated areas in coordination with the state, territory, and/or tribe almost immediately after the JFO is set up. DRCs are generally open for days or weeks, depending on the need. They are typically located in fixed facilities provided by the STTL, generally at no cost, which will necessitate the execution of a license or use agreement. FEMA also maintains mobile DRCs to allow for quick set up and portability to ensure that disaster affected communities will have access as needed. A license or use agreement may be needed to allow for placement of a mobile DRC.

Common issues regarding DRCs include appropriate credentialing of non-FEMA staff at DRCs, visitor restrictions on weapons (as DRCs are generally considered federal facilities), and ensuring protection of applicant personally identifiable information (PII), including when media representatives are escorted through a DRC.

⁸¹ NRF at 40.

⁸² Refer to the FEMA Disaster Assistance Policy (DAP) 9430.1, *Disaster Recovery Centers Services and Providers*, issued Oct 1, 2008 at <https://www.fema.gov/media-library/assets/documents/24416>; *IHPUG*, p.17.

c. Responder Support Camps (RSCs)

A Responder Support Camp (RSC), formerly known as a base camp, is a site that provides support to FEMA and other federal responders during the response phase and/or recovery phase of an emergency or major disaster. Such support can include lodging, meals, and laundry facilities to those who are part of the response effort when those essential services are not otherwise available.

Under appropriate conditions (and, in some cases, subject to reimbursement) the RSC may also house personnel sponsored by nonprofit organizations that are members of the National Voluntary Organizations Active in Disasters, STTL first responders, and contractors engaged in response efforts. An RSC Concept of Operations (CONOPS) defines FEMA HQ and regional roles, responsibilities, and relationships associated with the planning and execution of RSC activation, operation, and deactivation.⁸³

An RSC provides essential services such as lodging, meals, and laundry. If FEMA employees receive these items in-kind at the RSC, the agency should not also provide *per diem* for these same services or should reduce the *per diem* amount by what the employee receives at the RSC.

Similarly, if other federal employees or contract employees utilize the RSC, FEMA must ensure that it is not duplicating payment for these same services under the Mission Assignment/Interagency Agreement or the agency contract for services. FEMA must also ensure the RSC is accessible to individuals with disabilities. FEMA should work with the RSC contractor on accessibility issues during the design and construction phases and should also work with the contractor to quickly address and remedy accessibility issues if they become apparent following RSC construction.

For FEMA to require its employees to stay at an RSC, FEMA—through the Secretary of DHS unless otherwise delegated—must make a determination

⁸³ For the most current RSC CONOPS, refer to [https://intranet.fema.net/org/orr/lmd/lmd_divisions/lod/Documents/Responder Support Camp Information/RSC CONOPS Final 1Mar16.pdf](https://intranet.fema.net/org/orr/lmd/lmd_divisions/lod/Documents/Responder%20Support%20Camp%20Information/RSC_CONOPS_Final_1Mar16.pdf).

that the necessary service (disaster response) cannot be rendered unless employees utilize the available government accommodations (in this case, the RSC) in advance of sending the employees on temporary duty assignment.⁸⁴

FEMA must include the availability of government accommodations, the RSC, in the employees' travel authorization.⁸⁵ The FCO may, at his or her discretion, terminate the deployment of individuals who refuse to stay in the RSC or deny any *per diem* reimbursement if they are permitted to lodge elsewhere. Requests for lodging at the RSC for other than FEMA employees must be considered on a case-by-case basis by the FCO. Non-FEMA employees, including other federal agency employees, may be required to reimburse FEMA for the costs associated with lodging at the RSC. RSC lodging is not appropriate for survivors.

d. Use of State/Local Assets for Temporary Field Offices

FEMA provides supplemental assistance to assist STTL disaster response efforts. While FEMA provides federal operations support, including temporary field offices and staging bases, at a 100% federal cost share, we look to STTLs to help provide temporary facility space where appropriate. The Stafford Act authorizes FEMA to accept and utilize the services or facilities of any STTL for Stafford Act use.⁸⁶ In addition, FEMA may utilize the personnel or facilities of disaster relief organizations.⁸⁷

Services and facilities provided at no cost by STTLs or disaster relief organizations are not subject to FEMA's directive on gift acceptance discussed in *Gifts and Donations* further in this chapter.⁸⁸ FEMA may enter into a Memorandum of Agreement (MOA), License/Use Agreement (LUA), or an Intergovernmental Service Agreement (IGSA) with other

⁸⁴ See 5 U.S.C. § 5911(b): The head of an agency may provide, directly or by contract, an employee stationed in the United States with quarters and facilities, when conditions of employment or of availability of quarters warrant the action.

⁸⁵ See 44 Comp. Gen. 626 (1965) at <http://www.gao.gov/products/432755#mt=e-report>.

⁸⁶ Stafford Act § 306(a), 42 U.S.C. § 5149(a).

⁸⁷ Stafford Act § 309, 42 U.S.C. § 5152.

⁸⁸ FD 112-13, *Agency Gift Acceptance and Solicitation*, under Directives at https://intranet.fema.net/mgmt_resources/Pages/policy_guidance.aspx.

entities depending on the status of the other entity (federal, STTL, or private organization) and the scope of the temporary use.

i) License/Use Agreements (LUA)

A License/Use Agreement (LUA) is a form of MOA, with terms and terminology specific to the use of real property. In an LUA, the owner of real property (the licensor)⁸⁹ gives permission to a licensee to use it for a specific purpose at no cost to the licensee. FEMA commonly executes LUAs to obtain real property temporarily for disaster response and recovery, such as JFOs or DRCs, when no cost is involved.⁹⁰ Note that, to lease or rent property, FEMA must use General Services Administration (GSA) services to enter into an agreement on FEMA's behalf.⁹¹

Additionally, Regional and Headquarters logistics managers may pre-identify real property needed for other mission requirements, like staging areas and incident support bases, for contingencies. When it involves another federal or STTL agency, these commitments are often in the form of a Memorandum of Use (MOU) or an MOA containing the required terms of an LUA, or general MOU or MOAs, which FEMA may support by specific LUAs at the time of actual use.⁹²

⁸⁹ Generally, nonprofits, STTLs, or private commercial or educational entities. An LUA could be used with another federal entity, but such agreements are usually part of a broader MOA or Interagency Agreement.

⁹⁰ If the licensor is not an STTL or disaster relief organization, the gift acceptance authority of Stafford Act § 701(b), 42 U.S.C. § 5201(b) probably applies and would trigger utilization of FD 112-13, *Agency Gift Acceptance and Solicitation*.

⁹¹ See FD 143-1, Disaster Leasing Process under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx.

⁹² See FEMA Manual 112-5-1, *Interagency and Intergovernmental Agreements*, dated October 1, 2015, at page 40 under Instructions at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx. This manual includes comprehensive information and templates for interagency agreements, memoranda of understanding and agreement, revocable license agreements, real property license and use agreements, and intergovernmental service agreements.

ii) Intergovernmental Service Agreements (IGSAs)⁹³

An Intergovernmental Service Agreement (IGSA) is a form of contract between FEMA and an STTL. Specifically, it is an agreement authorized under Stafford Act Sections 306(a) and (b)(3) whereby FEMA (the requestor), needing supplies or services during a Stafford Act declared response effort, agrees to pay the STTL (the servicer) for services and/or supplies necessary to meet a public mission. All costs associated with IGSA's are subject to the requirements in 2 C.F.R. Part 225, *Cost Principles for State, Local and Indian Tribal Governments* (OMB Circular A-87). Due to specific authority under the Stafford Act,⁹⁴ this type of agreement is not subject to the Federal Acquisition Regulation (FAR); however, the agency's decision to use an IGSA may be protested to the Government Accountability Office (GAO).⁹⁵

e. Purchase of Bottled Water and Other Commodities for Staff

Issues often arise in the field regarding the purchase and provision of bottled water and commodities such as insect repellent and sunscreen, particularly since FEMA often deploys personnel directly to disaster areas with little notice. These deployed personnel may work long hours in intemperate conditions without access to commercial goods and services. Generally, drinking water, insect repellent, sunscreen, and appropriate wearing apparel for a position are considered personal expenses of employees. Pursuant to 31 U.S.C. § 1301(a) "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law," therefore, appropriated funds may not be expended for the personal expenses of federal employees. There are however, exceptions to the general prohibition for purchase of such items, depending on the item in question and the circumstances regarding the need for the item.

⁹³ *Id.*, Chapter 7.

⁹⁴ Stafford Act §§ 306(a) and (b)(3), 42 U.S.C. §§ 5149(a) and (b)(3).

⁹⁵ See *Energy Conversion Devices, Inc.*, B-260514, 95-2 CPD ¶ 121 (1995).

i) Bottled Water

Drinking water of federal employees is generally considered a personal expense of those employees.⁹⁶ Notwithstanding this general rule, federal agencies may expend appropriated funds to procure drinking water for its employees upon a determination that those employees do not have reasonable access to potable (i.e., fit or suitable for drinking) water.⁹⁷ The requisite lack of access to potable water may arise from either: (1) the available water supply being unsafe for consumption; or (2) a lack of reasonable, physical access to potable water.⁹⁸ It is important to emphasize that, to procure drinking water with appropriated funds where a water supply is *available*, the water must be unsafe for consumption; merely establishing that water is discolored, malodorous, or of poor taste

⁹⁶ *Clarence Maddox -- Relief of Liability for Improper Payments for Bottled Water*, B-303920 (Mar. 21, 2006); *Comptroller General Warren to the Chairman, Federal Communications Commission*, B-43297, 24 Comp. Gen. 56. (Jul. 26, 1944); *Acting Comptroller General Elliott to the Secretary of Commerce*, A-97419, 18 Comp. Gen. 238 (Sep. 20, 1938); *Acting Comptroller General Elliott to the Secretary of the Navy*, A-91465, 17 Comp. Gen. 698 (Mar. 2, 1938); *Comptroller General McCarl to the Secretary of Agriculture*, 2 Comp. Gen. 776 (May 24, 1923); *See also Decision of the Comptroller General*, B-137999 (Jul. 1, 1959); *Acting Comptroller General Ginn to the Secretary of State*, A-7483, 5 Comp. Gen. 90 (Aug. 5, 1925); *Decision by Comptroller General McCarl*, A-10207, 5 Comp. Gen. 53 (Jul. 24, 1925); *Decision by Comptroller General McCarl*, 3 Comp. Gen. 828 (May 3, 1924); *Decision by Comptroller General McCarl*, 3 Comp. Gen. 661 (Mar. 19, 1924); *Comptroller Downey to George G. Box, Disbursing Officer, Department of Labor -- The Purchase of Drinking Water for Use of Government Offices*, 22 Comp. Dec. 31 (Jul. 11, 1915); *Decision by Comptroller Downey -- Mineral Water as a Part of Subsistence Expenses*, 21 Comp. Dec. 319 (Nov. 16, 1914).

⁹⁷ *Dept. of the Army, Aberdeen Proving Ground -- Use of Appropriated Funds for Bottled Water*, B-324781 (2013). *See also Department of the Army, Military Surface Deployment and Distribution Command--Use of Appropriations for Bottled Water*, B-318588 (Sep. 29, 2009); *U.S. Agency for International Development--Purchase of Bottled Drinking Water*, B-247871 (Apr. 10, 1992); *Lieutenant Colonel Tommy B. Tompkins*, B-236330 (Aug. 14, 1989); *Decision of the Comptroller General*, B-147622 (Dec. 7, 1961); *Decision of the Comptroller General*, B-137320 (Oct. 27, 1958); *Decision of the Comptroller General*, B-119481 (Apr. 8, 1954); *Comptroller Warren to the Department of Labor*, B-190162 (Apr. 30, 1952); *Acting Comptroller General Yates to T.J. Slowie, Federal Communications Commission*, B-58031, 25 Comp. Gen. 920 (Jun. 28, 1946); *Comptroller General McCarl to the Secretary of Agriculture*, 2 Comp. Gen. 776 (May 24, 1923); *See also Comptroller Downey to A. Zappone, Disbursing Clerk, Department of Agriculture -- Purchase of Drinking Water For Use in Government Offices*, 21 Comp. Dec. 739 (Apr. 21, 1915).

⁹⁸ *Id.*

is insufficient.⁹⁹ Where the procurement of drinking water is authorized, the agency may also expend appropriated funds to cool the water being supplied where cooling the water is necessary to make the water fit for consumption.¹⁰⁰

In addition to a general necessary expense determination, an agency may determine that the Occupational Safety and Health Act of 1970 mandates the provision of potable water to employees. Under the Act, “agencies must provide safe and healthful places and conditions of employment for their employees and maintain an effective and comprehensive occupational safety and health program for their employees.”¹⁰¹ In this regard, federal agencies must provide access to potable water for employees working at remote sites with no access to potable water.¹⁰²

In such circumstances, it is within FEMA's discretion to determine how best to meet this responsibility, whether by providing coolers or jugs for transporting water or by providing bottled water. In such circumstances, FEMA will simply be required to support that the mechanism chosen for providing potable water was the best way to provide employees with access to potable water.¹⁰³

ii) Insect Repellent and Sunscreen

Common items for individual, personal use of employees such as insect repellent¹⁰⁴ and sunscreen are normally personal items for which appropriated funds are not available.

⁹⁹ *Acting Comptroller General Elliott to the Secretary of Commerce*, A-97419, 18 Comp. Gen. 238 (Sep. 20, 1938) (water being and tasting “muddy” does not render the water non-potable); *Acting Comptroller General Elliott to the Secretary of the Navy*, A-91465, 17 Comp. Gen. 698 (Mar. 2, 1938) (hard, salty, warm water still potable).

¹⁰⁰ *Acting Comptroller General Yates to T.J. Slowie, Federal Communications Commission*, B-58031, 25 Comp. Gen. 920; 1946 U.S. Comp. Gen. LEXIS 133 (Jun. 28, 1946); *Comptroller General McCarl to the Secretary of the Interior*, A-11153, 5 Comp. Gen. 201; 1925 U.S. Comp. Gen. LEXIS 348 (Sep. 15, 1925).

¹⁰¹ 29 U.S.C. § 668.

¹⁰² *Department of the Army--Use of Appropriations/or Bottled Water*, B-310502, 2008 U.S. Comp. Gen. LEXIS 38 (Feb. 4, 2008).

¹⁰³ *Id.*

¹⁰⁴ The terms “repellant” and “repellent” are often used interchangeably.

Three possible exceptions to the prohibition on use of appropriated funds for personal items would rarely, if ever, apply at FEMA for purposes of providing employees sunblock or insect repellent.

iii) Necessary Expense Doctrine

The Comptroller General uses a two-part test to determine whether an article of wearing apparel and other special equipment is a necessary expense that can be procured with appropriated funds: (1) whether the object for which the appropriation involved was made can be accomplished as expeditiously and satisfactorily from the Government's standpoint, without such equipment; and (2) whether the equipment is such as the employee reasonably could be required to furnish as part of the personal equipment necessary to enable one to perform the regular duties of the position.¹⁰⁵

Applying this test to the purchase of sunscreen or insect repellent, there is no reasonable basis for finding either sunblock or insect repellent is a necessary expense, as an employee could reasonably be required to furnish these items as part of the personal equipment necessary for one to perform the duties of his or her position. These relatively inexpensive items are available at many commercial venues.

iv) Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act of 1970 mandates that all agencies "acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees."¹⁰⁶ The Comptroller General has never found that insect repellent or sunblock are "safety equipment, personal protective equipment, [or] devices reasonable necessary to protect employees." This statutory language and OSHA regulations suggest "equipment" and "devices" are items one would not ordinarily expect an employee to

¹⁰⁵ *Comptroller General McCarl to the Secretary of War*, 3 Comp. Gen. 433 (Jan. 19, 1924).

¹⁰⁶ Pub. L. No. 91-596, (1970) § 19(a) codified as amended at 29 U.S.C. § 668(a)(2),). The regulations implementing the PPE requirements are at 29 C.F.R. §§ 101.132 – 101.138.

provide.¹⁰⁷ Even if sunscreen or insect repellent could constitute such equipment or devices,¹⁰⁸ only in exceptional circumstances could a FEMA official determine there is a hazard for which such devices are reasonably necessary to protect employees.¹⁰⁹ For insect repellent, the presence in the area of Zika or West Nile Virus may present such a circumstance. For example, in 2016, FEMA considered it likely that such a hazard would exist for FEMA employees working in any area where the Centers for Disease Control and Prevention found local transmission of the Zika virus.

v) Administrative Expenses Act of 1946, 5 U.S.C. § 7903

5 U.S.C. § 7903, enacted as part of the Administrative Expenses Act of 1946,¹¹⁰ provides: “Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks.”

For an item to be authorized by 5 U.S.C. 7903, three tests must be met: (1) the item must be “special” and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not

¹⁰⁷ The regulations implementing OSHA’s PPE requirement state that “[p]rotective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment.” 29 C.F.R. § 1910.132(a). *See also* 29 C.F.R. § 1910.132(h)(4)(iii) (stating that employers are not responsible for providing “[o]rdinary clothing, skin creams, or other items, used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, ordinary sunglasses, and **sunscreen**.” (Emphasis added).

¹⁰⁸ When the GAO previously considered the procurement of insect repellent for employees it categorized it as an apparel equivalent stating that the use repellent, “being primarily for the protection of the skin from insect bites, which is a function similar to that of the special clothing and equipment ...”. *Comptroller General Warren to E. C. Crary, Department of Agriculture*, B-80295, 28 Comp. Gen. 236, 1948 U.S. Comp. Gen. LEXIS 235 (Oct. 8, 1948).

¹⁰⁹ Pursuant to 29 C.F.R. § 1910.132(d), the agency shall provide a hazard assessment “to determine if hazards are likely to be present” and if such hazards are likely to be present, “select and have each affected employee use the types of PPE that will protect the affected from the hazards identified ...”

¹¹⁰ Pub. L. 83-737 (1946). *as amended*.

solely for the protection of the employee; and (3) the employee must be engaged in hazardous duty.¹¹¹

Even though the statute is specifically for the “purchase and maintenance of special clothing and equipment,” items other than special clothing and equipment may be furnished under 5 U.S.C. § 7903 if the three-part test has been met. It would be extremely challenging to conclude that sunscreen or insect repellent widely available to employees is “special” and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself.¹¹²

It would be challenging for FEMA to conclude that the provision of sunscreen or insect repellent is essential to the successful accomplishment of work. Such a circumstance may exist for FEMA employees who work outside and who do not have ready access to sunscreen or insect repellent. Finally, as with the OSHA statute, exceptional circumstances would be required to conclude a FEMA employee is engaged in “hazardous duty.”

Perhaps working in an environment where West Nile Virus or Zika is present could constitute hazardous duty though such a determination will always be fact specific.

vi) Wearing Apparel and Personal Protective Equipment (PPE)

Questions may arise in the field regarding cold weather gear, PPE such as steel toed boots, and the provision of FEMA-distinctive clothing. The general rule is that every employee of the federal government is required to present himself or herself for duty properly attired according to the

¹¹¹ GAO, *Principles of Federal Appropriations Law*, Vol. I, 3rd ed., 2004, ch. 4, § C.13.i, pp. 4-266-; *Comptroller General Warren to the Secretary of Commerce*, B-112031 (Nov. 7, 1952).

¹¹² The Comptroller General found appropriate under 5 U.S.C. § 7903 the purchase of mosquito repellent for the use of Forest Service employees engaged in the repair of roads and trails in an area where the mosquitos were much more prevalent than normal and under conditions where it was impossible for the employees to perform their assigned tasks without using a mosquito repellent or other similar protection. *Comptroller General Warren to E. C. Crary, Department of Agriculture*, B-80295, 28 Comp. Gen. 236, 1948 (Oct. 8, 1948). The focus of the opinion appears to have been on classification of insecticides or mosquito repellents as functionally similar to special clothing and equipment as the use being primarily for the protection of skin from insect bites.

requirements of his or her position.¹¹³ In other words, most items of wearing apparel are considered the employee's personal responsibility and not the federal government's.

There are, however, several exceptions to the general prohibition. First, three statutory exceptions permit the purchase of items of apparel from appropriated funds under certain circumstances: 1) the Administrative Expenses Act of 1946;¹¹⁴ 2) the Federal Employees Uniform Allowance Act of 1955;¹¹⁵ and 3) OSHA.¹¹⁶ Second, where these three statutes do not apply, then the purchase of the items may be permissible using the "necessary expense" doctrine.

FEMA's reliance upon the necessary expense doctrine to purchase wearing apparel and other special equipment has been extremely limited and used only within the context of purchasing FEMA-distinctive clothing.¹¹⁷

IV. Federal Response Teams

The Stafford Act and the Homeland Security Act authorize FEMA to activate specialized assets and teams¹¹⁸ to aid in the response effort based on the type and scope of an incident.¹¹⁹ Some of these teams are subject to FEMA's authority, some are subject to DHS's authority, and some are subject to the authority of other departments. Generally, the senior staff at the NRCC, the RRCCs, or the FCO may activate these

¹¹³ *Purchase of Down-Filled Parkas*, B-213993 (Mar. 6, 1984); *Purchase of Insulated Coveralls, Vicksburg, Mississippi*, B-123223 (Jun. 22, 1955); 1 Principles of Federal Appropriations Law, 3rd ed., at page 4-265 available at <http://www.gao.gov/legal/red-book/overview>.

¹¹⁴ 5 U.S.C. § 7903.

¹¹⁵ 5 U.S.C. § 5901. *See also* 6 U.S.C. § 453a.

¹¹⁶ 29 U.S.C. § 651, *et seq.*

¹¹⁷ *See* FD No. 123-18-Rev, *Standard FEMA-Distinctive Clothing* (Jul. 25, 2011) available under Directives at

https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx. As described in the Directive, FEMA may issue standard FEMA-distinctive clothing bearing Agency seals, insignia, or markings (caps, jackets, and shirts) for use by FEMA employees when activated to support disaster operations and/or performing duties where they must be identified as FEMA employees in the performance of their official functions.

¹¹⁸ Stafford Act, § 303, 42 U.S.C. § 5144; 44 C.F.R. § 206.43. *See also* 6 U.S.C. § 317(f) requiring the establishment of regional strike teams authorized under the Stafford Act § 303, 42 U.S.C. § 5144, and detailing the composition of the teams.

¹¹⁹ NRF at 38.

specialized emergency support and response teams but additional concurrences may be necessary.

A. Incident Management Assistance Teams (IMATs)¹²⁰

FEMA Incident Management Assistance Teams (IMATs)¹²¹ are highly mobile, responsive forces of qualified and experienced federal emergency management personnel and resources that can immediately deploy in support of any all-hazard incident response in the Nation. In addition to deploying in support of Stafford Act events, IMATs have also assisted other federal agencies (OFAs) in non-Stafford activities through interagency agreements authorized under the either the authorities of the OFAs or the Economy Act.

While STTL responders are, of course, the first on the scene of an incident, IMATs are often the earliest federal presence to arrive on scene. An IMAT rapidly deploys as a cohesive team to an incident or incident-threatened venue to lead or support a prompt, effective, and coordinated federal response in support of STTL officials.

Although FEMA may deploy an IMAT in anticipation of an event and before the President issues a declaration,¹²² FEMA may not authorize the IMAT to provide reimbursement or direct federal assistance prior to a declaration.¹²³ The IMAT is limited to coordinating with the STTL authorities and working towards getting the federal government pre-positioned so it is appropriately postured to respond.

¹²⁰ See FD 010-7, Incident Management Assistance Team (IMAT) Program Directive (January 12, 2015), available under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx. See also the IMAT Fact Sheet available at <http://www.fema.gov/media-library/assets/documents/96850>.

¹²¹ PKEMRA § 633, 6 U.S.C. § 317 Pub. L. 109-295 (2006), amending the Stafford Act § 303, 42 U.S.C. § 5144, requiring the establishment of three national response teams and sufficient regional response teams.

¹²² FD 125-7, *Financial Management of the Disaster Relief Fund (DRF)* (October 1, 2016), available under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx.

¹²³ *Id.*

In addition, FEMA may designate the IMAT lead as an FCO once the President issues a declaration. IMATs are composed of a cadre of full-time¹²⁴ staff entirely focused on exercising, analyzing, and executing disaster response operations. Currently, FEMA has three national IMATs and a regional IMAT in each FEMA region.¹²⁵

B. Mobile Emergency Response Support (MERS)

FEMA Response Directorate's Disaster Emergency Communications Division¹²⁶ can rapidly deploy Mobile Emergency Response Support (MERS)¹²⁷ capability to provide secure and non-secure voice, video, and information services, operations, and logistics support to response operations.¹²⁸ The MERS also has the ability to build out and support disaster support facilities, such as the JFO.

MERS works closely with federal, state, tribal, and other mission partners to deliver information and provide situational awareness to emergency management decision makers.¹²⁹ MERS units are available for immediate deployment and equipped with self-sustaining elements of assistance. MERS assistance falls into the following three broad categories:

1. Operations Support

- Situation and event reporting and briefing;

¹²⁴ Previously, federal on-scene teams were a combination of full-time staff pulled from other duties and temporary federal employees.

¹²⁵ 6 U.S.C. § 317(c)(2)(D) and (f). PKEMRA § 633 (Pub. L. No. 109-295, (2006), 6 U.S.C. § 721), in amending § 303 of the Stafford Act, 42 U.S.C. § 5144, also required that FEMA establish a "Target Capability Level" for each team. An FCO leads each team. The FCO leading a Type I team is in the federal government's Senior Executive Service (SES), and these teams have the most experience and the most training. National IMATs are Type I teams, and a member of the SES leads the team, while Regional IMATs are Type II teams, and their leader is a GS-15.

¹²⁶ See <https://www.fema.gov/disaster-emergency-communications-division>.

¹²⁷ See <http://www.fema.gov/disaster-emergency-communications>.

¹²⁸ Disaster Emergency Communications Fact Sheet at 1, available at <http://www.fema.gov/media-library/assets/documents/96850>.

¹²⁹ *Id.*

- Data collection and display;
- Interagency coordination;
- On-site security (facility, equipment, and personnel), planning, and supervision; and
- Law enforcement coordination.

2. Communications Support

- Telecommunications transmission systems, including satellite, high frequency, microwave line of sight, and local area networks;
- Communications equipment and assets, including radios, computers, phone, and video systems; and
- Technician and operator communications.

3. Logistics Support

- Power generation and distribution; heating, ventilation, and cooling (HVAC); fuel transportation and distribution, and potable water;
- Experienced personnel in facility management, acquisition support, warehouse operation, transportation management, and property accountability; and
- Emergency operation vehicles.
- MERS stages units in six strategic locations and can support multiple field operating sites at the same time. The six MERS detachment locations and the FEMA region(s) they cover are:
 - Bothell, Washington (Regions IX and X);

- Denton, Texas (Regions VI and VII);
- Denver, Colorado (Regions V and VIII);
- Maynard, Massachusetts (Regions I and II);
- Thomasville, Georgia (Regions III and IV); and
- Frederick, Maryland (National Capitol Region)

C. Urban Search & Rescue Teams (US&R)

The Urban Search and Rescue (US&R) System, first created by FEMA administratively and then codified by PKEMRA,¹³⁰ provides the framework for structuring local emergency services personnel into integrated response task forces.¹³¹ US&R teams provide urban search and rescue and life-saving assistance to STTL authorities when activated for incidents or potential incidents requiring a coordinated federal response.

The US&R System is a three-way partnership between FEMA, the host state of the sponsoring agency, and the sponsoring agency of the US&R Task Force. US&R Task Forces may also deploy as a state activated resource. Pursuant to the MOA signed between FEMA, the states, and the sponsoring agencies, US&R Task Forces must deploy as state resources for incidents within the host state.¹³²

Two US&R sponsoring agencies have long-standing contracts with the U.S. Agency for International Development (USAID), Office of

¹³⁰ PKEMRA, § 634, 6 U.S.C. § 722, confirmed FEMA's authority to establish the US&R. FEMA's US&R's regulations found at 44 C.F.R. Part 208, generally predate PKEMRA.

¹³¹ NRF, Emergency Support Function #9 – Search and Rescue Annex (June 2016), available at <http://www.fema.gov/media-library/assets/documents/25512>. See also the Urban Search and Rescue Fact Sheet available at <http://www.fema.gov/media-library/assets/documents/96850>.

¹³² FEMA has made two exclusions to this policy. First, if the incident response is preeminently a federal responsibility or if FEMA has already activated the Task Force in a federal status.

Foreign Disaster Assistance (OFDA), to conduct urban search and rescue operations outside the United States.

US&R Task Forces have a separate cache of equipment for this purpose and are not affiliated with FEMA for these deployments. In 2010, additional US&R Task Forces, under FEMA, responded to the earthquake in Haiti through an MOA with OFDA under their authority found in the Foreign Assistance Act.

There are many participants in the national US&R System. During its steady state, preparedness phase, the organization of US&R System falls into four categories:

1. FEMA – establishes policy and leads the coordination of the national system;
2. Sponsoring Agency – an STTL that has executed an MOA with DHS/FEMA to organize and administer a task force;
3. Task Force – an integrated US&R organization of multi-disciplinary resources with common communications and a leader, organized and administered by a sponsoring agency and meeting DHS/FEMA standards; and
4. Participating Agencies – an STTL, nonprofit organization, or private organization that has an executed agreement with a sponsoring agency to participate in the national US&R Response System.¹³³

FEMA's US&R system consists of three main operational elements when training for or responding to an incident:

1. FEMA – establishes policy, leads the coordination of the national system, and provides the senior federal leadership for deployed US&R Task Forces through ESF #9;

¹³³ 44 C.F.R. § 208.2.

2. Task Forces – the 28 FEMA US&R Task Forces spread throughout the continental United States, which FEMA trains and equips to handle structural collapse; and
3. Incident Support Teams (ISTs) – support the US&R Task Forces in accomplishing their mission through logistical, electronic, and coordination expertise. They are drawn from members of the 28 US&R Task Forces who, when assigned a role on an IST, take on that role rather than their regular US&R Task Force membership.

D. Hurricane Liaison Team (HLT)

The mission of the Hurricane Liaison Team (HLT) is to support hurricane response operations and decision-making by STTL and federal officials through the rapid and accurate exchange of information between the National Hurricane Center (NHC), the National Weather Service (NWS), and the emergency management community. On June 1 of each year, FEMA activates the HLT to provide daily monitoring and reporting to be ready when a hurricane threatens the United States or its territories. The NHC director may also request the HLT be activated when a tropical storm is threatening.¹³⁴

The HLT is a FEMA-sponsored team made up of federal, state, and local emergency management managers who have extensive hurricane operational experience.¹³⁵ The HLT communicates about the progress and threat level of a storm with appropriate federal, state, and local officials to assist them in their decision-making. The team also organizes and facilitates video and/or teleconferences with the NHC, FEMA, OFAs, STTL emergency operations centers, weather prediction centers, and river forecast centers.

¹³⁴ Hurricane Liaison Team Fact Sheet (Aug. 2, 2004) available at: <https://www.fema.gov/media-library/assets/documents/2719>.

¹³⁵ *Id.*

E. Nuclear Incident Response Team (NIRT)

Nuclear Incident Response Teams (NIRTs)¹³⁶ are teams with specific expertise to provide a rapid response to nuclear or radiological incidents. They are generally composed of trained personnel with specialized equipment from the Department of Energy (DOE)/National Nuclear Security Administration and the Environmental Protection Agency (EPA).¹³⁷

NIRTs can assess situations and advise STTL and federal officials on the scope and magnitude of response needs. When activated, the NIRT provides DHS/FEMA with expert technical advice and support in disaster response operations on the following types of issues:

- Nuclear weapons accidents;
- Radiological accidents;
- Lost or stolen radioactive material incidents; and
- Acts of nuclear terrorism.
- Assets and capabilities of the NIRT include:
 - Aerial Measuring System - Airborne radiological sensing and surveying; and
 - Federal Radiological Monitoring and Assessment Center - Operational and logistical management for radiological consequence management.¹³⁸

The NIRT can also receive valuable support from the Interagency Modeling and Atmospheric Assessment Center (IMAAC). This

¹³⁶ 6 U.S.C. § 312 and 314(a)(2); *see generally*, 42 U.S.C § 5144; 44 C.F.R. § 206.43.

¹³⁷ NRF, Nuclear/Radiological Incident Annex (June 2008), available at <http://www.fema.gov/media-library/assets/documents/25554>.

¹³⁸ Department of Homeland Security (DHS), Management Directive 9400 (Mar. 25, 2003), *Nuclear Incident Response Teams* available at <https://www.dhs.gov/publication/management-directives-volume-9000-emergency-preparedness-and-response>.

capability was moved from DHS to FEMA in 2015 and is managed by the Chemical, Biological, Radiological, Nuclear and Explosives Office within FEMA Response.

The IMAAC provides a single point for the coordination and dissemination of federal atmospheric dispersion modeling and hazard prediction products that represent the federal position during actual or potential incidents involving hazardous material releases. Through plume modeling analysis, IMAAC provides emergency responders with predictions of hazards associated with atmospheric releases to aid in the decision-making process to protect the public and the environment.

FEMA assists the NIRT by establishing standards and certifying when the NIRT meets those standards; conducting joint and other exercises, and training and evaluating performance; and providing funds to the DOE and the EPA, as appropriate, for homeland security planning, exercises and training, and equipment.

The NIRT operates subject to the direction, authority, and operational control of the Secretary of DHS.¹³⁹ NIRT assets deploy at the direction of the Secretary of DHS in connection with an actual or threatened terrorist attack, major disaster, or other emergency in the United States. The legal issues regarding control of these assets are resolved through close coordination with DOE, EPA, and DHS to assure clear roles and responsibilities of the multiple agencies involved with the NIRT.

F. Domestic Emergency Support Team (DEST)

The Domestic Emergency Support Team (DEST)¹⁴⁰ is a specialized interagency team designed to provide expert advice, guidance, and support to the Federal Bureau of Investigation (FBI) On-Scene Commander (OSC) during a weapons of mass destruction incident or

¹³⁹ 6 U.S.C. § 321f (a). *See also* 6 U.S.C. § 314 (a)(3)(B) which also says the FEMA Administrator directs the NIRT.

¹⁴⁰ 6 U.S.C. § 314 (a)(3)(B); *see generally*, 42 U.S.C § 5144; 44 C.F.R. Part 206.43. *See also* the DEST Fact sheet (updated July 2015) available at <http://www.fema.gov/media-library/assets/documents/96850>.

credible threat. The DEST is comprised of members from the following agencies: FBI, FEMA, Department of Defense (DOD), Department of Health and Human Services (HHS), EPA, and DOE.¹⁴¹ FEMA manages the DEST in support of the FBI.

The DEST consists of “crisis and consequence management” components and augments the FBI’s Joint Operations Center with tailored expertise, assessment, and analysis capabilities, providing the FBI OSC with expert advice and guidance in the following areas:

- Interagency crisis management assistance;
- Information management support;
- Enhanced communications capability;
- Contingency planning for consequence management support;
- Explosive devices and their components; chemical, biological, and nuclear weapons/devices and their components, as well as radiological dispersion devices; and
- Technical expertise and equipment to operate in a contaminated environment to conduct threat sampling, take measurements, and collect tactical intelligence and evidence.

G. National Disaster Medical System (NDMS)

NDMS is a coordinated interagency effort among the HHS, DOD, Department of Veterans Affairs (VA), DHS/FEMA, STTL, and private sector institutions and medical professionals to provide medical response, patient evacuation, and hospitalization during disasters and emergencies.¹⁴² Under the NRF, NDMS serves as a component of ESF

¹⁴¹ NRF, Terrorism Incident Law Enforcement and Investigation Annex (Dec. 2004), available at: <http://www.fema.gov/media-library/assets/documents/25560>.

¹⁴² 42 U.S.C. § 300hh-11(a)(2); Stafford Act § 303, 42 U.S.C. § 5144.

#8, Public Health and Medical Services.¹⁴³ NDMS supplements STTL medical resources.

NDMS, formed in 1984 as part of the Public Health Service within HHS, began with medical professionals who were strictly volunteers. HHS managed NDMS since its inception, except from 2003–2006, when Congress transferred it to DHS.¹⁴⁴ PKEMRA, as of January 1, 2007, however, transferred NDMS back to HHS.¹⁴⁵ In the absence of a Stafford Act declaration, the authority to activate NDMS rests with the Assistant Secretary for Preparedness and Response in HHS. When the President issues a Stafford Act declaration, however, FEMA may mission assign HHS to deploy NDMS teams. The following NDMS teams have significant roles in disaster response activities:¹⁴⁶

- Disaster Medical Assistance Team (DMAT);
- Disaster Mortuary Operations Response Team (DMORT);
- National Veterinary Response Team (NVRT); and
- National Medical Response Team (NMRT).

¹⁴³ NRF, at 33; see NRF ESF #8 – Public Health and Medical Services Annex (May 2013), available at: <http://www.fema.gov/media-library/assets/documents/25512>.

¹⁴⁴ 6 U.S.C. 542, Reorganization Plan (Nov. 25, 2002) as of March 1, 2003, transferred NDMS of HHS to DHS.

¹⁴⁵ PKEMRA, Pub. L. 109-295 (2006). See also Conference Report on H.R.5441 (House Rept. No. 109-699), DHS Appropriations Act, 2007, Title III, Public Health Programs, 72 Cong. Rec. H 7789 (Sept. 28, 2009) available at <https://www.congress.gov/congressional-record/2006/09/28/house-section/article/H7784-1>.

¹⁴⁶ <http://www.phe.gov/Preparedness/responders/ndms/teams/Pages/default.aspx>.

Medical Licensure

The issue of medical licensure frequently arises in major disasters or emergency declarations when local medical authorities are overwhelmed and require assistance from out-of-state medical professionals. State authorities establish medical licensing requirements. The Stafford Act is silent on medical licensing, and FEMA has no authority to authorize licensure. During Hurricanes Katrina and Rita, HHS set up a licensure process that allowed doctors practicing under HHS auspices and licensed in one state to practice as a volunteer in another state with the same protection as other federal employees. Out-of-state medical professionals not affiliated with HHS who volunteer to assist in a jurisdiction in which they are not licensed must consult state licensing authorities for their requirements.

H. Disaster Medical Assistance Team (DMAT)

A Disaster Medical Assistance Team (DMAT)¹⁴⁷ is a rapid response medical team consisting of physicians, nurses, and medical technicians sent to the site of declared events to supplement local medical care until FEMA or HHS mobilize other federal or contract resources, or the situation resolves itself. With logistics and administrative personnel support, DMATs deploy to disaster sites with sufficient supplies and equipment to sustain themselves for a period of 72 hours while providing medical care at a fixed or temporary medical care site.

The HHS activates DMAT personnel for two weeks. The statute authorizing NDMS provides that team members, such as the DMATs, become federal employees when HHS activates them to provide medical care during an event, and they are therefore insulated from liability in the event of a malpractice claim.¹⁴⁸

The medical care that DMATs provide includes primary and acute care; triage of mass casualties; resuscitation and stabilization; advanced life support; patient reception at staging facilities; and preparation of

¹⁴⁷ *Id.*

¹⁴⁸ 42 U.S.C. § 300hh-11(c)(1).

sick or injured patients for evacuation. The ability of the DMATs to provide the same type of care that an eligible nonprofit hospital can provide is limited and thus, once the DMAT stabilizes a patient, the DMAT staff works to “regulate” or move the patient to an out-of-area full service hospital. In mass casualty incidents, DMATs provide high-quality medical care despite the adverse and austere environment often found at a disaster site. When it is necessary to evacuate disaster survivors to a different locale to receive definitive medical care, HHS may activate DMATs to support the movement of patients to an appropriate hospital.

I. Disaster Mortuary Operational Response Team (DMORT)

HHS deploys Disaster Mortuary Operations Response Teams (DMORTs)¹⁴⁹ to provide victim identification and mortuary services in disasters and emergencies. The DMORTs work under the guidance of local authorities, including coroners, medical examiners, law enforcement, and emergency managers, to provide technical assistance and personnel to assist with the recovery, identification, and processing of deceased victims. Teams consist of funeral directors, medical examiners, coroners, pathologists, forensic anthropologists, medical records technicians and transcribers, fingerprint specialists, forensic odontologists, dental assistants, x-ray technicians, and support staff. The DMORTs can also assist with maintaining temporary morgue facilities and helping address mortuary concerns in unique situations, including deaths from chemical, biological, or radiological events.

¹⁴⁹ <http://www.phe.gov/Preparedness/responders/ndms/teams/Pages/dmort.aspx>.

Examples of Reinternment

In Louisiana, following Hurricanes Katrina and Rita (2005), FEMA utilized the DMORTs to identify remains so that the state and local entities could reinter caskets, which the floodwaters had disinterred. Initially, there was a legal issue regarding whether the caskets came from a public or nonprofit church cemetery; FEMA would have had the authority under the Stafford Act to assist these cemeteries compared to a private cemetery where FEMA would be unable to assist the state to reinter the bodies. In 1999, after Hurricane Floyd, (FEMA-DR-1292-NC), there was controversy in North Carolina about whether FEMA should pay for grave markers for disinterred remains. Applicants for Other Needs Assistance (ONA)¹⁵⁰ under the Individuals and Households Program (IHP) may be eligible for reinternment costs. Please refer to DOLR Chapter 6, *Individual Assistance*.

J. National Veterinary Response Team (NVRT)

HHS deploys National Veterinary Response Teams (NVRTs)¹⁵¹ to provide veterinary health care and public health assistance following disasters or emergencies. Like other emergency response teams, NVRTs supplement the efforts already underway by STTL veterinary and public health resources. NVRTs are comprised of veterinarians, veterinarian pathologists, veterinary technicians, microbiologists, virologists, epidemiologists, toxicologists, and various scientific and support personnel.

NVRT capabilities include:

- Assessment, treatment, and stabilization of animals;
- Animal disease surveillance;
- Zoonotic disease surveillance;

¹⁵⁰ Stafford Act § 408(e)(1), 42 U.S.C. §5174(e)(1) and 44 C.F.R. § 206.119.

¹⁵¹ <http://www.phe.gov/Preparedness/responders/ndms/teams/Pages/nvrt.aspx>.

- Public health assessments;
- Technical assistance related to food and water quality; and
- Animal decontamination.

K. National Medical Response Team (NMRT)

National Medical Response Teams (NMRTs)¹⁵² provide medical care for victims following a nuclear, biological, and/or chemical incident. NMRTs are comprised of health, medical, and hazardous materials professionals supported by logistics and administrative staff. The NMRT capabilities include:

- Agent detection;
- Sample collection;
- Mass casualty decontamination;
- Medical triage and emergency care of contaminated patients; and
- Medical care to stabilize victims for transportation to tertiary care facilities that are able to manage hazardous materials.

V. Other Response Partners

A. Whole Community Approach

The FEMA Administrator is charged with partnering with STTLs, emergency response providers, OFAs, the private sector, and NGOs to further the FEMA mission.¹⁵³ This is to build a national emergency management system that effectively and efficiently utilizes the full

¹⁵² 42 U.S.C. §§ 300hh-11(c)(1)(A); the Pandemic and All-Hazards Preparedness Act, Pub. L. No. 109-417, § 2811(c)(1)(A) (2006); Defense Against Weapons of Mass Destruction Act of 1996, Pub. L. No. 104-201, §§ 1412, 1414(b) (1996); *see generally*, 42 U.S.C. § 5144; 44 C.F.R. Part 206.4.

¹⁵³ 6 U.S.C. § 313(b)(2)(B). *See also* § 317(c)(1) regarding RA responsibilities.

measure of the Nation's resources to respond to natural disasters, terrorism and other man-made disasters.¹⁵⁴

A Whole Community approach to emergency management engages the full capacity of the private and nonprofit sectors, including businesses, regional associations, faith-based and disability organizations, and the general public, in conjunction with the participation of STTL and federal government partners.

The benefits of Whole Community include a more informed, shared understanding of community risks, needs, and capabilities; an increase in resources through the empowerment of community members; and, in the end, more resilient communities.¹⁵⁵

This is also in keeping with PPD 8¹⁵⁶, which provides that “[o]ur national preparedness is the shared responsibility of all levels of government, the private and nonprofit sectors, and individual citizens. Everyone can contribute to safeguarding the Nation from harm. As such, while this directive is intended to galvanize action by the Federal Government, it is also aimed at facilitating an integrated, all-of-Nation, capabilities-based approach to preparedness.”

B. Relief Organizations

Relief organizations usually arrive at a disaster location before federal assistance is present and remain long after. The Stafford Act also authorizes FEMA to utilize the personnel and facilities of relief organizations such as the American Red Cross, The Salvation Army, the Mennonite Disaster Service, and others to distribute medicine,

¹⁵⁴ *Id.*

¹⁵⁵ FEMA Publication 1, *The Federal Emergency Management Agency*, (Pub. 1) April 2016, p. 45 available at <http://www.fema.gov/media-library/assets/documents/25272>. *See also* FEMA Publication: *A Whole Community Approach to Emergency Management: Principles, Themes, and Pathways for Action*, *FDOC 104-008-1 / December 2011* available at <https://www.fema.gov/media-library/assets/documents/23781>.

¹⁵⁶ PPD 8, *National Preparedness*, March 30, 2011 at <https://www.dhs.gov/xlibrary/assets/presidential-policy-directive-8-national-preparedness.pdf>. *See also* <http://www.fema.gov/learn-about-presidential-policy-directive-8>.

food, supplies, or other items and to restore and reconstruct community services, housing, and essential facilities.¹⁵⁷

FEMA has written agreements with many of these organizations so that the FCO may coordinate disaster relief activities with those activities of the STTLs.¹⁵⁸ Any written agreement must include assurance that the nonprofit will implement the use of federal facilities, supplies, and services in a non-discriminatory manner and will not duplicate benefits to recipients of federal assistance.¹⁵⁹ The authority to use federal facilities, supplies, and services is triggered only if there is a major disaster or emergency.¹⁶⁰

FEMA has also developed a system to use these relief organizations to distribute to disaster survivors items that others have donated to FEMA.¹⁶¹ FEMA may utilize invitational travel under the Federal Travel Regulation for relief organization personnel who are engaged in coordinated relief operations, particularly for remote or insular areas.¹⁶²

FEMA has MOUs with various relief organizations, including the following:

- AARP
- Adventist Community Services
- American Radio Relay League
- American Red Cross

¹⁵⁷ Stafford Act, § 309, 42 U.S.C. § 5152(a); 44 C.F.R. § 206.12(a).

¹⁵⁸ *Id.* § 309, 42 U.S.C. § 5152(b); 44 C.F.R. § 206.12(b).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ FEMA Standard Operating Procedure, *Processing, Distribution and Disposal of Donated and Federally-Purchased Goods Controlled by FEMA* [hereinafter *Donated Goods SOP*] (Annex, FEMA 6150-1) (August 20, 2008) available at <https://intranet.fema.net/org/orr/collab/Recovery/RPD/Policy/Annex%206150-1.pdf>.

¹⁶² Travel expenses and reimbursements are subject to the Federal Travel Regulation, 41 C.F.R. Chapters 301-304.

- Church World Service, Inc.
- Civil Air Patrol
- Corporation for National and Community Service
- FBI Crimes Against Children Unit
- Feeding America
- The Institute of the Black World 21st Century
- Mennonite Disaster Service
- NAACP
- National Council on Independent Living
- National Disability Rights Network
- National Emergency Family Registry and Locator System
- National Voluntary Organizations Active in Disaster
- Operation HOPE
- The Salvation Army
- Southern Baptist Convention Disaster Relief – North American Mission Board
- United Methodist Committee on Relief
- YMCA of the USA

Partnering with Relief Organizations

In the 2010 Alaska major disaster declaration, FEMA, the State of Alaska and several relief organizations, including the MDS, and Samaritan's Purse (SP), partnered to purchase, assemble, and furnish log cabins for disaster victims in a very remote village. FEMA purchased the log cabin kits under the Stafford Act's Federal Assistance to Individuals and Households program (*see* Chapter 6, *Individual Assistance*). The MDS volunteers oversaw the assembly and construction, and SP provided necessary furnishings and appliances. FEMA also provided logistical (transportation) support under the Stafford Act's emergency assistance program, called "Essential Assistance" in the statute. Stafford Act §§ 402, 403, 407, 502, 503; 42 U.S.C §§ 5170b(a), 5192(a); 44 C.F.R. §§ 206.201(b) and 206.225.

C. Private Sector

Private sector organizations contribute to response efforts through participation with each level of government.¹⁶³ They include large, medium, and small businesses; commerce, private cultural and educational institutions; and industry, as well as public/private partnerships that have been established specifically for emergency management purposes.¹⁶⁴ Some examples of how private sector entities may be involved in a disaster response include contributing resources, personnel, and expertise, and participating in information sharing.¹⁶⁵

The private sector has different coordinating structures such as business emergency operations centers, industry trade groups, and information and intelligence centers.¹⁶⁶ These organizations are composed of multiple businesses and entities brought together to support collaboration, communication, and sharing of information within the private sector.¹⁶⁷

¹⁶³ NRF at p. 10

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at p. 11.

¹⁶⁶ *Id.* at p. 33.

¹⁶⁷ *Id.*

These organizations coordinate with NGOs and may serve as a conduit to local, state, and federal coordinating structures. FEMA's coordination centers may also have embedded private sector subject matter expert liaison officers assisting to ensure a unified and coordinated disaster response.¹⁶⁸

1. Access for Essential Service Providers

The Stafford Act provides that federal officials may not restrict access to disaster areas where the service provider, such as the electric company or a communications company, seeks to restore service.¹⁶⁹ To assure that these providers are able to carry out their work and to ensure that STTL officials do not inadvertently restrict them, all levels of government can effectively coordinate through the JFO.

Utility repair crews may have difficulty accessing the disaster area due to road blocks established by local law enforcement. The private sector in the past has asked FEMA to intervene to solve the problem. FEMA, however, has no authority to override local law enforcement. As a solution, a best practice that FEMA has developed is to encourage appropriate STTL officials to issue a letter to the private sector that asks the local law enforcement to let them pass through critical access points.

2. Incidental Benefits to the Private Sector

FEMA may authorize direct federal assistance to state, tribal, and local governments when these governments lack the capability to perform or to contract for eligible emergency work and/or debris removal and request

¹⁶⁸ 6 U.S.C. § 321h provides that the Secretary of DHS is to use national private sector networks and infrastructure, to the maximum extent practicable, for emergency response to chemical, biological, nuclear, or explosive disasters, and other major disasters.

¹⁶⁹ Stafford Act § 427, 42 U.S.C. § 5189(e). This was a PKEMRA amendment to the Stafford Act.

that work be accomplished by a federal agency.¹⁷⁰ However, the Stafford Act and its implementing regulations do not authorize FEMA to provide direct federal assistance to private for-profit entities directly in response to a request for assistance, nor does it authorize federal assistance exclusively for economic recovery.

In limited circumstances, private commercial entities may be indirect or incidental beneficiaries of direct federal assistance. To address an immediate threat to the community at large that is beyond STTL capability, FEMA may provide direct federal assistance through a private organization. For example, FEMA could provide a generator to a for-profit hospital, if necessary, to ensure the community has adequate emergency medical care.¹⁷¹

By contrast, direct federal assistance would not be appropriate in situations where assistance is requested for certain businesses or industries based on a perceived importance of the asset to the STTL economy. In each case, this will be a very fact-specific analysis and subject to the prior approval of Office of Chief Counsel (OCC).

VI. Response Operations

Generally, state, tribal, and local governments are responsible for the welfare of those citizens who reside in their jurisdictions. Emergency management is a police power and STTL authorities have primary responsibility for the welfare of their citizens. When STTL resources are overwhelmed, the governor or tribal chief executive may request supplemental federal assistance by requesting the President issue either an Emergency or Major Disaster Declaration under the Stafford Act. As discussed previously, the NRF provides the framework for

¹⁷⁰ Stafford Act, §§ 402(1) and 502(a)(1) (codified as amended at 42 U.S.C. §§ 5170a and 5192(a)(1)). As described in these sections, FEMA may direct any federal agency to perform work necessary to “support...State and local assistance response and recovery efforts, including precautionary evacuations” (§ 402(1)), or to “support...State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations.” (§ 502(a)(1)); *See also* 44 C.F.R. § 206.208.

¹⁷¹ Such assistance would be based on a request of the appropriate STTL and subject to cost share provisions.

federal interaction with the various players exercising their emergency management responsibilities in domestic disaster response operations, which include STTL, private sector, and non-governmental entities.

Supplemental federal assistance is generally provided under the Stafford Act through two forms of supplemental assistance. Pursuant to what the President authorizes in the declaration, FEMA may provide direct federal assistance, coordinate and technical assistance, task other federal agencies to provide direct federal assistance through mission assignments, or reimburse STTLs' eligible response costs through grants. This chapter focuses on the provision of direct federal assistance. Grant reimbursement for eligible response activities is discussed in Chapter 5, *Public Assistance*.

A. Direct Assistance and Mission Assignments

1. Introduction

FEMA may provide direct assistance or financial assistance under the Stafford Act to carry out eligible response activities. FEMA provides direct assistance through in-house resources, such as the provision of generators or mass care commodities through the Logistics Directorate of ORR; direct contracting, such as transportation for commodities; and directives or mission assignments to other federal agencies (OFAs) for direct federal assistance, such as medical evacuation services or generator needs assessments, or federal operations support, such as directing OFAs to send personnel to the NRCC to support its activities.

For a major disaster, the Stafford Act authorizes FEMA to direct any agency, with or without reimbursement, to utilize its existing authorities and resources in support of STTL response and recovery efforts¹⁷² and to “provide assistance that is essential to meeting immediate threats to life and property,” including debris removal.¹⁷³ For an emergency, the Stafford Act authorizes FEMA to direct any agency, with or without

¹⁷² Stafford Act § 402(1), 42 U.S.C. § 5170a(1). PKEMRA § 681 added FEMA's authority under the Stafford Act to direct another agency in support of recovery efforts.

¹⁷³ *Id.* § 403(a), 42 U.S.C. § 5170b(a).

reimbursement, to utilize its existing authorities and resources in support of STTL emergency assistance efforts.¹⁷⁴

Mission assignments are defined in FEMA's regulations as a "Work order issued to a Federal agency by the Regional Administrator, Assistant Administrator for the Disaster Operations Directorate, or Administrator, directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance."¹⁷⁵ Essentially, mission assignments allow the President, through FEMA, to utilize the resources of OFAs to assist in Stafford Act events.

FEMA generally will not mission assign OFAs to do work they are already authorized to do under their own statutory authority, nor will it reimburse them for such work.¹⁷⁶ This is generally true even if the OFA has no funding to carry out its statutory authority. If another federal agency has authority to carry out a mission but lacks sufficient appropriations to carry out that mission, it needs to ask Congress for supplemental appropriations rather than seek reimbursement from FEMA through a mission assignment under the Stafford Act. In cases where a federal agency has authority to perform disaster assistance work but is not doing so in a prompt manner, FEMA generally seeks to engage that agency through its authority to coordinate all disaster assistance under the appointed FCO.¹⁷⁷

There are two types of mission assignments, Direct Federal Assistance (DFA) and Federal Operational Support (FOS).¹⁷⁸

¹⁷⁴ Stafford Act § 502(a)(1), 42 U.S.C. § 5192(a)(1).

¹⁷⁵ 44 C.F.R. § 206.2(18). *See also* the FEMA Mission Assignment Policy, FP No. 104-010-2, issued November 6, 2015 and available at <http://www.fema.gov/media-library/assets/documents/112564>.

¹⁷⁶ *See* 44 C.F.R. 206.8(b) and 44 C.F.R. § 206.208(c)(2).

¹⁷⁷ 44 C.F.R. § 206.5(d).

¹⁷⁸ FEMA previously included a third type of mission assignment: Technical Assistance (TA). FEMA discontinued the use of TA Mission Assignments (Mas) which were at a 100% federal cost share in 2013. An MA providing advice or expertise (i.e., technical assistance) is now issued as a FOS MA if the advice is for federal operations or a DFA MA if the advice is for the STTLs. *See* the FEMA Mission Assignment Policy, FP 104-010-2, November 6, 2015, footnote 1, page 4 available at <http://www.fema.gov/media-library/assets/documents/112564>.

Table 4- 4: Mission Assignment Categories, Funding, and Timing¹⁷⁹

Mission Assignment (MA) Category	Requested By	Surge Funded	DRF Funded	Subject to Non-federal Cost Share?
		Pre-Declaration	Post-Declaration	
FOS	FEMA/OFA	✓	✓	No
DFA	State/Tribe		✓	Yes

2. Direct Federal Assistance (DFA)

STTLs typically perform or arrange for the performance of emergency work, described previously, and then apply to FEMA for financial reimbursement for the costs of that work. However, occasionally the STTL is incapable of performing or arranging for needed emergency work. Under such circumstances, the state, territory, or tribe as the grantee/recipient for the declaration may make a request for FEMA to arrange for the provision of the work. FEMA categorizes the execution of such work as Direct Federal Assistance (DFA).¹⁸⁰ DFA is subject to the non-federal cost share established for the disaster.¹⁸¹

DFA consists of goods or services that FEMA, another federal agency, or a contractor provides to the STTL jurisdictions that lack the capability to perform or contract for eligible emergency work. DFA provides emergency protective measures to save lives, protect public health and safety, protect property, and implement debris removal for STTLs. The Response Directorate coordinates with the Recovery Directorate on DFA mission assignments as they are authorized under the Public Assistance Program, in particular as they relate to mass care services.

¹⁷⁹ See Chapter 2, *Disaster Readiness*, for an explanation of “surge” and DRF funding.

¹⁸⁰ 44 C.F.R. § 206.208(a).

¹⁸¹ Stafford Act § 403(b), 42 U.S.C. § 5170b(b) and § 503(a), 42 U.S.C. § 5193(a); 44 C.F.R. § 206.208(a).

FEMA's regulations require the completion of mission assignments for DFA within 60 days of the date of declaration of the major disaster or emergency, unless extended by the RA.¹⁸²

Extending a mission assignment beyond these time frames is normally done by converting the mission assignment to an Interagency Agreement (IAA). Nearly all DFA mission assignments carry out emergency work authorized by Sections 403 and 502 of the Stafford Act and are subject to a non-federal cost share as established by the President.

3. Federal Operational Support (FOS)

FOS is technical, operational, or logistical support provided by a federal agency or department to support FEMA or another responding federal agency. FEMA may issue an FOS mission assignment to place federal assets in position to respond before a major disaster or emergency declaration or after a declaration to support federal response efforts.¹⁸³ FOS permits FEMA to activate OFAs and assure they are in place, ready to assist the state, territory, or tribe once a declaration occurs. For instance, FEMA issues FOS mission assignments to OFAs to support FEMA's disaster response coordination responsibilities at the NRCC, RRCCs, JFOs, and other locations as required.

The Stafford Act does not explicitly authorize FEMA to direct OFAs for purposes of supporting FEMA or another federal agency. Such work is

¹⁸² 44 C.F.R. § 206.208(d). Recovery mission assignments are not subject to the regulatory 60-day time limit: PKEMRA amended Stafford Act § 402 to include recovery efforts after publication of 44 C.F.R. 206.208. Office of Chief Counsel (OCC) determined that that this limitation did not apply to recovery mission assignments. Recovery mission assignments are only authorized for major disasters. The period of performance of all Mission Assignments (MAs) for recovery must conclude prior to the second anniversary of the declaration. Activities extending beyond the two-year period must be completed under an Interagency Agreement (IAA). See FEMA Mission Assignment Policy, FP 104-010-2, VIII. F. b., page 8.

¹⁸³ *Id.* at VIII. B.1., page 4. See also FD 125-7, *Financial Management of the Disaster Relief Fund (DRF)* (October 1, 2016), which lists those particular activities that FEMA may fund before the President makes a Stafford Act declaration, available under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx and see also DOLR Chapter 2, *Disaster Readiness*.

required, however, for FEMA and the federal government to support STTL assistance response and recovery efforts.

This work is thus considered a “necessary expense”¹⁸⁴ for FEMA to carry out its mission and does not constitute a form of direct assistance for which a non-federal cost share would be required. The work instead facilitates operational activity at the federal level necessary to facilitate disaster response activities, including but not limited to DFA, and is 100% federally funded.

FOS mission assignments are not used to provide actual disaster assistance. As noted earlier, recovery operations mission assignments are often FOS—for example activating OFAs to support certain National Disaster Recovery Framework (NDRF) activities in a JFO.

4. Prescribed Mission Assignments (PSMAs)

PKEMRA mandates the use of Prescribed Mission Assignments (PSMAs) to expedite assistance.¹⁸⁵ PSMAs are draft mission assignments with agreed upon scopes of work and cost estimates by FEMA and OFAs.¹⁸⁶ PSMAs capture directives FEMA regularly gives to OFAs, but they are not automatically issued; they are tailored for a specific event and specific need. The PSMA statement of work, dollar amount, and timeline serve only as a guideline. FEMA routinely revises PSMAs as needed to fit the specific need. The decision to issue a mission assignment always remains with FEMA. The particular circumstances of an event may require changes to the scope of work or other parts of the mission assignment.

Since PKEMRA, FEMA has worked with OFAs and developed over 250 PSMAs. By developing some provisions of mission assignments ahead of time (e.g., statements of work and cost estimates, which can be time consuming), PSMAs facilitate a more rapid response.

¹⁸⁴United States Government Accountability Office (GAO), I Principles of Federal Appropriations Law [hereinafter GAO Red Book](3rd ed.), pages 4-22 and 23.

¹⁸⁵ PKEMRA § 681, Pub. L. 109-295 (2006), 6 U.S.C. § 753(c).

¹⁸⁶ PKEMRA, § 681, 6 U.S.C. § 771.

PSMA Example

Activate Transportation Security Administration support personnel to the FEMA Region ##REGION## RRCC to perform duties of ESF #1 in support of disaster operations in response to ##INCIDENT## in the State of ##STATE##.

Statement of Work:

Pre-Declaration activation for appropriate Transportation Security Administration personnel to perform the functions of ESF #1 in the RRCC beginning ##BEGINDATE##. This activation may include overtime and administrative costs. Pre-declaration MAs that exceed 7-10 days will require FEMA approval.

Equipment purchases are not authorized under this Mission Assignment.

Mission Assignment Task Orders will be issued to direct specific activities within the scope of this mission assignment, to include personnel, resource movement, duty locations, and dates.

PSMA Cost Based On:

Overtime: up to 44 hours per week, 12 hours per day/7 days per week less regular 40-hour week.

Lodging and *per diem* at \$_____ per day for _____ days = \$_____.

Travel: \$_____ per person X # = \$_____

Transportation at Duty Station: \$_____

Cost Estimate:

To deploy two persons for 7 days: \$6,719.76.

This cost estimate includes cost of travel and *per diem* (including miscellaneous expenses) and overtime for two Transportation Security Administration employees for 7 days.

Per Diem computations are based on the GSA FY 2006 rates for New Orleans, Louisiana. Actual travel and *per diem* reimbursement will be based on the Federal Travel Regulation and applicable GSA bulletins.

Overtime rate is based on GS-10 / Step 10.

This estimate does not include employee salary or wages.

5. Mission Assignment (MA) Process

Mission Assignments (MAs) consist of two primary elements. The first is the scope of work or the specific tasking to the OFA by FEMA. The second is a “do not exceed” amount or an estimate of the cost of the work. This serves two purposes. First, it is the maximum amount of money FEMA has agreed to reimburse the OFA for the work and is not to be exceeded. This allows FEMA to ensure it can accurately track the obligations against the DRF. Second, for DFA MAs, it represents the maximum amount of assistance a state, territory or tribe has agreed to pay as the applicable non-federal cost share for the work.

States, territories, and tribes may request mission assignments for DFA using FEMA Form 010-0-7, the Resource Request Form).¹⁸⁷ States, territories, and tribes may also request mission assignments orally, so long as they are later confirmed in writing.¹⁸⁸ Verbal requests are allowed in recognition of the fact that operational tempo may not allow for full completion of a form; however, written confirmation should be made as quickly as possible to document the request, and it should be quickly followed by a formal Resource Request Form.

FEMA reviews MAs with a three-step process. The first is to determine whether the work falls under another federal agency’s authority. If so, the MA request should be denied and the work referred to the correct federal agency. FEMA’s regulations bar it from approving an MA to another federal agency if the mission properly falls under the disaster assistance authorities of another federal agency.¹⁸⁹ Second, FEMA must confirm that the Stafford Act authorizes the type of assistance requested. Third, FEMA must confirm that funding is available in the DRF to pay for the work, up to the maximum amount approved in the MA.

Operationally, FEMA also determines if the assistance can be provided by FEMA’s own resources, such as search and rescue operations conducted by

¹⁸⁷ Available at <https://www.fema.gov/media-library/assets/documents/95031>.

¹⁸⁸ 44 C.F.R. § 206.7.

¹⁸⁹ 44 C.F.R. § 206.8(b) denies reimbursement for such work. 44 C.F.R. § 206.208(c)(2) states that RAs “shall not approve that portion of the work.”

its US&R system; the delivery of food, commodities, or equipment held in-house by FEMA; or through contracts with the private sector. After taking into account these considerations, FEMA may then issue a mission assignment.¹⁹⁰

As DOLR Chapter 3, *Declarations* discusses, until the state, territory, or tribe signs the FEMA-State/Tribe Agreement—except where it is necessary to provide essential emergency services or housing assistance under the Individuals and Households program—FEMA may not provide DFA to any recipient or other applicant. As a practical matter, the FEMA-State/Tribe Agreement is generally signed within several days of the declaration, and most DFA requirements during that immediate time frame will be for essential emergency services.

¹⁹⁰ Mission Assignment, FEMA Form 010-0-8 at <https://www.fema.gov/media-library/assets/documents/95031>.

Reimbursable Mission Assignment Expenditures¹⁹¹

- Overtime, travel, and per diem of federal agency personnel whose salaries have been funded by an appropriation.
- Wages, travel, and per diem of temporary federal agency personnel assigned solely to provide disaster services.
- Contract costs incurred by OFAs to provide work, services, and materials for providing assistance. OFA bills for “contract services” must state contractor’s name, cost, period of performance, and purpose.
- Costs paid from trusts, revolving funds, and other funds whose reimbursement is required by law.
- Travel and per diem of federal military personnel assigned solely to perform services requested by the Assistant Administrator (AA), Response Directorate, or the RA.
- Costs submitted by an OFA with written justification and documentation, and agreed to in writing by: (1) the AA, Response Directorate, or the RA; and (2) the assigned federal agency.
- Cost of materials, equipment, and supplies (including transportation, repair, and maintenance) from regular stocks used in providing disaster assistance (e.g., saw blades provided by the U.S. Forest Service).
- Justified and approved costs supported by written justification and approved by: (1) the AA, Response Directorate or the RA; and (2) the OFA.

¹⁹¹ 44 C.F.R. § 206.8. *See also* Stafford Act § 304, 42 U.S.C. § 5147, which essentially provides that FEMA may use the DRF to reimburse federal agencies for expenditures in the immediate anticipation of or after a major disaster or emergency declaration. Federal agencies may deposit any funds they receive as reimbursement for services or supplies they furnish to the credit of their own appropriation(s) currently available for such services or supplies rather than having to turn these funds over to the U.S. Treasury.

B. Pre-Declaration Operations

Absent an emergency or major disaster declaration, FEMA is not authorized to provide STTLs any type of assistance, including DFA. However, FEMA can undertake certain activities in advance of and in preparation for an imminent major disaster or emergency declaration. If an event is imminent and is reasonably likely to result in a Stafford Act Presidential major disaster or emergency declaration, FEMA may undertake activities prior to a declaration that are necessary to prepare and pre-position federal resources necessary for an effective response.¹⁹²

FEMA carries out a host of activities necessary to prepare and pre-position federal resources necessary for a rapid and efficient response when it is reasonable to assume that a Presidential declaration is imminent.¹⁹³ These activities ensure the federal government is ready to respond in the event of a declaration. The delivery of actual assistance to the state, territory or tribe is not authorized until the issuance of a Stafford Act declaration. *See* Chapter 2, *Disaster Readiness* for further discussion of FEMA's authorities in the absence of a Stafford Act declaration.

C. Post-Declaration Operations

DFA may be provided for emergency work such as debris removal and emergency protective measures.¹⁹⁴ STTLs, however, may also choose to undertake emergency work themselves or contract out for them and seek reimbursement under FEMA's Public Assistance Program. If supplemental federal assistance authorized by the President pursuant to the declaration includes reimbursement assistance, and the following activities are performed by an eligible applicant, the applicant may be reimbursed through Public Assistance grants, subject

¹⁹² FD 125-7, *Financial Management of the Disaster Relief Fund (DRF)* (October 1, 2016), available under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx.

¹⁹³ *Id.*

¹⁹⁴ Stafford Act §§ 403, 407, and 502, 42 U.S.C. §§ 5170b, 5173, and 5192.

to a non-federal cost share. Chapter 5, *Public Assistance*, discusses reimbursement assistance in detail.

The following examples of DFA activities may be undertaken in disaster response operations.

1. Mass Care Services

a. Mass Care Planning and Operational Concerns

i) Individuals with Disabilities and Functional Needs

The Stafford Act¹⁹⁵ and federal civil rights laws¹⁹⁶ prohibit discrimination against individuals with disabilities in the provision of publicly funded services, programs, or activities. In addition, FEMA has a Disability Coordinator to ensure that the access and functional needs of individuals with disabilities are properly addressed in emergency preparedness and disaster relief.¹⁹⁷

The FEMA *Guidance on Planning for Integration of Functional Needs Support Services in General Population Shelters* (FNSS Guidance)¹⁹⁸ supports state, tribal, local, and federal government efforts to integrate individuals who have access and functional needs into every aspect of emergency shelter planning and response. FNSS was developed and

¹⁹⁵ PKEMRA, (Pub. L. No. 109-295) amended the Stafford Act, adding persons with disabilities to § 308, 42 U.S.C. 5151, prohibiting discrimination in the provision of disaster assistance, and adding durable medical equipment to § 403(a), 42 U.S.C. § 5170b(a), as essential assistance.

¹⁹⁶ The Rehabilitation Act of 1973 § 504, as amended, 29 U.S.C. § 794; the Americans with Disabilities Act (ADA) of 1990, as amended by the ADA Amendments Act of 2008, 42 U.S.C. §§ 12101-12213; and the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157. See *A Reference Guide for Accommodating Individuals with Disabilities in the Provision of Disaster Mass Care, Housing and Human Services* at <http://www.fema.gov/media-library-data/20130726-1617-20490-6430/section689referenceguide.pdf> for summaries of applicable civil rights laws.

¹⁹⁷ Homeland Security Act § 513, 6 U.S.C. § 321b.

¹⁹⁸ *Guidance on Planning for Integration of Functional Needs Support Services in General Population Shelters* (Nov. 2010) at http://www.fema.gov/pdf/about/odc/fnss_guidance.pdf.

approved in conjunction with a number of partners, including the Department of Justice (DOJ).¹⁹⁹

Functional Needs Support Services (FNSS) enable individuals to maintain their independence in a general population shelter. Children and adults requiring FNSS may have physical, sensory, mental health, cognitive, and/or intellectual disabilities affecting their ability to function independently without assistance. Others who may also have access and functional needs include but are not limited to women in late stages of pregnancy, elders, and individuals needing bariatric equipment or communication assistance. FNSS includes:

- Reasonable modification to policies, practices, and procedures;
 - Durable medical equipment;
 - Consumable medical supplies;
 - Personal assistance services; and
 - Other goods and services as needed.
- Examples of specific needs addressed by planning for FNSS in general population shelters include the following:
- Access to effective communication during shelter registration and while applying for disaster-related benefits and services;
 - Access to necessary medications;

¹⁹⁹ FNSS Review Panel members included FEMA, HHS, DHS, Department of Justice, American Red Cross, the National Council on Disability, the National Council on Independent Living, the National Disability Rights Network, the Center for Disability and Health Policy, the Rhode Island Department of Health, the Florida Division of Emergency Management Statewide Disability Coordinator for Emergency Management, and the California Emergency Management Agency Office of Access and Functional Needs.

- Availability, modification, and stabilization of universal/accessible sleeping accommodations (cots, beds, and/or cribs);
- Access to orientation and way-finding for people who are blind or have low vision;
- Assistance for individuals with cognitive and intellectual disabilities;
- Access to an air conditioned and/or heated environment (for example, for those who cannot regulate body temperature);
- Availability of food and beverages appropriate for individuals with dietary restrictions (for example, persons with diabetes or severe allergies to foods);
- Providing food and supplies for service animals (for example, dishes for food and water, arrangements for the hygienic disposal of waste; and, if requested, portable kennels for containment);
- Accessible transportation for individuals who use a wheelchair or other mobility device; and
- Assistance with activities of daily living.

The FNSS Guidance identifies key considerations that shelter planners should consider when planning for shelter setup and shelter operations, and transitioning survivors from shelters back into the community. The FNSS Guidance includes over 35 operational tools and templates—examples and excerpts taken from a variety of state and local jurisdictional documents—for local, tribal, state, and federal emergency sheltering planners.

In addition, FEMA publishes a reference guide called *Accommodating Individuals with Disabilities in the Provision of Disaster Mass Care*,

Housing, and Human Services.²⁰⁰ Further, the DOJ developed the Americans with Disabilities Act - ADA Guide for Local Governments: Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities²⁰¹ and an ADA Checklist for Emergency Shelters.²⁰² The ADA Checklist provides informal guidance to assist in understanding the ADA and DOJ regulations for ADA accessibility standards.²⁰³ The standards address facility features such as:

- Passenger drop off areas with wheelchair/mobility device accessibility;
- Accessible parking spaces and entrance to shelters;
- Interior hallways and corridors wide enough for mobility devices;
- Accessible ramps with handrails;
- Elevators large enough to accommodate mobility devices;
- Accessible routes to accessible sleeping areas, restrooms, and bathing areas (minimum dimensions required for turning mobility devices);
- Accessible telephones when public telephones are provided, including text telephones or TDY devices for individuals who are deaf, hard of hearing, or who have a speech disability;
- An accessible route at least 36" wide and without steep slopes to accessible tables and seating; and

²⁰⁰ See <http://www.fema.gov/media-library-data/20130726-1617-20490-6430/section689referenceguide.pdf>

²⁰¹ See <http://www.ada.gov/emergencyprepguide.htm>.

²⁰² See <http://www.ada.gov/shleterck.htm>.

²⁰³ 28 C.F.R. Part 36, Appendix A.

- A backup power supply to provide refrigeration for medication, operation of supplemental oxygen and breathing devices, and battery charging for power wheelchairs and scooters.

Litigation on Emergency Preparedness for Persons with Disabilities

A federal district court ruling found, as a matter of law, that the City of Los Angeles excluded individuals with disabilities from participation in the city's emergency preparedness program in violation of the ADA, the Rehabilitation Act, and state statutes that prohibit discrimination against individuals with disabilities in state and local government programs and in programs receiving federal financial assistance. This Los Angeles case illustrates the importance of assuring that local governments plan to meet the access and functional needs of individuals with disabilities in an emergency or major disaster.²⁰⁴ The nondiscrimination principles apply to other levels of government.

In 2013, a class action lawsuit was filed against New York City for failing to adequately plan for persons with disabilities during disasters. On November 7, 2013, a judge in the Southern District Court of New York ruled that New York City discriminated against people with disabilities in its failure to plan for their needs in large-scale disasters such as Hurricane Sandy.²⁰⁵

ii) Household Pets and Service Animals

A lesson learned from Hurricane Katrina in 2005 was that individuals with household pets and service animals refused to evacuate without their pets or service animals, and there were few, if any, provisions to evacuate and shelter the animals. In 2006, Congress passed two identical statutes to address this issue, both of which amended the Stafford Act to authorize

²⁰⁴ *Communities Actively Living Independently and Free v. City of Los Angeles*, U.S. Dist. LEXIS 118364 (C.D. CA. Feb. 10, 2011). Although Los Angeles County entered a consent decree with the plaintiffs to address the need of disabled individuals in the County's emergency planning and preparedness (<http://dralegal.org/case/communities-actively-living-independent-and-free-calif-et-al-v-city-of-los-angeles/>), the City of Los Angeles continued to fight the lawsuit, resulting in this decision.

²⁰⁵ *Brooklyn Center for Independence of the Disabled v. Mayor Bloomberg*, 290 F.R.D. 409; 2012 U.S. Dist. LEXIS 159835 (S.D.N.Y., Nov. 7, 2013). See also <http://dralegal.org/case/brooklyn-center-for-independence-of-the-disabled-bcid-et-al-v-mayor-bloomberg-et-al/>

rescue, care, shelter, and essential needs for household pets and service animals as eligible emergency assistance.²⁰⁶

FEMA defines the types of household animals covered by these statutes through policy. A household pet is defined as a domesticated animal, such as a cat, dog, bird, rabbit, rodent, or turtle that is traditionally kept in the home for pleasure rather than for commercial purposes; that can travel in commercial carriers; and that can be housed in temporary facilities.²⁰⁷ A service animal, on the other hand, has a regulatory definition in the ADA implementing regulations.²⁰⁸ FEMA policy provides that “Service animals are dogs that are individually trained to do work or perform tasks for people with disabilities or access and functional needs.”²⁰⁹

Eligible Public Assistance applicants may be reimbursed for eligible emergency protective measures for rescue, care, shelter, and essential needs of pets and service and assistance animals, including:

²⁰⁶ The Pets Evacuation and Transportation Standards Act of 2006, § 4, Pub. L. No. 109-308, 120 Stat. 1725; PKEMRA, (Pub. L. No. 109-295) (1996) § 689(b)(D), amending § 403 of the Stafford Act, 42 U.S.C. § 5170b(a)(3)(J), which may be authorized under a major disaster declaration. Although Stafford Act § 502 providing emergency assistance under emergency declarations was not correspondingly amended to specifically include assistance for pets and service animals, FEMA policy allows for such assistance under both major disaster and emergency declarations.

²⁰⁷ See the PAPPG, FP 104-009-2, January 2016 at pp 64 and 155, at <http://www.fema.gov/public-assistance-policy-and-guidance>. This supersedes DAP 9523.19, *Eligible Costs Related to Pet Evacuations and Sheltering* (Oct. 24, 2007) for incidents declared on or after January 1, 2016.

²⁰⁸ The revised Title II Regulations of the ADA define “service animal” as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” See 28 C.F.R. §§ 35.104 and 35.136 for the current definition of service animal and additional regulations regarding service animals. FEMA policy also includes “assistance animals,” which are defined as “animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or provide emotional support that alleviates identified symptoms or effects of a person’s disability.” Although dogs are the most common type of assistance animal, other animals can also be assistance animals. PAPPG pp. 64 and 151.

²⁰⁹ PAPPG pp. 64 and 157. FEMA policy also includes “assistance animals,” which are defined as “animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or provide emotional support that alleviates identified symptoms or effects of a person’s disability.” Although dogs are the most common type of assistance animal, other animals can also be assistance animals. PAPPG pp. 64 and 151.

- Search and rescue;²¹⁰
- Purchasing, packaging, and providing impacted communities with life-saving and life-sustaining commodities, including food and water;²¹¹
- Evacuation and sheltering of survivors, including household pets and service and assistance animals, but not exhibition or livestock animals;²¹²
- Transportation of evacuees, household pets and service and assistance animals;²¹³
- Tracking of evacuated animals, including use of microchipping;²¹⁴
- Costs for sheltering and caring for household pets, which may be eligible while the pet owner is in an emergency shelter;²¹⁵
- Shelter staff costs, including veterinary staff;²¹⁶
- Shelter supplies/commodities, including ²¹⁷
- Food, water and bowls for household pets and service and assistance animals,
 - Medication for animal decontamination and parasite control,

²¹⁰ *Id.* at p. 58.

²¹¹ *Id.* at p. 62. This may also include the cost of delivering such life-saving and life-sustaining commodities to unsheltered residents in communities where conditions constitute a level of severity such that these items are not easily accessible for purchase. This includes food and water for household pets whose owners are in shelters.

²¹² PAPPG at p. 64.

²¹³ *Id.* at p. 65

²¹⁴ *Id.*

²¹⁵ *Id.* at p. 66.

²¹⁶ *Id.* at p. 66.

²¹⁷ *Id.* at p. 67.

- Crates, cages, leashes, and animal transport carriers,
- Animal cleaning tables and supplies;
- Shelter services, including²¹⁸
 - Cleaning animal crates,
 - Emergency medical and veterinary services for household pets and service and assistance animals, to include vaccinations for transmissible or contagious diseases such as bordetella (kennel cough).

Service animals will be sheltered with their owners;²¹⁹ however, household pets may be sheltered in separate congregate pet shelters.

iii) Firearms

The Stafford Act provides that an official may require the temporary surrender of a firearm as a condition for entry into any mode of transportation used for rescue or evacuation during a major disaster or emergency, if the official returns the temporarily surrendered firearm at the completion of such rescue or evacuation.²²⁰ An official is a federal officer or employee, civilian or military, or any person operating under color of federal law or receiving federal funds, among other situations,²²¹ while supporting relief after a declaration of major disaster or emergency.

FEMA has not issued a policy on this provision, but if these governmental entities determine that other federal, state, or local laws do not already

²¹⁸ *Id.* at pp. 67-68.

²¹⁹ The ADA generally requires that emergency managers and shelter operations make reasonable modifications to policies, practices, and procedures when necessary to avoid discrimination (28 C.F.R. § 35.130(b)(7)), such as modifying “no pets” policies to allow people with disabilities to be accompanied by their service animals. *See* ADA Best Practices Tool Kit for State and Local Governments, Chapter 7 Addendum 2: *The ADA and Emergency Shelters: Access for All in Emergencies and Disasters* at <https://www.ada.gov/pcatoolkit/chap7shelterprog.htm>.

²²⁰ Stafford Act, § 706(b), 42 U.S.C. § 5207(b).

²²¹ *Id.* § 706(a), 42 U.S.C. § 5207(a).

apply, FEMA may financially assist STTLs that use this provision.²²² Many private transportation companies, however, already disallow firearms on their carriers.²²³

b. Evacuations

The conduct of evacuation operations is generally an STTL responsibility.²²⁴ However, if circumstances overwhelm the capabilities of the responding jurisdiction, upon request, FEMA may provide assistance with precautionary evacuations or augment ongoing evacuation operations. In these instances, FEMA will coordinate federal support with the STTL. STTL officials in affected areas, in conjunction with officials in other states, decide on the destinations for evacuees and regulate the flow of transportation assets.²²⁵

In situations that require evacuees to move to another state, FEMA or OFAs working with the affected STTLs will ensure the governor or chief executive of the state, territory, or tribe receiving evacuees has agreed to accept the evacuees prior to the evacuation.²²⁶ Large-scale mass evacuations requiring federal support involve the cooperation of many ESFs.²²⁷

c. Distribution of Disaster Commodities

FEMA maintains pre-positioned critical disaster relief assets and supplies in strategically located distribution centers within and outside the continental United States.²²⁸ Life-saving and life-sustaining commodities include water, tarps, meals, cots, blue roofing sheeting, blankets, hygiene kits, and generators. To provide assistance essential to meeting threats to life

²²² *Id.* § 403, 42 U.S.C. § 5170b(a)(3)(I).

²²³ For example, see <https://www.greyhound.com/en/help-and-info/travel-info/baggage>.

²²⁴ NRF, Mass Evacuation Incident Annex, at 5 (June 2008), available at: <http://www.fema.gov/media-library/assets/documents/25548>.

²²⁵ *Id.* at 2.

²²⁶ *Id.*

²²⁷ *Id.* at 5.

²²⁸ PKEMRA (Pub. L. No. 109-295) § 636. See Logistics Management Directorate Fact Sheet (Revised Sept. 2010).

and property following a declaration, FEMA may distribute these commodities directly or, through the STTL and other response partners, procure these commodities through contracts with private sector entities or task OFAs to provide them through mission assignments. See the *Initial Response Resources* section in DOLR Chapter 2, *Disaster Readiness*.

d. Congregate Sheltering

As the ESF #6 Co-lead Coordinator and Primary Agency, FEMA coordinates the delivery of federal mass care with the whole community to meet the immediate needs of disaster survivors if federal assistance is needed to supplement state, local, or tribal efforts.²²⁹ FEMA coordinates with the other ESF #6 Primary Agency, the American Red Cross, support agencies,²³⁰ and NGOs, including voluntary, faith-based, community-based, and other nonprofit organizations in the civic/nonprofit sector.

Mass care includes providing life-sustaining services to the affected population, such as sheltering and establishing, managing, and operating congregate and non-congregate care facilities. After providing immediate essential sheltering assistance, FEMA may provide eligible survivors with longer term assistance, including temporary housing; repair, replacement; semi-permanent or permanent housing construction; and direct housing assistance through its Individuals and Households Program (IHP). Chapter 6, *Individual Assistance*, discusses IHP in detail.

²²⁹ NRF, ESF #6 – Mass Care, Emergency Assistance, Temporary Housing, and Human Services Annex (May 2013), available at <http://www.fema.gov/national-preparedness-resource-library>. FEMA and American Red Cross coordinate with states in planning and executing mass care services.

²³⁰ *Id.* Support agencies include the Corporation for National and Community Service; Departments of Agriculture; Defense; Health and Human Services; Homeland Security; Housing and Urban Development; Interior; Justice; Labor, Transportation; Treasury; and Veterans Affairs; as well as General Services Administration; Social Security Administration; U.S. Army Corps of Engineers; U.S. Postal Service; U.S. Small Business Administration; the American Red Cross; National Center for Missing and Exploited Children; National Voluntary Organizations Active in Disaster; and other nongovernmental organizations.

- e. Family Reunification Services
 - i) National Emergency Family Registry and Locator System (NEFRLS)²³¹

The mass evacuation of hundreds of thousands of Gulf Coast residents after Hurricane Katrina separated many survivors, including children, from their families. No adequate mechanism existed at the time to collect information on all those displaced and to reunite them with their families. As a result, Congress directed under PKEMRA that FEMA establish the National Emergency Family Registry and Locator System (NEFRLS)²³² to help reunify families separated after an emergency or major disaster.

NEFRLS is a web-based system that facilitates the reunification of families separated because of a declared event. Activated during a declared disaster or emergency, NEFRLS enables displaced adults to register voluntarily over the Internet or by phone with their name, current location of residence, and other information that others seeking to locate them could use. The design of the system protects individual privacy and complies with laws that protect “personally identifying” information, including the Privacy Act.²³³

Upon registration, FEMA provides a standard Privacy Act statement. The registrant either views it online or FEMA call center staff read it to the registrant. After acknowledging the Privacy Act statement, registrants provide personally identifiable information (PII) to NEFRLS, including their name and current location. A third-party contractor verifies the registrant’s actual identity, and the registrant can name up to seven individuals authorized to view his or her PII. Only authorized searchers may access the registrant’s information, and a third party must also

²³¹ See the National Emergency Family Registry and Locator System Fact Sheet at <https://www.fema.gov/media-library/assets/documents/94763>.

²³² PKEMRA, Pub. L. No. 109-295) § 689c, 6 U.S.C. § 775.

²³³ 5 U.S.C. § 552(a), *et seq.* FEMA’s Disaster Recovery Assistance Files, FEMA/REG-2, includes a routine use, permitting FEMA to disclose information to a federal or state law enforcement authority authorized to investigate or coordinate locating missing children or reuniting families.

authenticate the searchers' identities. NEFRLS refers displaced children to the National Emergency Child Locator Center.

ii) National Emergency Child Locator Center (NECLC)

PKEMRA²³⁴ also mandated the creation of the National Emergency Child Locator Center (NECLC) to assist state, local, and tribal governments, as well as law enforcement agencies, to track and locate children separated from their parents or guardians because of a declared event.

NECLC is operated by the National Center for Missing and Exploited Children (NCMEC)²³⁵ as a clearinghouse for information about children displaced in a declared event, and it assists law enforcement in locating these children.²³⁶ During a major event with large numbers of displaced people, the NECLC will operate a telephone bank and a website for information about displaced children; deploy staff, called "Adam teams," to shelters to help ensure the safety of displaced children; and coordinate reunification efforts with local law enforcement and human service agencies.²³⁷

2. Debris Removal

The Stafford Act authorizes FEMA to provide assistance for debris removal²³⁸ through a mission assignment to another federal agency, or by contracting for the services, or through grants to an eligible applicant for the cost of removing debris or wreckage resulting from a major disaster or emergency from publicly or privately owned lands and waters. *See* Chapter 5, *Public Assistance*, for a detailed discussion on debris removal.

²³⁴ *Id.* § 689b, 6 U.S.C. § 774.

²³⁵ The National Center for Missing and Exploited Children (NCMEC) was established in 1984 as private nonprofit organization to serve as the Nation's clearinghouse on issues related to missing and sexually exploited children. It works in partnership with the DOJ. *See* 42 U.S.C. § 5771.

²³⁶ 6 U.S.C. § 774. FEMA has a blanket agreement with NCMEC to activate NECLC in declared events.

²³⁷ *See* <https://www.fema.gov/individual-assistance-program-tools/individual-assistance-national-emergency-child-locator-center>

²³⁸ Stafford Act §§ 403(3)(A), 407 and 502(a)(5), 42 U.S.C. § 5170b(3)(A), 42 U.S.C. § 5173 and 42 U.S.C. § 5192(a)(5).

3. Emergency Power

The loss of electric power caused by a disaster poses a tremendous threat to public health and safety. Individuals may have to function without heat, cooling, light, food and water. Additionally, emergency service providers such as hospitals cannot function without electric power or fuel for generators. The loss of power also impedes efforts to respond to and recover from a disaster, as emergency work is difficult or impossible in areas without power, and other critical infrastructure assets, such as communications, may be compromised and frustrate response efforts. Therefore, it is imperative that power be restored as soon as possible following a disaster.

ESF #12, led by the DOE, works with the private sector to coordinate and assist in power restoration efforts.²³⁹ FEMA plays a critical coordination role, issuing mission assignments necessary to assist in power restoration and providing generator support from FEMA assets, contracted assets, and mission assignments.

The *Power Restoration Primer*, found in the DOLR appendices, provides a brief overview of this complex area, describing the nature of the electricity distribution system, commonly known as "the Grid," and describes how federal agencies, states, municipalities, and the private sector work together to regulate, maintain, and restore electric power.

4. Emergency Communications

FEMA may establish temporary communications systems and make them available to STTL officials and others deemed appropriate during, or in anticipation of, an emergency or major disaster.²⁴⁰ The Homeland Security Act provides that to the maximum extent feasible, the Secretary of DHS will use private sector networks for emergency response.²⁴¹

²³⁹ NRF, ESF #12 - Energy Annex (May 2013) available at <http://www.fema.gov/national-preparedness-resource-library>.

²⁴⁰ Stafford Act, §§ 418 and 424, 42 U.S.C. §§ 5185 and 5189b. Note that section 418 does not include the provision of financial assistance to state, tribal, or local governments.

²⁴¹ Homeland Security Act § 519, 6 U.S.C. § 321h.

FEMA may only provide for such emergency communications through direct federal assistance; FEMA does not have authority to reimburse an applicant for these costs. However, applicant costs associated with public warnings and other dissemination of public information regarding health and safety may be eligible emergency protective measures. Chapter 5, *Public Assistance*, discusses eligibility in detail as it relates to reimbursing applicants.

A temporary emergency communications system could be a mobile radio system or cellular telephones meant to supplement that portion of a community's communication system that is inoperable. It does not replace or expand the pre-disaster system. The expectation is that the community will repair the damaged system on an expedited basis; federal assistance will end when there is no longer an emergency need.

5. Emergency Public Transportation

When a major disaster damages essential portions of a community's transportation system and disrupts the vital functions of community life, FEMA may provide temporary public transportation, through DFA, to stores, post offices, schools, major employment centers, and other places that will assist the community in returning to its normal pattern of life.²⁴² As with emergency communications, FEMA does not have authority to reimburse an applicant through a grant to set up an emergency transportation system.²⁴³ DOLR Chapter 5, *Public Assistance*, discusses eligibility in detail as it relates to reimbursing applicants.

²⁴² Stafford Act § 419, 42 U.S.C. § 5186; PAPPG at 62-63.

²⁴³ *Id.*

Example of an Emergency Transportation Project

In Louisiana, after Hurricane Katrina, FEMA issued a mission assignment to the U.S. Department of Transportation to contract for bus service to provide emergency transportation in Baton Rouge because of the influx of disaster survivors to Baton Rouge who did not have cars.²⁴⁴

D. Accelerated Federal Assistance

Once the President has declared a major disaster or emergency under the Stafford Act, FEMA may provide accelerated federal assistance and federal support “where necessary to save lives, prevent human suffering, or mitigate severe damage even in the absence of a specific request” from the state, territory or tribe.²⁴⁵ Congress added this language in PKEMRA in response to criticisms of the federal response to Hurricane Katrina where allegations surfaced that the federal government would not assist Louisiana until it made a specific request for the particular type of assistance it desired.

The language of the provision is not limited with respect to time, and because it allows FEMA to act unilaterally without the consent of the governor or chief executive and is limited to those circumstances where “necessary to save lives, prevent human suffering, or mitigate severe damage,” application of this authority is limited to circumstances where a rapid response is critical and a governor or chief executive is unavailable to make a request.

In any event, FEMA must promptly notify and coordinate with the state, territory, or tribe to the fullest extent practicable. FEMA may provide accelerated assistance only after a major disaster or emergency declaration. If FEMA acts unilaterally to provide accelerated assistance, the state, territory, or tribe would not be required to pay a non-

²⁴⁴ *Id.*

²⁴⁵ Stafford Act §§ 402(5) and 502(a)(7), 42 U.S.C. §§ 5170a(5) and 5192(a)(7). FEMA must promptly notify and coordinate with the state, territory, or tribe “to the fullest extent practicable.”

federal cost share for the work. The authority to provide accelerated assistance has not been utilized to date.

E. Gifts and Donations

Private companies, organizations, individuals, and foreign governments may offer to donate goods and services to FEMA after a disaster. Gifts and donations can raise legal and ethical issues. This section discusses only gifts and donations offered to FEMA as an entity to further the purposes of the Stafford Act, not gifts to individual FEMA employees. *See* Chapter 11, *Ethics* for further discussion of gifts to FEMA employees.

The Stafford Act authorizes the FEMA Administrator to accept donations and gifts of services, money, or property in furtherance of the purposes of the Stafford Act, i.e., to alleviate the suffering and damage caused by disasters.²⁴⁶ The Administrator has delegated or redelegated such gift acceptance authority to various FEMA officials.²⁴⁷

The scope of such delegations varies depending on factors such as whether the source of the gift is a domestic or international entity or whether the gift involves the use or transfer of real property or facilities. Nonetheless, FEMA officials exercising delegated authority must consult with the OCC *before* accepting any bequests, gifts, or donations offered to FEMA.²⁴⁸ Offers of gifts and/or donations received by any FEMA official not specifically authorized in the sub-delegation must be sent to the Administrator for acceptance.

²⁴⁶ Stafford Act § 701(b), 42 U.S.C. § 5201(b). *See also* Stafford Act § 621(d), 42 U.S.C. § 5197(d) (The Director [now called the Administrator] may accept gifts of supplies, equipment, and facilities and may use and distribute those gifts for emergency preparedness purposes under Stafford Act Title VI, *Emergency Preparedness*).

²⁴⁷ FD 112-13, Agency Gift Acceptance and Solicitation, November 20, 2012, found under Directives at

https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/ByCategory.aspx

²⁴⁸ *Id.*

1. Gifts and Donations from Domestic Sources

FEMA Directive 112-13, Agency Gift Acceptance and Solicitation, establishes FEMA's policy and responsibilities for accepting and soliciting gifts from domestic sources. The Gift Acceptance and Solicitation Directive does not apply to gifts to individuals; use of state, tribal, or local government or relief or disaster assistance facilities for Stafford Act purposes; certain travel expenses; volunteer services; foreign gifts; or gifts accepted by the GSA under its own authorities for use by FEMA.

With the exception of gifts of real property or facilities, the following are authorized agency officials who may accept or solicit gifts and/or donations to FEMA from domestic sources: the Administrator, the Deputy Administrator, Deputy Administrator for Protection and National Preparedness, Associate Administrator for Response and Recovery, Associate Administrator for Mission Support, Associate Administrator for Policy and Program Analysis, the Chief Counsel, the Chief Financial Officer, the Deputy Associate Administrator for Response and Recovery, the Assistant Administrators for both the Response and Recovery Directorates, the Superintendent of the Emergency Management Institute, the Superintendent of the Center for Domestic Preparedness, the Regional Administrators, and FCOs appointed for declared events.

In addition, the Administrator of the United States Fire Administration and the Associate Administrator of the Federal Insurance and Mitigation Administration are delegated authority to accept gifts for the purposes of the Fire Prevention and Control Act and the Earthquake Hazards Reduction Act, respectively. The authority to accept or solicit gifts of real property or facilities is reserved for the Administrator, Deputy Administrator, and RAs.

The process for accepting or soliciting gifts subject to FEMA Directive 112-13 is as follows:

- The prospective donor must fill out the relevant sections of the FEMA Gift Donation Agreement, FEMA Form 112-13-0-2.²⁴⁹

²⁴⁹ https://portalapps.fema.net/apps/employee_tools/forms/Pages/forms.aspx

- An authorized agency official, with the assistance of a FEMA Ethics Counselor, must analyze the gift by completing the Checklist for Reviewing Gift Donations or Solicitations (FEMA Form 112-13-0-1)²⁵⁰. The list guides agency officials in making a determination of whether or not the proposed gift or donation reflects poorly on the agency, compromises the agency's integrity, attaches prohibited conditions on the gift or requires the agency to act outside of its mission and duties, requires the expenditure of appropriated funds, provides the donor with some benefit, or creates a conflict of interest or the appearance of a conflict of interest.
- Both the authorized agency official and the Ethics Counselor must sign the Gift Donation Agreement to signify that the agreement is complete and that the agency will accept the gift.
- For gifts of facilities subject to FEMA Directive 112-13, OCC will assist in development, review, and approval of Interagency Agreements, Memorandums of Understanding, Memorandums of Agreement, License Agreements, and Use Agreements, as necessary. Gifts involving use of a facility accepted by GSA under its authorities on behalf of FEMA may be accepted pursuant to the policies and procedures established by GSA in lieu of FEMA's policies for gift acceptance and solicitation.

²⁵⁰ *Id.*

Example of Donation Issue

In August 2011, Hurricane Irene caused major damage and disruption to telecommunications systems from North Carolina through the Mid-Atlantic region, all the way north through the New England states. A communications company offered to donate telecommunications services, including networking, wireless access, phone, videoconferencing, and radio interoperability, to any government entities (federal, state, or local) that needed it in responding to Hurricane Irene. The question was whether FEMA could accept this offer of donated telecommunications services from the company. Services are specifically included in items that FEMA may accept for donation under Stafford Act. As part of its offer, however, the company requested that the accepting entity agree to provide food, fuel, and shelter for its employees who would be providing the donated services. FEMA declined the donation because the agency does not accept gifts and/or donations that may result in a conflict of interest or the appearance of a conflict of interest.²⁵¹

2. Gifts and Donations from International Sources

FEMA may accept gifts and/or donations from international sources pursuant to its gift acceptance authority under the Stafford Act.²⁵² The Associate Administrator for Response and Recovery has delegated this authority to the Deputy Associate Administrator for Response and Recovery; the Assistant Administrator, Response Directorate; and the Chief and Deputy Chief of the NRCS.²⁵³ Typically, the NRCS Chief or Deputy or their senior management, in consultation with OCC, will determine whether to accept an international offer of assistance.

²⁵¹ See also 5 C.F.R. § 2601.203-.204; Ethical Implications of Emergency Response Conf. Report, *Agency Gift Acceptance* (June, 2006) at [https://www.oge.gov/web/oge.nsf/Special%20Reports/6C5EF8B7EC38394385257EF8006B50DE/\\$FILE/ethical%20implications%20of%20emergency%20response%20conference%20report.pdf?open](https://www.oge.gov/web/oge.nsf/Special%20Reports/6C5EF8B7EC38394385257EF8006B50DE/$FILE/ethical%20implications%20of%20emergency%20response%20conference%20report.pdf?open).

²⁵² See Stafford Act § 701(b), 42 U.S.C. § 5201(b).

²⁵³ Memorandum from the Associate Administrator for Response and Recovery, *Sub-delegation of Gift Acceptance Authority* (Aug. 30, 2011). This delegation does not include Stafford Act Title VI preparedness gift acceptance authority under § 621(d), 42 U.S.C. § 5197(d).

Generally, the federal government expects to have the resources to respond to a domestic disaster without the need of international assistance and has an interest in avoiding an unanticipated influx of goods, which may interfere with ongoing response and recovery operations. Thus, typically the Department of State (DOS) will refer foreign offers of assistance for domestic disaster events to NGOs.

In response to what some may characterize as catastrophic disasters, however, the federal government may receive offers of assistance from another country or international organization where DHS/FEMA and DOS make a decision in principle to accept international assistance. The International Assistance System Concept of Operations (IAS CONOPS) governs offers and receipt of goods and services from foreign governments and international organizations.²⁵⁴

The IAS CONOPS includes when and how FEMA coordinates with the DOS for communicating acceptance and denials of offers; how FEMA may task USAID OFDA for logistics support in receiving and distributing donations; and procedures for ensuring compliance with entry-into-country requirements.

F. Federal Laws Affecting Transportation of Commodities and Equipment

1. Shipping: Jones Act

The Merchant Marine Act of 1920²⁵⁵ (commonly known as the Jones Act), prohibits foreign-owned, -built and -flagged (meaning registered under another Nation's laws and regulations) vessels from transporting merchandise from points along the U.S. coastline (or inland areas) to other points along the U.S. coast or inland areas (known as "cabotage"),

²⁵⁴ *International Assistance System Concept of Operations* (2015), public facing version available at http://www.fema.gov/media-library-data/1444411200092-5b09869d53801ceb5640c00b2f337e64/2015_IAS_CONOPS_Public_Version_Accessible.pdf.

²⁵⁵ Pub. L. 61-261 (1920).

either directly or via a foreign port.²⁵⁶ The Jones Act is enforced by the DHS Customs and Border Patrol (CBP).²⁵⁷

The purpose of the Jones Act is to stimulate and encourage the maintenance of an American merchant marine and shipbuilding industry and to ensure sufficient business for domestic shipping lines such that their facilities would be adequate in times of national emergency.²⁵⁸

The Jones Act applies to the United States, including Alaska, Hawaii, and the island territories and possessions of the United States, e.g., Puerto Rico and Guam.²⁵⁹ However, the coastwise laws generally do not apply to American Samoa, the U.S. Virgin Islands, or the Commonwealth of the Northern Mariana Islands.²⁶⁰

Due to a shortage of U.S.-flagged vessels available to transport merchandise between U.S. ports, the requirements of the Jones Act may become an obstacle in responding to large-scale disasters requiring large quantities of commodities (such as food, gasoline, or generators) to be shipped domestically to affected areas. The authority to waive the coastwise provisions of the Jones Act lies with the Secretary of Homeland Security.²⁶¹

Waivers may be granted when the Department determines a waiver is in the interest of national defense.²⁶² This may include situations involving disaster response operations. CBP consults with the U.S. Maritime Administration (MARAD) regarding the availability of U.S.-flagged vessels that may be used in lieu of granting a waiver,²⁶³ with the DHS/U.S. Coast Guard (USCG) regarding vessel eligibility, with Department of Defense (DOD) regarding national security concerns and may also consult the DOE

²⁵⁶ 46 U.S.C. § 55101 *et seq.*; 19 C.F.R. § 4.80b. *See* 46 U.S.C. § 55102(b).

²⁵⁷ *See* https://help.cbp.gov/app/answers/detail/a_id/23/~the-jones-act.

²⁵⁸ *Pennsylvania R. Co. v Dillon*, 118 US App DC 335 F2d 292 (D.C. Cir., 1964).

²⁵⁹ *See* 46 U.S.C. § 55101(a). Guam, Midway Island, and Wake Island are exempt from the U.S. built requirement of the Jones Act. *See* 46 U.S.C. § 12111(b).

²⁶⁰ *See* 46 U.S.C. § 55101(b).

²⁶¹ 46 U.S.C. § 501; *See also* “*What Every Member of the Community Should Know about Coastwise Trade: Merchandise*” by the DHS, Customs and Border Protection (CBP), (January 2009).

²⁶² *Id.*

²⁶³ *See* <http://www.marad.dot.gov/ships-and-shipping/domestic-shipping/>.

regarding the availability of energy resources in making its waiver determination.

Waivers of the coastwise provisions were granted to allow for shipment of oil, gasoline, and other refined products on foreign-flagged vessels between domestic ports following Hurricanes Katrina (DR-1603)²⁶⁴ and Sandy (DR-4085).²⁶⁵

After Hurricanes Harvey, Irma and Maria hit Texas, Puerto Rico and the US Virgin Islands in 2017, the Homeland Security Secretary issued several ten-day waivers of the Jones Act for shipments between points in the Continental U.S. and states or territories declared under those disaster declarations.²⁶⁶ The waivers issued for Hurricanes Harvey and Irma were limited to shipments of refined petroleum products, such as gasoline, diesel, and jet fuel shipped to affected areas.²⁶⁷ However, the waiver issued for Puerto Rico after Hurricane Maria covered shipments of all products.²⁶⁸ Please note that no waivers of the Jones Act were required for shipments to the U.S. Virgin Islands, as the coastwise provisions of the Jones Act do not apply to the USVI, although they do apply to Puerto Rico.²⁶⁹

²⁶⁴ See <https://www.maritime-executive.com/article/2005-09-08jones-act-waiver-granted-due-to-hurric>

²⁶⁵ See <https://www.dhs.gov/news/2012/11/02/secretary-napolitano-issues-temporary-blanket-jones-act-waiver> and http://www.marad.dot.gov/wp-content/uploads/pdf/MARITIME_ADMINISTRATION_JONES_ACT_WAIVER_REPORTING_REQUIREMENTS.pdf.

²⁶⁶ <https://www.dhs.gov/publication/september-2017-jones-act-waivers>

²⁶⁷ *Id.*

²⁶⁸ https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf

²⁶⁹ 46 USC 55101(b)

Case Example

During the winter of 2013-14, the Eastern United States experienced a severe road salt shortage due to frequent winter storms and snowstorms. Seeking to expedite a shipment of salt from Maine by an ocean-going vessel, the State of New Jersey approached FEMA and CBP for a request to waive the coastwise provisions of the Jones Act to allow a foreign-flagged vessel to transport the salt to New Jersey. New Jersey cited the need to provide salt to treat Interstate 95, the central road artery on the East Coast, as a national security interest. New Jersey withdrew its waiver request after MARAD identified several U.S.-flagged vessels that were available to transport the salt to New Jersey.

a. Passenger Vessels

The coastwise provisions of the Jones Act do not apply to passenger vessels, such as cruise liners, ferries, or tour boats, etc. Coastwise provisions of a similar law, the Passenger Vessel Services Act (PVSA), applies to transportation of passengers between US ports.²⁷⁰ In general, all passenger vessels carrying passengers solely between US ports, must be US-owned and flagged.

i) Puerto Rico Exception:

An exception to the coastwise provisions of the PVSA apply to passenger vessels transporting passengers to and from US ports and Puerto Rico, where qualified US-owned and flagged vessels are not available for use.²⁷¹ The coastwise provisions of the PVSA do not apply to most other US territories, including, the US Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.²⁷² In other words, all territories except Puerto Rico do not necessarily need to be US-owned and flagged.

²⁷⁰the Passenger Vessel Services Act (PVSA), as amended, codified at 46 U.S.C 5103,

²⁷¹ See 46 USC 55104.

²⁷² 46 USC 55101(b).

2. Ground Transportation: Weight Restrictions and Hazardous Materials

In the wake of major disasters and emergencies, states may seek to expedite shipments of supplies critical for disaster relief efforts (such as sand, salt, gasoline, food, medicine, water, etc.) as well as the transport of heavy equipment such as large generators on interstate highways and other federal-aid roads. Overweight loads are generally not allowed to travel on interstate highways unless the state issues a special permit.²⁷³

a. Department of Transportation (DOT) Weight Restrictions on Interstate Highways

The roadway infrastructure of the Interstate System is protected by the imposition of maximum weight restrictions.²⁷⁴ Generally, those restrictions are as follows:²⁷⁵

- Single Axle – 20,000 lbs.
- Tandem Axle – 34,000 lbs.
- Gross Weight – 80,000 lbs.
- Alternatively, the maximum allowed by the Federal Bridge Formula.²⁷⁶

b. Special Permits for Non-Divisible Loads

If the load is non-divisible, meaning it “...cannot be easily dismantled or divided...” into separate loads, then the state may issue, in accordance with its own law, a special permit to travel the Interstate System.²⁷⁷

²⁷³ 23 U.S.C. § 127(a)(2) and (i).

²⁷⁴ 23 U.S.C. § 127

²⁷⁵ 23 U.S.C. § 127(a)(2); 23 C.F.R. § 658.17.

²⁷⁶ Federal Bridge Formula,

http://www.ops.fhwa.dot.gov/freight/sw/brdgcalc/calc_page.htm.

²⁷⁷ 23 U.S.C. § 127(a)(2); 23 C.F.R. § 658.17(h).

Examples of non-divisible loads include heavy equipment, large generators, and modular homes.

c. Special Permits for Divisible Loads in Excess of Weight Limits during Stafford Act Declarations

Overweight loads that are divisible are generally banned from the Interstate System and are not usually eligible for special permits except in limited circumstances involving transport of relief supplies following a Stafford Act declaration.²⁷⁸ A load is divisible if it “...can easily be dismantled or divided...” into separate loads.²⁷⁹

A state may issue a special permit for an overweight, divisible load if:²⁸⁰

- The President has declared an emergency or major disaster under the Stafford Act;²⁸¹
- The special permit is issued in accordance with state law;²⁸²
- The vehicle and load receiving the special permit are delivering relief supplies²⁸³; and

²⁷⁸ Special permits were not allowed for divisible loads prior to enactment of the Moving Ahead for Progress in the 21st Century Act (MAP-21) P.L. 112-141 (Oct. 1, 2012), see Section 1511 available at <https://www.gpo.gov/fdsys/pkg/PLAW-112publ141/pdf/PLAW-112publ141.pdf>; 23 U.S.C. § 127(i).

²⁷⁹ 23 U.S.C. § 127(i).

²⁸⁰ 23 U.S.C. § 127(i)(1), *See also* Federal Highway Administration (FHWA) Guidance: MAP-21 Section 1511 – *Special Permits During Periods of National Emergency Implementation, Revised* (June 5, 2013) at <http://www.fhwa.dot.gov/map21/guidance/guideemergency.cfm> (FHWA Guidance).

²⁸¹ 23 U.S.C. § 127(i)(1)(A). The statute allows for state issued waiver permits when the President has “declared the emergency to be a major disaster” under the Stafford Act which is rather ambiguous language but the FHWA guidance provides that this waiver authority is triggered for both emergencies and major disasters.

²⁸² 23 U.S.C. § 127(i)(1)(B).

²⁸³ 23 U.S.C. § 127(i)(1)(C).

- It is within 120 days of the date of the President’s declaration.²⁸⁴

The Federal Highway Administration (FHWA) has interpreted “relief supplies” to include but not be limited to:²⁸⁵

- Medicine and medical equipment;
- Food supplies (including feed for livestock);
- Water;
- Materials used to provide or construct temporary housing; and
- Other supplies directly supporting the type of relief needed following a disaster.

A state may issue a permit for loads destined for another state, so long as the destination is part of the geographical area covered by the emergency or major disaster.²⁸⁶ Transporting material from a declaration-designated area is not an eligible activity under this authority unless the state demonstrates to FHWA that such transport is necessary to facilitate delivery of relief supplies to a specific locations and for a limited duration.²⁸⁷ Permits may not be issued in anticipation of a Presidential declaration.²⁸⁸

VII. Non-Stafford Act Events

A. Other Federal Agency Authorities

FEMA may become involved in a supporting or coordination role in incidents or events that do not meet the criteria for a Stafford Act

²⁸⁴ Special permits must be issued before, and expire definitively on the 120th day following, the declaration of a major disaster. 23 U.S.C. § 127(i)(2); FHWA Guidance.

²⁸⁵ FHWA Guidance.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

emergency or major disaster declaration. Federal assistance needed in these events often falls under the existing statutory authority of another federal agency, such as the Department of Health and Human Services (i.e., a public health emergency such as a flu pandemic); U.S. Coast Guard (i.e., an oil spill such as Deepwater Horizon); the Environmental Protection Agency (i.e., a Superfund hazardous waste cleanup); U.S. Army Corps of Engineers (i.e., flood fighting on the Mississippi River); or one of the agencies dealing with immigration (i.e., unaccompanied alien children).

Generally, FEMA will not recommend a Stafford Act declaration when the authority to respond to an incident is within the existing statutory authority of another federal agency, unless there are significant unmet needs that other federal assistance does not address and that the Stafford Act could address.²⁸⁹

B. Coordination of Federal Response Operations

The Homeland Security Act of 2002,²⁹⁰ as well as HSPD-5,²⁹¹ designate the Secretary of Homeland Security as the principal federal official for domestic incident management, including terrorist incidents, major disasters, and other emergencies.²⁹² In this role, the Secretary is responsible for coordinating federal operations within the United States to prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies.²⁹³

HSPD-5 directs the Secretary to “coordinate the Federal Government’s resources utilized in response to or recovery from terrorist attacks, major disasters, or other emergencies if and when any one of the following four conditions applies: (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate State and local authorities; (3) more than one Federal

²⁸⁹ 44 C.F.R. § 206.37(d).

²⁹⁰ Pub. L. 107-296 (2002), 6 U.S.C. §§ 101-557.

²⁹¹ Homeland Security Presidential Directive-5 (HSPD-5), (2003).

²⁹² *Id.*

²⁹³ *Id.*

department or agency has become substantially involved in responding to the incident; or (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the President.”

The Homeland Security Act and HSPD-5 also require the Secretary and federal agencies to adopt implement the National Incident Management System (NIMS) and National Response Plan (now replaced by the National Response Framework, or NRF) to provide a “single, comprehensive approach to domestic incident management . . . to ensure that all levels of government across the Nation have the capability to work efficiently and effectively together”.²⁹⁴

Pursuant to NIMS and the NRF, the secretary may designate a National Incident Commander to coordinate response activities and resources on a national level, as well as a Federal On-Site Coordinator responsible for directing and coordinating response efforts on an operational level during times of natural and man-made crises.

During incidents that do not warrant or meet the criteria for an emergency or major disaster declaration under the Stafford Act, the Secretary may direct FEMA to provide support to the National Incident Commander, Federal On-Site Coordinator, and other federal agencies having primary authority for directing the response and providing assistance. However, in the absence of a Stafford Act Declaration, FEMA cannot provide disaster assistance to states, territories, or tribes through the DRF or issue mission assignments to other federal

²⁹⁴ *Id.*

agencies. Instead, FEMA could be tasked to coordinate the efforts of the Federal Interagency in support of the lead federal agency.²⁹⁵

1. Coordination Examples:

a. Non-Stafford Act Event: British Petroleum (BP) Deepwater Horizon Oil Spill

In 2010, the federal government responded to the April 20, 2010, BP Deepwater Horizon Oil Spill, the largest marine oil spill in U.S. history, in the Gulf of Mexico pursuant to the National Oil and Hazardous Substance Pollution Contingency Plan²⁹⁶ (National Contingency Plan). The Secretary of Homeland Security declared the Deepwater Horizon an incident of national significance under the NCP.²⁹⁷ FEMA provided support to the U.S. Coast Guard National Incident Commander but the President did not declare an emergency or major disaster under the Stafford Act.

b. Non-Stafford Act Event: Unaccompanied Alien Children

In response to an influx of unaccompanied alien children on the southwest border of the United States, on June 2, 2014, the President issued a memorandum directing the Secretary of Homeland Security to establish an interagency UCG to ensure unity of effort across the executive branch.²⁹⁸ In turn, pursuant to the authority of the Homeland Security

²⁹⁵ See the Region V *Non-Stafford Act Recovery Guide: Developing and Coordinating Resources*, at http://www.fema.gov/media-library-data/20130726-1910-25045-8797/non_stafford_act_recovery_guide.pdf and the OCC Legal Guide and Toolkit for FEMA officials, providing coordination and incident support to states and other federal agencies for non-declared events (March 2016) at <https://intranet.fema.net/org/occ/FEMAs%20Tool%20Kit/Non-Stafford%20Act%20event%20guidance/SLP4%20Non-Stafford%20Guide%20final%20030316.pdf> and <https://intranet.fema.net/org/occ/FEMAs%20Tool%20Kit/Non-Stafford%20Act%20event%20guidance/SLP4%20Non-declared%20events%20Toolkit%20030316%20final.pdf>

²⁹⁶ 40 C.F.R. Part 300.

²⁹⁷ 40 C.F.R. 300.323.

²⁹⁸ Presidential Memorandum – *Response to the Influx of Unaccompanied Alien Children Across the Southwest Border*, dated June 2, 2014 at <https://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr>.

Act and HSPD-5, the Secretary directed the FEMA Administrator to serve as the Federal Coordinating Official (FCO) of the Coast Guard.

The federal agencies with primary responsibility and authority regarding processing, custody, and continued care of these children included U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and the Department of Health and Human Services (HHS). The President did not issue a Stafford Act Declaration for this event. FEMA personnel and travel costs were funded by IAAs with CBP and HHS.

c. Stafford Act Event and Non-Stafford Act Authorities and Responsibilities: Flint, Michigan Contaminated Drinking Water Crisis

In 2014-15, the residents of Flint, Michigan, began to suffer a serious public health crisis relating to contaminated drinking water caused by lead leaching from pipes used to supply untreated river water. On January 16, 2016, a Stafford Act emergency declaration was issued in response.²⁹⁹ This declaration was limited in scope and time, providing for bottled water and water filters as emergency protective measures. Additionally, the President offered assistance in identifying other federal agency capabilities that could support the recovery effort but do not require an emergency declaration (HHS, Small Business Administration, EPA). On January 19, the President designated HHS as the lead federal agency responsible for coordinating federal support for response and recovery efforts in Flint. The goal of the federal response was to help state and local leaders identify the size and scope of the problem, and work with them to make and execute a plan for mitigation of the short- and long-term health effects of lead exposure.³⁰⁰

²⁹⁹ FEMA-3375-EM-MI, declared January 16, 2016. See <http://www.fema.gov/disaster/3375>.

³⁰⁰ See <http://www.hhs.gov/blog/2016/01/19/ground-week-hhs-lead-federal-response-flint.html> and the White House Fact Sheet, *Federal Support for the Flint Water Crisis Response and Recovery* dated May 3, 2016, at <https://www.whitehouse.gov/the-press-office/2016/05/03/fact-sheet-federal-support-flint-water-crisis-response-and-recovery>.

d. National Special Security Events

FEMA may also be asked to support the Secret Service for national special security events by providing expertise for their planning and prestaging certain teams or assets. In May of 1998, President Clinton issued Presidential Decision Directive 62 (PDD-62). In effect, this directive formalized and delineated the roles and responsibilities of federal agencies in the development of security plans for major events. The clarifying of responsibilities serves to focus more clearly the role of each agency and eliminate the duplication of efforts and resources. Examples of national special security events have included Super Bowl games, Presidential inaugurations, major party Presidential nominating conventions, international summits, and papal visits.³⁰¹

In 2000, the Presidential Protection Act of 2000 became public law. Included in the bill, signed on December 19, was an amendment to Title 18, U.S.C. § 3056, which codified PDD-62. Now, with the support of federal law, the Secret Service is authorized to participate "in the planning, coordination and implementation of security operations at special events of national significance."

When an event is designated by the Secretary of Homeland Security as a national special security event, the Secret Service assumes its mandated role as the lead agency for the design and implementation of the operational security plan. The Secret Service has developed a core strategy to carry out its security operations, which relies heavily on its established partnerships with law enforcement and public safety officials at the local, state, and federal levels.

The goal of the cooperating agencies is to provide a safe and secure environment for Secret Service protectees, other dignitaries, event participants, and the general public. There is a tremendous amount of advance planning and coordination for these events, particularly in the areas of venue and motorcade route security, communications, credentialing, and training.

³⁰¹ https://web.archive.org/web/20110712031817/https://www.dhs.gov/xnews/releases/pr_1167323822753.shtm.

VIII. Defense Support of Civil Authorities

A DOD directive defines Defense Support of Civil Authorities (DSCA) as “support provided by U.S. Federal military forces, DOD civilians, DOD contract personnel, DOD Component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in title 32, U.S.C., status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.” DSCA is also known as civil support.³⁰² This section describes the elements of DSCA.

A. Title 10 Forces

The active duty military forces of the United States are organized under Title 10 of United States Code (U.S.C.) and are often referred to as “Title 10 forces” or “federal military forces.” The operational chain of command for federal military forces engaged in DSCA runs from the President to the Secretary of Defense to the commander of U.S. Northern Command (NORTHCOM) or, for incidents in Hawaii and Alaska, to the commander of U.S. Pacific Command (PACOM).³⁰³

The Secretary of Defense, working through the Assistant Secretary of Defense for Homeland Defense and Americas’ Security Affairs, may assign forces to carry out mission assignments from FEMA through the commander of NORTHCOM or PACOM.³⁰⁴ FEMA will only pay for the travel and *per diem* of federal military forces plus other costs directly attributable to carrying out mission assignments such as materials, equipment, and supplies expended.³⁰⁵

The Secretary of Defense may also involuntarily order units and individuals of the Army, Navy, Marine Corps, and Air Force Reserve to active duty for up to 120 days “when a governor requests federal

³⁰² Department of Defense Directive No. 3025.18 (2010).

³⁰³ 10 U.S.C. §§ 162 and 164.

³⁰⁴ Department of Defense Directive No. 5111.13. (2018).

³⁰⁵ 44 C.F.R. § 206.8(c).

assistance in responding to a major disaster or emergency.”³⁰⁶ Like the regular federal military forces, FEMA will only pay for the travel and *per diem* of activated military reservists.³⁰⁷

B. National Guard

The National Guard (NG) is the present day version of the original state militia concept in the Constitution.³⁰⁸ When the NG is working for the governor of a state, it is in “State Active Duty” status; the state determines the pay and benefits of its NG personnel, and personnel are considered state employees for benefits and liability purposes. Each state has its own militia law governing this status.³⁰⁹ Three territories also have national guards: Guam, the U.S. Virgin Islands and Puerto Rico, as well as the District of Columbia.³¹⁰

NG members and units may be placed into “federal service” by being ordered to active duty in their reserve component status or called into federal service in their militia status under various sections of Title 10 of the U.S.C.³¹¹ In this role, NG forces are under the command of the President. When in federal service, NG members are relieved from duty in the NG of their state and consequently removed from state command and control.³¹²

A limited exception allows selected NG members to be placed on active duty without being relieved from duty in the NG of the state.³¹³

³⁰⁶ National Defense Authorization Act for FY 2012, 10 U.S.C. § 12304a.

³⁰⁷ 44 C.F.R. § 206.8(c)(3).

³⁰⁸ U.S. CONST. art. I, § 8, cl. 15 and 16; art. II, § 1 and amend. II, for references to the militia. The Constitution empowered Congress to “provide for organizing, arming, and disciplining the militia.” However, recognizing the militia’s state role, the Founding Fathers reserved the appointment of officers and training of the militia to the states. Today’s National Guard (NG) remains a dual state-federal force. *See also Perpich v. Department of Defense*, 496 U.S. 334, 342 (1990).

³⁰⁹ For example, Arizona Constitution, art. 5, § 3; A.R.S. § 26-101 (governor as Commander in Chief of state military forces when not in federal service); A.R.S. § 26-121 (composition of militia); A.R.S. § 26-172 (mobilization of militia for emergencies and when necessary to protect life and property).

³¹⁰ *See* <http://www.ngaus.org/state-national-guard-information>. The President is the Commander in Chief for the DC NG.

³¹¹ 10 U.S.C. §§ 101(c); 331-335; 12301-12304; and 12406.

³¹² 32 U.S.C. § 325.

³¹³ *Id.*

This exception allows an NG member to be under the President's command and concurrently under a governor's command for specified matters.

Alternatively, NG members may be ordered to perform training or operational duty in support of operations or missions at the request of the President or Secretary of Defense³¹⁴ (popularly referred to as Title 32 Status). In this capacity, members train for their federal military missions according to the congressionally established disciplines in Title 32, U.S.C., under state control as members of their respective states' militia.

The NG can also perform operational missions, such as disaster response in the United States. NG members in this "state status" receive federal pay and benefits from funds appropriated to DOD and are considered federal employees for purposes of the Federal Tort Claims Act³¹⁵ but are under the governor's command and control.

C. Defense Coordinating Officer/Defense Coordinating Element

Defense Coordinating Officers (DCOs) are the "Department of Defense single point of contact for domestic emergencies who is assigned to a joint field office to process requirements for military support, forward mission assignments through proper channels to the appropriate military organizations, and assign military liaisons, as appropriate, to activated emergency support functions."³¹⁶

DCOs are permanently assigned to each of FEMA's 10 regions, while additional DCOs may be activated and provided to JFOs. The DCO normally does not have command and control over DOD forces performing DSCA, although DCOs may be provided limited authority for command and control under exigent circumstances.

³¹⁴ 32 U.S.C. §§ 502(a) and (f). *See also* 32 U.S.C. §§ 901-904, authorizing DOD funding to governors for NG units engaged under section 502(f) in "homeland defense activities," which is an activity "undertaken for the military protection of the territory . . . of the United States . . . as being critical to national security, from a threat or aggression."

³¹⁵ Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.

³¹⁶ DOD Joint Publication 03-28, *Defense Support of Civil Authorities*, (2013)

DCOs are supported by a Defense Coordinating Element (DCE) consisting of administrative and support personnel. Each FEMA Region DCO is supported by a DCE of approximately 10 persons. The DCE may be augmented by additional personnel if necessary and may also include an Emergency Preparedness Liaison Officer.

An Emergency Preparedness Liaison Officer is “a senior Reserve officer, typically an O-5 (Lieutenant Colonel/Navy Commandant) or O-6 (Colonel/Navy Captain) who is a representative of one of the Military Departments or Military Services and is trained in DSCA requirements, regulations, and law, and performs a liaison role in planning and coordinating Military Department and Military Service participation in support of civil authorities.”³¹⁷

D. Dual Status Command

Recognizing the growing scope of state and federal military domestic missions following 9/11, Congress amended Title 32 in the 2004 National Defense Authorization Act, permitting NG commanders to retain their state commissions after they received orders to active duty. This change allows NG officers to command both federal and state forces simultaneously (dual status) to preserve unity of command at the operational level. Within months of this legislative change, three national special security events implemented dual status command arrangements and did so in support of the U.S. CBP's border patrol during Operation Winter Freeze.

These operations were coordinated extensively among NORTHCOM, the NG Bureau, and the NG and were viewed as successful examples of state and federal military cooperation. Building on this momentum, in 2005, Congress again amended Title 32, authorizing the Secretary of Defense to “provide funds to a governor to employ National Guard units or members to conduct homeland defense activities.”

The purpose of a dual status commander is to consolidate the authority to command NG forces and federal military forces.

³⁰⁶ DOD Instruction 3025.16, *Defense Emergency Preparedness Liaison Programs*, (2017).

Consolidating this authority promotes unity of effort between these two separate military forces when they are providing DSCA.

A dual status commander is a commissioned officer of the regular Army or Air Force or an ARNG or Air National Guard officer authorized by the President or Secretary of Defense, with the consent of the applicable governor of a state, to exercise command on behalf of, and receive separate orders from, a federal chain of command and a separate state chain of command.

In a large-scale event, to assure a unified command and control among the regular Army forces and NG forces, the President may authorize one officer to be in command of both forces and thus be in duty status in both the Army and the NG.

Table 4-5: Status of Military Forces

	State Active Duty	Title 32	Title 10	Title 14
Command and Control	Governor	Governor	President	Commandant of the USCG
Location of Duty	In accordance with state law	U.S.	Worldwide	Worldwide. law enforcement jurisdiction upon High Seas and waters over which the United States has jurisdiction
Funding	State funds	Federal	Federal	Federal
Mission Types	In accordance with state law (riot control, emergencies)	Training and/or other federally authorized missions	Overseas training and other missions as assigned	Uniformed armed service with broad law enforcement powers
Military Discipline	State military code	State military code	Uniform Code of Military Justice	Uniform Code of Military Justice

	State Active Duty	Title 32	Title 10	Title 14
Support to Law Enforcement	Yes, within authority extended by state law	Yes, within authority extended by state law	As limited by federal law Posse Comitatus Act	Yes
Indemnity for Accidents	State	Federal	Federal	Federal

E. Immediate Response Authority

Base commanders and a DOD component have the delegated authority to provide immediate assistance to civil authorities to save lives, prevent human suffering, and mitigate great property damage in the event of a civil emergency or attack.³¹⁸ In addition, the Stafford Act also provides that a governor of a state, territory, or tribe may request the Secretary of Defense to use DOD resources to perform emergency work, which is essential for life and property, prior to an emergency or major disaster declaration under the Stafford Act. If the FEMA Associate Administrator for Response and Recovery grants the request, DOD may perform the work for no more than 10 days.³¹⁹

F. Posse Comitatus

The primary statutory restriction on the participation of military personnel in civilian law enforcement activities is the Posse Comitatus Act (PCA).³²⁰ The PCA provides that “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse Comitatus or otherwise to execute the laws shall be fined . . . or imprisoned . . . or both.” The term “posse Comitatus” means the power of the county and refers to the authority of the sheriff to call upon the population of the county to assist in capturing escaped felons and keeping the peace.

³¹⁸ DOD Directive No. 3025.1, *Military Support to Civil Authorities (MSCA)*, § 4.5 (1993).

³¹⁹ Stafford Act, § 403(c), 42 U.S.C. § 5170b(c), 44 C.F.R. § 206.34.

³²⁰ 18 U.S.C. § 1385.

The prohibitions of the PCA apply to the enforcement of federal, state, or local law by members of the Army or Air Force unless otherwise authorized by the Constitution or by federal statute.³²¹ The PCA makes unlawful the willful use of “any part of the Army or Air Force” absent constitutional or statutory authority. Although not expressly applicable to the Navy and Marine Corps, a DOD directive extends the prohibitions of the PCA to restrict similarly the use of Navy and Marine Corps personnel without proper approval of the Secretary of Defense or Secretary of the Navy.³²²

Thus, the NG may support state law enforcement while in “State Active Duty” or in Title 32 status without violating the prohibitions in the

Posse Comitatus statute. If the federal government uses Title 10 forces to preserve order without carefully following PCA provisions, however, commanding officers may violate Posse Comitatus. The PCA does not prohibit activities for which the primary purpose is to further military affairs, which are undertaken under the inherent right of the U.S. government, such as protecting military property or when express authority exists to assist law enforcement.

IX. Continuum from Response to the Recovery: National Disaster Recovery Framework (NDRF)

FEMA has learned that recovery and recovery planning can commence almost as soon as response activities do, and the quicker a dedicated effort is underway for an area to recover, the earlier the community can begin to do so. FEMA has worked with a number of OFAs to develop the National Disaster Recovery Framework (NDRF), a structure for the whole community to address recovery issues.³²³ The NDRF establishes a common platform for how the whole community

³²¹ See the Insurrection Act, 10 U.S.C. §§ 331-335, and 10 U.S.C. Chapter 18, *Military Support for Civilian Law Enforcement Agencies*.

³²² DOD Directive No. 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (Feb. 27, 2013).

³²³ National Disaster Recovery Framework, 2nd ed., issued June 2016 at http://www.fema.gov/media-library-data/1466014998123-4bec8550930f774269e0c5968b120ba2/National_Disaster_Recovery_Framework2nd.pdf.

builds, sustains, and coordinates delivery of recovery capabilities. The primary value of the NDRF is its emphasis on preparing for recovery in advance of disaster, which is keeping with the requirements of PPD 8, *National Preparedness*.

The NDRF includes recovery-specific leadership, organizational structure, planning guidance, and other components needed to coordinate continuing recovery support to individuals, businesses, and communities.

The NDRF suggests consulting the following about decisions throughout the recovery process:

- Federal Disaster Recovery Coordinator,
- State or Tribal Disaster Recovery Coordinators, and
- Local Disaster Recovery Managers.

The *National Disaster Recovery Framework* introduces six new Recovery Support Functions that provide a structure to facilitate problem solving, improve access to resources, and foster coordination among state and federal agencies, non-governmental partners, and stakeholders. Each Recovery Support Function has coordinating and primary federal agencies and supporting organizations that operate together with local, state, and tribal government officials; NGOs; and private sector partners:

1. Community Planning and Capacity Building Recovery Support Function³²⁴
 - a) Coordinating Agency: FEMA
 - b) Primary Agency: U.S. Department of Housing and Urban Development (HUD)

³²⁴ http://www.fema.gov/media-library-data/1466705670641-82c846c9cfe2db88a70bf2475d5785bf/RSF_CPCB_41416.pdf

- c) Mission: to enable local governments to effectively and efficient carry out community-based recovery planning and management in a post-disaster environment.

2. Economic Recovery Support Function³²⁵

- a) Coordinating Agency: U.S. Department of Commerce (DOC)
- b) Primary Agencies: U.S. Department of Agriculture (USDA); DHS; U.S. Department of Labor (DOL); U.S. Department of Treasury
- c) Mission: to help local, regional/metropolitan, state, tribal, territorial, and insular area governments and the private sector sustain and/or rebuild businesses and employment and develop economic opportunities that result in sustainable and economically resilient communities after an incident.

3. Health and Social Services Recovery Support Function³²⁶

- a) Coordinating Agency: U.S. Department of Health and Human Services (HHS)
- b) Primary Agencies: Corporation for National and Community Service; USDA; DOC; DHS/National Protection and Programs Directorate; DHS/Office for Civil Rights and Civil Liberties; HUD; U.S. Department of Interior (DOI); Department of Justice (DOJ); DOL; Environmental Protection Agency (EPA); FEMA
- c) Mission: to support locally led recovery efforts to address public health, health care facilities and coalitions, and essential social services needs.

³²⁵ https://www.fema.gov/pdf/recoveryframework/economy_rsf.pdf

³²⁶ http://www.fema.gov/media-library-data/1466718036433-e2026c3a5907bf0cb86e75b3a3c51757/RSF_HealthandSocialServices_0623_508.pdf.

4. Housing Recovery Support Function³²⁷
 - a) Coordinating Agency: HUD
 - b) Primary Agencies: USDA; DOJ; HUD; FEMA
 - c) Mission: to coordinate and facilitate the delivery of federal resources to implement housing solutions that effectively support the needs of the whole community and contribute to its sustainability and resilience.
5. Infrastructure Systems Recovery Support Function³²⁸
 - a) Coordinating Agency: U.S. Army Corps of Engineers (USACE)
 - b) Primary Agencies: HUD, U.S. Department of Energy (DOE); DHS; U.S. Department of Transportation (DOT); FEMA, USACE
 - c) Mission: to efficiently facilitate the restoration of infrastructure systems and services to support a viable, sustainable community and to improve resilience to and protection from future hazards.
6. Natural and Cultural Resources Recovery Support Function³²⁹
 - a) Coordinating Agency: DOI
 - b) Primary Agencies: DOI; EPA; FEMA
 - c) Mission: to support the protection of natural and cultural resources and historic properties through appropriate response and recovery actions to preserve, conserve, rehabilitate, and restore them consistent

³²⁷ http://www.fema.gov/media-library-data/1466718036445-e2026c3a5907bf0cb86e75b3a3c51757/RSF_Housing_0623_508.pdf.

³²⁸ http://www.fema.gov/media-library-data/1466718036457-e2026c3a5907bf0cb86e75b3a3c51757/RSF_Infrastructure_Systems_0623_508.pdf.

³²⁹ http://www.fema.gov/media-library-data/1466718036481-e2026c3a5907bf0cb86e75b3a3c51757/RSF_NaturalandCultural_0623_508.pdf.

with post-disaster community priorities and in compliance with applicable environmental and historical preservation laws and executive orders.

While similar to the NRF positions and functions, these NDRF personnel and functions focus strictly on recovery issues.

CHAPTER 5
Public Assistance
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Public Assistance

This chapter discusses the legal authorities governing the Public Assistance (PA) program, including the Stafford Act¹ and its implementing regulations.² It also references many of FEMA's PA program policies, which explain and assure basic consistency in the discretion FEMA has to manage the PA program.

This chapter is divided into three parts:

1. Part One, *Public Assistance Eligibility*, discusses eligibility requirements, including general eligibility, categories of work, types of repair/replacement projects, related mitigation measure codes and standards, insurance and duplication of benefits considerations, and the Fire Management Assistance Grant (FMAG) and Community Disaster Loan Programs.
2. Part Two, *PA Grants Management Process*, discusses the PA grant funding process, public notice requirements, special funding

¹ See Stafford Act §§ 403, 406, 407, 417, 418, 419, 420, 422, 428, 502, and 503; 42 U.S.C. §§ 5170a, 5172, 5173, 5184, 5185, 5186, 5187, 5189, 5189f, 5192, and 5193, respectively.

² The applicable regulations include 44 C.F.R. §§ 206.31 – 206.67 (The Declaration Process and Emergency Assistance); 44 C.F.R. §§ 206.200 – 206.253 (Public Assistance Grant Administration, Eligibility, and Insurance Requirements); 44 C.F.R. Part 207 (Management Costs); and 44 C.F.R. Part 204 (FMAG Program). Other relevant regulations include: 44 C.F.R. Part 9 (Floodplain Management and Protection of Wetlands); and 44 C.F.R. Part 75 (Exemption of State-Owned Properties under Self-insurance Plan). Part Two of this chapter, *Public Assistance and Grants Management Process*, discusses 2 C.F.R. Part 200, which replaces 44 C.F.R. Part 13 (2014) (*Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments*), as well as 2 C.F.R. Part 215 (2013), *Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Learning, Hospitals, and Other Non-Profit Organizations*. See 79 F.R.75867 (Dec. 19, 2014) at <https://www.gpo.gov/fdsys/granule/FR-2014-12-19/2014-28697>. Throughout this chapter, we will cite Part 13 and Part 215 regulations applicable for older declarations, in addition to the new Part 200 regulations.

circumstances, management costs, and grant procurement requirements.

3. Part Three, *Public Assistance Appeals and Dispute Resolution*, discusses facilitated discussions, appeals, arbitrations, and litigation.

Part One: Public Assistance Eligibility

I. Introduction

The Stafford Act authorizes federal assistance for state, territorial, tribal, and local governments (STTLs), and certain private non-profit (PNP) entities to respond to emergencies (emergency assistance) and to respond to and recover from major disasters (emergency assistance and permanent repair assistance). FEMA has administratively combined these authorities under the umbrella of its PA program.

The PA program provides a broad range of assistance. First, it provides direct services and financial assistance for emergency assistance, such as emergency evacuation, sheltering, and debris removal.³ Second, it provides financial assistance for the permanent restoration of disaster-damaged facilities, which is generally considered part of “Recovery.”

A. Uniform Guidance (Supercircular) Adoption and New Terminology

In 2014, the Department of Homeland Security (DHS), including FEMA, adopted, in its entirety, the government-wide new *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance).⁴ The Uniform Guidance, enacted at 2 C.F.R. Part 200, consolidated eight federal regulations (Office of Management and Budget circulars) ⁵ and

³ See also discussion in Chapter 2, *Disaster Readiness*, and Chapter 4, *Response*.

⁴ 2 C.F.R. § 3002.

⁵ Office of Management and Budget [hereinafter OMB] Circulars A-21, A-87, A-110, and A-122 (which have been placed in past OMB guidance); Circulars A-89, A-102, and A-133; and the guidance in Circular A-50 on Single Audit Act follow-up.

replaced 44 C.F.R. Part 13, as well as 2 C.F.R. Part 215, *Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Learning, Hospitals, and Other Non-Profit Organizations* for grants awarded under emergency or major disaster declarations issued on or after December 26, 2014.⁶ It is also referred to as the Supercircular.

The Uniform Guidance includes new terminology commonly used in FEMA PA regulations and guidance, such as “award” and “subaward” instead of “grant” and “subgrant” and “recipient” and “subrecipient” instead of “grantee” and “subgrantee.” These terms and definitions, as well as the definitions found at 2 C.F.R. Part 200, are applicable to FEMA administration of Public Assistance programs going forward. See Part Two of this chapter, *Public Assistance and Grants Management Process* for further discussion.

B. New Policy Guidance: The Public Assistance Program and Policy Guide (PAPPG)

In January 2016, FEMA published the *Public Assistance Program and Policy Guide* (PAPPG), which combines PA policies and guidance into a single publication with links to other publications and documents that provide additional process details.⁷ The PAPPG generally supersedes previously issued PA Program publications and 9500 Series documents for all incidents declared on or after January 1, 2016.⁸

⁶ For non-federal entities that are nonprofit organizations or institutions of higher education, there is a one-year grace period for implementation of the procurement standards in 2 C.F.R. 200.317 through 200.326. See Federal Awarding Agency Regulatory Implementation of Office of Management and Budget’s Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, 79 Fed. Reg. 75867 (Dec. 19, 2014) at 75857, 75872, and 76084. See also *Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards*, 78 Fed. Reg. 78590 (Dec. 26, 2013) at <https://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf>.

⁷ *Public Assistance Program and Policy Guide* (PAPPG), FP 104-009-2 available at <https://www.fema.gov/public-assistance-policy-and-guidance>.

⁸ The intent is to publish the PAPPG annually. Refer to the version that corresponds to the year that the disaster/emergency was declared for declarations issued on or after January 1, 2016. See also <https://www.fema.gov/public-assistance-policy-and-guidance>, which includes a listing of (and links to) those few 9500 Series Policies that were not superseded, as well as other FEMA PA Policy and Guidance not superseded by the PAPPG.

The previous policy and guidance documents remain in effect for incidents declared prior to January 1, 2016, unless previously rescinded.⁹

C. PA Pilot Programs

The Sandy Recovery Improvement Act of 2013 (SRIA) (Pub. L. 113-2) was signed into law on January 29, 2013, amending the Stafford Act. It authorized alternative procedures for the PA Program for debris removal and for permanent work.¹⁰ FEMA was authorized to implement these alternative procedures through pilot programs.¹¹ SRIA also authorized a Dispute Resolution Pilot Program, which had a sunset date of December 31, 2015, for arbitrations requests to be filed.¹²

Participation in the debris removal and permanent work pilot programs and use of the alternative procedures for specific subgrants (or projects) is voluntary.¹³ If subrecipients use any alternative procedures, they will sign an acknowledgement regarding these procedures, which FEMA will attach to the subgrant application (also

⁹ The archived 9500 Policy Series, called Disaster Assistance Policy (DAP) or Recovery Policy (RP) depending on when the policy was issued, is available at <https://www.fema.gov/media-library/assets/documents/128488>. The archived Public Assistance Guide, FEMA 322 (2007) [hereinafter PA Guide]; Public Assistance Policy Digest, FEMA P-321 (2008) [hereinafter PA Digest]; Public Assistance Applicant Handbook, FEMA 323 (2010) [hereinafter PA Handbook]; Public Assistance Debris Management Guide, FEMA 325 (2007) [hereinafter PA Debris Management Guide]; the Debris Monitoring Guide, FEMA 327 (2010). See <https://www.fema.gov/media-library/assets/documents/128488> for a list of PA policies rescinded, effective January 23, 2013. Throughout this chapter, we will cite older policies and guides, as well as the PAPPG and other current policy and guidance as applicable. Refer to <https://www.fema.gov/public-assistance-policy-and-guidance> for current and archived FEMA policies and guidance to ensure you are referencing the correct documents.

¹⁰ Stafford Act § 428, 42 U.S.C. § 5189f. Additional information regarding these pilot programs is found in Sections III(A)(1), *debris removal* and III(B), *permanent work* of this chapter.

¹¹ Stafford Act § 428(f), 42 U.S.C. § 5189f(f) provides for the waiver of notice and comment rulemaking allowing FEMA to carry out these programs as pilots pending promulgation of regulations. See <http://www.fema.gov/alternative-procedures> for the most current guidance, as well as archived guidance.

¹² SRIA § 1105; See 44 C.F.R. § 206.210 for the implementing regulations for this pilot program. No arbitration requests were filed.

¹³ Stafford Act § 428(d), 42 U.S.C. § 5189f(d).

known as a project worksheet) for the subgrant(s) in question. Applicants may voluntarily participate in the procedures, which will allow FEMA to efficiently deliver PA funding and provide applicants the flexibility to apply the funding for the community's recovery. Standard procedures for Public Assistance will apply unless an applicant indicates its commitment to participating in the pilot program.

FEMA will approve projects to which the alternative procedures apply in accordance with the applicable pilot program guidance documents. However, all other statutory, regulatory, and policy requirements of the PA Program apply and are not affected by the alternative procedures. The alternative procedures also do not affect requirements for compliance with other federal requirements, including environmental and historic preservation (EHP) laws, regulations, and executive orders.¹⁴

II. Eligibility – In General

The PA Program places eligible work into project categories (A-G for emergency and permanent repair work),¹⁵ which must meet eligibility requirements to be eligible for FEMA funding. Eligibility determinations commence when the applicants (a state, tribal, or local government or certain PNP organizations) submit a Request for Public Assistance (RPA)¹⁶ and continue through project formulation, financial obligation, and financial and programmatic closeout process.

The applicant's project must also satisfy specific eligibility requirements for the following four essential elements that FEMA staff

¹⁴ SRIA also directed FEMA to establish an expedited and unified interagency review process for compliance with federal environmental and historic preservation requirements. See Stafford Act § 429, 42 U.S.C. § 5189(g).

¹⁵ Category Z is for management costs, which are discussed in Part Two of this chapter.

¹⁶ 44 C.F.R. § 206.202(c). The RPA, FEMA Form 90-49, initiates the project grant application.

should review in this order: (1) the applicant,¹⁷ (2) the facility,¹⁸ (3) the work,¹⁹ and (4) the costs.²⁰

A. Applicant Eligibility

Eligible PA applicants include STTLs and certain PNP organizations.²¹

The Stafford Act and its implementing regulations do not authorize FEMA to provide direct federal or grant assistance to private for-profit entities. However, in limited circumstances, private commercial entities may be indirect or incidental beneficiaries of Direct Federal Assistance (DFA) when FEMA determines a state or tribal government lacks the capability to address an immediate threat to the life and safety of the public at large and such threat can be addressed through activity of a private organization that lacks the capability to perform the activity on its own. *See* Chapter 4, *Response*, Section V(C)(2) on *Incidental Benefits to the Private Sector*.

1. STTLs

a. States and Territories

The states and territories are comprised of 56 entities, including any state of the United States, the District of Columbia, Guam, the Virgin Islands, Puerto Rico, American Samoa, and the Commonwealth of the Northern Mariana Islands.²²

¹⁷ 44 C.F.R. § 206.222.

¹⁸ *Id.* §§ 206.221, 206.223(b), 206.223(c), and 206.226.

¹⁹ *Id.* §§ 206.224-226. Eligibility determinations are also made as to types and location of debris. *See* PA Debris Management Guide for pre-2016 declarations at 21-40; PAPPG, pp. 22-3.

²⁰ *Id.* § 206.228 and § 13.36.

²¹ *See* Stafford Act §§ 403(a)(4) and 406(a), 42 U.S.C. §§ 5170b(a)(4) and 5172(a), and 44 C.F.R. § 206.222.

²² *See Id.* § 102(4), 42 U.S.C. § 5122(4).

b. Tribal Governments²³

An Indian tribal government is defined in the Stafford Act and its implementing regulations as the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a, *et seq.*).²⁴

Indian tribal governments have a number of avenues through which they may pursue Public Assistance. In January 2013, SRIA amended the Stafford Act to allow “Indian tribal governments” to directly request emergency or major disaster declarations from the President.²⁵

An Indian tribal government may therefore choose to submit its own request for a Presidential emergency or major disaster declaration and apply for and receive PA as a recipient, directly working with FEMA and pursuant to a FEMA-Tribe Agreement. Alternatively, an Indian tribal government may opt to apply for assistance through a state declaration as a recipient or as subrecipient under the state award as allowed under state law.²⁶

Other tribal entities (e.g., any Indian tribe or authorized tribal organization, or Alaska Native village or organization that is not federally recognized per 25 U.S.C. 479a, *et seq.*) fall under the Local Government

²³ See <https://www.fema.gov/tribal-declaration-and-disaster-assistance-resources> for Tribal Declaration and Disaster Assistance Resources.

²⁴ Stafford Act § 102(6), 42 U.S.C. § 5122(6) and 44 C.F.R. § 206.201(i). There are 567 tribal entities as of May, 2016. See 81 Fed. Reg. 26826 (May 4, 2016) Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs at <https://www.gpo.gov/fdsys/pkg/FR-2016-05-04/pdf/2016-10408.pdf>.
²⁵ SRIA § 1110, Pub. L. 113-2 (2013), amending/adding Stafford Act §§ 102(6) and (8)(B), 103, 401(b) and 501(c); and codified at 42 U.S.C. §§ 5122(6) and (8)(B), 5123; 5170(b), and 5191(c). Indian tribal governments cannot directly request Fire Management Assistant Grant [hereinafter FMAG] declarations pursuant to FEMA implementing regulations found in 44 C.F.R. Part 204 but may act as a recipient under the state’s declaration. The statutory provision for FMAGs found at Stafford Act § 420 (42 U.S.C. § 5187) does not proscribe how FMAG declarations may be requested but left that to regulations, and the SRIA amendments did not change that.

²⁶ 44 C.F.R. §§ 206.201(e) and 206.222(c).

definition and must apply through the state for assistance as a subrecipient.²⁷

Alaska Native Corporations, the ownership of which is vested in private individuals, are not eligible as PA applicants (recipient or subrecipient).²⁸

Unique issues may arise with respect to tribal ownership and control of certain entities and structures on tribal lands, including corporate or development commissions, federally owned facilities (i.e., roads), gaming partnerships, and private/public small businesses. In addition, other federal agencies may have assistance programs for disaster-related damages on tribal land.

c. Local Governments

Local governments include:

- Counties, municipalities, cities, towns, townships, local public authorities, school districts, special districts, intrastate districts, councils of government, regional or interstate government entities, and agencies or instrumentalities of a local government;²⁹
- Indian tribes, authorized tribal organizations or Alaska Native villages or organizations that are not federally recognized (excluding Alaska Native Corporations, the ownership of which is vested in private individuals);³⁰ and

²⁷ Stafford Act § 102(8)(B), 42 U.S.C. § 5122(8)(B), and 44 C.F.R. § 206.222(c).

²⁸ See 44 C.F.R. §§ 206.201(i), 206.222(c), and 204.3 (FMAGs).

²⁹ Stafford Act § 102(8)(A), 42 U.S.C. § 5122(8)(A). A council of government is eligible even if it is a non-profit corporation under state law.

³⁰ *Id.* § 102(8)(B), 42 U.S.C. § 5122(8)(B); See also 44 C.F.R. §§ 206.201(i), 206.222(c), and 204.3 (FMAGs), which exclude Alaska Native Corporations.

- Rural communities, unincorporated towns or villages, or other “public entity” for which an application for assistance is made by a state or political subdivision of the state.³¹

Evaluating applicants under the special district subcategory can be complex, as local governments across the country create various districts for financing purposes that blend public and private interests. Thus, they may require a more in-depth review of their legal status as a local government entity and their responsibility for the requested work.³²

2. Private Non-Profit (PNP) Organizations

PNPs that own or operate facilities that provide eligible services as defined in the Stafford Act³³ are eligible for PA.³⁴ PNP applicant and facility eligibility determinations are intertwined.³⁵ The regulations require, as a condition to funding, that an eligible PNP provide a letter from the U.S. Internal Revenue Service (IRS) ruling that it is a 501(c),³⁶ (d),³⁷ or (e)³⁸ exempt organization or has satisfactory evidence from the state that it is a non-profit organization doing business under state law.³⁹

³¹ Stafford Act § 102(8)(C), 42 U.S.C. § 5122(8)(C). “Public entity” is defined as “an organization formed for a public purpose whose direction and funding are provided by one or more political subdivisions of the State.” 44 C.F.R. § 206.221(g). *See also* § 206.223(c) regarding facilities belonging to a public entity.

³² *See* Section II (C)(3), *Work Eligibility, Legal Responsibility* in this chapter.

³³ Stafford Act § 102(11), 42 U.S.C. § 5122(11), and 44 C.F.R. § 206.221(e).

³⁴ 44 C.F.R. §§ 206.222(b); *See also* Stafford Act §§ 403(a)(4), 406(a)(1)(B), and 407(a)(2); 42 U.S.C. §§ 5170b(a)(4), 5172(a)(1)(B), and 5173(a)(2).

³⁵ *See* 206.223(b), which provides that to be eligible, private nonprofit (PNP) facilities must be owned and operated by an organization meeting the definition of a private nonprofit organization; *See also* Disaster Assistance Policy (DAP) 9521.3, Private Nonprofit (PNP) Facility Eligibility [hereinafter DAP 9521.3, PNP Eligibility] at VII.B.2 (2007) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/128488>; PAPPG, pp. 15-19.

³⁶ 26 U.S.C. § 501(c), *List of exempt organizations*.

³⁷ *Id.* at § 501(d), *Religious and apostolic organizations*.

³⁸ *Id.* at § 501(e), *Cooperative hospital service organizations*.

³⁹ 44 C.F.R. § 221(f).

The PNP must also meet the general work eligibility requirements in 44 C.F.R. 206.223(a)(1)-(3), including that it must be legally responsible for performing the work.⁴⁰

B. Facility Eligibility

After FEMA determines that an entity is an eligible PA applicant, consideration must then be given to the disaster-damaged facility for which the applicant requires assistance, if there is a facility at issue.⁴¹ Permanent work assistance for repair, restoration, reconstruction, or replacement is available for eligible disaster-damaged facilities.⁴²

“Facility” is defined as “any publicly or privately owned building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature. Land used for agricultural purposes is not a facility.”⁴³

1. Public Facilities

Public facilities include the following facilities owned by a state, territorial, tribal, or local government:⁴⁴

⁴⁰ See 44 C.F.R. § 223(a)(3). While this is true of all projects regardless of the applicant status, PNP projects are more likely to involve leased facilities, shared facilities, joint venture relationships, and/or mixed use facilities requiring apportionment of costs. See the *PNP Facilities* section in this chapter.

⁴¹ There are both emergency work and permanent work categories of assistance under PA. Emergency work (debris removal and emergency protective measures) may or may not involve a damaged facility. See 44 C.F.R. §§ 206.224 and 206.225.

⁴² Stafford Act § 406, 42 U.S.C. § 5172; 44 C.F.R. §§ 206.201(j) and 206.226.

⁴³ 44 C.F.R. § 206.201(c); for special considerations regarding restoration of integral land supporting an eligible facility, see PAPPG, *Landslides and Slope Stabilization*, pp. 129-130 or, for pre-2016 declarations, the superseded DAP 9524.2, *Landslides and Slope Failures*, VII.A.4, at <https://www.fema.gov/media-library/assets/documents/128488>, which provide that “[i]ntegral ground refers to ‘natural or improved ground’ upon which an eligible facility is located and which is essential to support the structural integrity and utility of the facility.” See also 44 C.F.R. § 206.221(e) and (h) for more specific definitions of various types of facilities.

⁴⁴ Stafford Act § 102(10), 42 U.S.C. § 5122(10); 44 C.F.R. § 206.221(h). FEMA’s practice is to provide PA for leased facilities if the eligible applicant can establish legal responsibility for disaster-related repair or replacement of the damaged facility.

- Any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility;
- Any non-federal aid street, road, or highway;
- Any other public building, structure, or system, including those used for educational, recreational, or cultural purposes; and
- Any park.

Under certain conditions, public beaches may be an improved and maintained feature and thereby an eligible facility for sand replacement.⁴⁵

On tribal lands, tribal members may live in tribally owned housing. In such circumstances, FEMA may consider the housing a public facility; therefore, assistance for the repair of this housing may come under the PA program rather than the Individual Assistance (IA) program for owner occupied housing.⁴⁶

2. PNP Facilities

The Stafford Act provides for two categories of eligible PNP facilities that—when owned or operated⁴⁷ by a PNP entity—may be eligible for PA funding:

⁴⁵ 44 C.F.R. § 206.226(j); FEMA PA Fact Sheet 9580.8, *Eligible Sand Replacement on Public Beaches* (2009) (for pre-2016 declarations), PAPPG, pp. 21-23
<https://www.fema.gov/media-library/assets/documents/128488>

⁴⁶ Stafford Act § 408(c)(2) and (3), 42 U.S.C. § 5174(c)(2) and (3).

⁴⁷ Stafford Act § 406(a)(1)(B), 42 U.S.C. § 5172(a)(1)(B). *See also* 44 C.F.R. §206.222(b), which tracks the Stafford Act language of “own or operate.” Note, however, that there is a discrepancy in 44 C.F.R. §206.223(b), which provides that a PNP facility must be owned *and* operated by a PNP organization to be eligible. This regulatory language would appear to be *ultra vires*. FEMA practice and policy has been to implement the terms of the Stafford Act and determine eligibility based on whether an applicant with an appropriately documented PNP status owns *or* operates a PNP defined facility, recognizing that some PNPs may operate out of leased facilities. Also note that the legal responsibility eligibility requirement found in § 206.223(a)(3) still applies and may lead to a determination of ineligibility if the PNP operator-applicant is not legally responsible for disaster-related repairs or replacement of the facility.

- Specifically, enumerated types of facilities: education, utility, irrigation, emergency, medical, rehabilitation, and temporary or permanent custodial care facilities.⁴⁸
- Facilities that provide essential services of a governmental nature to the general public, including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, and facilities that provide health and safety services of a governmental nature.⁴⁹

⁴⁸ Stafford Act § 102(11)(A), 42 U.S.C. § 5122(11)(A). The specific facility types are further defined in FEMA's regulations, which also address whether administrative and support facilities are included. *See* 44 C.F.R. § 206.223(e)(1) – (7).

⁴⁹ *Id.* § 102(11)(B), 42 U.S.C. § 5122(11)(B). FEMA's implementing regulations found at 44 C.F.R. § 206.221(e)(7) have not been updated to include performing arts facilities and community arts centers which were added to the Stafford Act definition pursuant to PKEMRA § 688. FEMA's policy regarding PNP facility eligibility provides the following examples of health and safety services of a governmental nature: low income housing, alcohol and drug treatment centers, residences and other facilities offering programs for battered spouses, animal control facilities directly related to public health and safety, facilities offering food programs for the needy, daycare centers for children, and daycare centers for individuals with access and functional needs. DAP 9521.3, PNP Eligibility at VII.B.4; PAPPG, pp. 14-15.

a. Open to the General Public⁵⁰

Irrigation facilities⁵¹ and facilities providing essential services of a governmental nature⁵² must be open to the public.⁵³ FEMA policy provides that a PNP facility is likely to meet this requirement if it is open to the general public and if membership fees, if any, are nominal and can be waived due to inability to pay.⁵⁴

The policy also lists factors that would likely lead to a determination that a facility does not serve the general public, such as a membership fee that would exclude access by a significant portion of the community or that clearly exceeds what would be considered an appropriate fee based on reasonable assumed use of the facility. Other examples include membership limited to a certain number of people; membership limited

⁵⁰ Until 2002-03, FEMA interpreted 206.221(e), which provides that “Private nonprofit facility means any private nonprofit educational, utility, emergency, medical, or custodial care facility, including a facility for the aged or disabled, and other facility providing essential governmental type services *to the general public*, and such facilities on Indian reservations...” (emphasis added) as requiring *all* PNP facilities to be open to the general public irrespective of the type of facility. This regulatory definition deviated only slightly from the then statutory language found in 42 U.S.C. 5122(9) prior to the addition of irrigation facilities and the PKEMRA changes renumbering the definition and establishing two subcategories of PNP in the Disaster Mitigation Act of 2000 (Oct 30, 2000) (DMA2K), Public Law 106-390. FEMA changed its interpretation after the 2nd Appeal (2003) and an Office of Legal Counsel (OLC) Opinion, *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy* (Sept. 25, 2002), were issued for the Seattle Hebrew Academy, a private PNP school open only to Jewish students, that was damaged in the 2001 Washington Nisqually Earthquake (FEMA-1361-DR-WA). The school had been initially found ineligible for failure to be open to the general public. The second appeal decision and the OLC opinion determined that Stafford Act and its implementing regulations did not require that all eligible PNP facilities be open to the general public; thus, the PNP school was determined eligible in the 2nd appeal decision. The OLC opinion also determined that funding the school would not be in violation of the Establishment clause of the U.S. Constitution regarding religion.

⁵¹ 44 C.F.R. § 206.221(e)(3). Irrigation facilities for agricultural purposes are specifically excluded from the regulatory definition. There also appears to be some overlap with the definition of utility, i.e., water supply, under e(2).

⁵² See Stafford Act § 102(11)(B), 42 U.S.C. § 5122(11)(B). FEMA regulation further specifies that “[a]ll such facilities must be open to the general public.” 44 C.F.R. § 206.221(e)(7).

⁵³ The regulatory definition for emergency facilities also includes that emergency services be provided to the general public; however, FEMA does not impose this requirement in either policy or practice. 44 C.F.R. § 206.221(e)(4).

⁵⁴ DAP 9521.3, *PNP Facility Eligibility*, at VII.C.1; PAPP, pp. 11-12.

to a defined group of individuals who have a financial interest in the facility (e.g., a condo association); or membership discriminating against discrete classes of people or limited to a geographic area more restrictive than the community from which the facility could normally be expected to draw users.⁵⁵

Facilities owned or operated by homeowners' associations can present challenges. Such associations are generally formed as non-profit corporations to provide services, including managing, maintaining, and governing the use of property within a housing subdivision. Membership is restricted to property owners, and access to facilities may be restricted to members and their guests.

Eligibility of facilities owned or operated by a homeowners' association depends on the type of facility and whether it is required to be open to the general public. Museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, irrigation facilities, emergency facilities, and facilities that provide health and safety services of a governmental nature must be open to the general public to be eligible for PA.⁵⁶ Accordingly, an association would not be eligible for assistance for those types of facilities if access is restricted to association members.

However, an association may be eligible for assistance for its eligible educational, medical, custodial care, and utility facilities even if use of those facilities is restricted to association members.⁵⁷ Debris removal from roadways owned by an association may be eligible for emergency access purposes if performed under the auspices of an eligible state or local government;⁵⁸ however, permanent repair of private roads owned or operated by an association would not be eligible because roads are not eligible PNP facilities.⁵⁹

⁵⁵ DAP 9521.3, *PNP Facility*, at VII.C.2; PAPP, pp. 11-12

⁵⁶ 44 C.F.R. § 206.221 (e)(3), (4) and (7).

⁵⁷ 44 C.F.R. § 206.221(e)(1), (2), (5) and (6). *See also* PAPP, Appendix B, *Private Nonprofit Facility Eligibility Examples*.

⁵⁸ Stafford Act §§ 403(a)(3) and 502(a), 42 U.S.C. §§ 5170b(a)(3), and 5191(a), 44 C.F.R. § 206.224.

⁵⁹ *Id.* § 102(11), 42 U.S.C. § 5122(11), 44 C.F.R. § 206.221(e). PAPP, p. 18 *Small Business Administration Loan Requirement*.

PNPs that own or operate a medical or custodial care facility are eligible for direct reimbursement of costs related to patient evacuation⁶⁰.

b. Requirement for Non-Critical PNPs to First Apply for SBA Disaster Loan for Permanent Work

The Stafford Act provisions for PA permanent work require that PNP facilities not deemed to provide critical services first apply to the Small Business Administration (SBA) for a disaster loan.⁶¹ Critical services include “power, water (including water provided by an irrigation organization or facility), sewer services, wastewater treatment, communications, education, and emergency medical care.”⁶²

A PNP that provides critical services is not required to first apply for an SBA loan but may directly apply to FEMA for assistance with eligible permanent work. A PNP that does not meet the critical services definition may still apply for eligible emergency work (PA Categories A and B) but must first apply to SBA for a disaster loan for its permanent work (PA Categories C-G).

FEMA recommends that PNPs apply for the SBA loan for permanent work at the same time it submits its RPA to meet both programs’ filing deadlines. If the PNP organization does not receive a loan from SBA, or if it receives a loan in an amount less than the disaster damage, it may then be eligible for PA funding.⁶³

c. PNP Mixed Use Facilities

PNP organizations offer so many types of services that eligibility issues can be multi-tiered and complex. Funding will depend on whether the facility is an eligible type and whether the PNP has legal responsibility for the

⁶⁰ PAPPG, Chapter 2, VI.B.10, *Evacuation and Sheltering*, p.66.

⁶¹ *Id.* § 406(a)(3)(A)(ii); 42 U.S.C. § 5172(a)(3)(A)(ii); 44 C.F.R. § 206.226(c)(1); PAPPG, p. 18 *Small Business Administration Loan Requirement*.

⁶² DAP 9521.3, *PNP Facility*, at VII.F.2 for pre-2016 declarations; PAPPG, pp. 17-19.

⁶³ DAP 9521.3, *PNP Facility*, at VII.B and E for declarations issued before 2016; PAPPG, 12- 15.

facility's repair.⁶⁴ PNPs may share facilities with for-profit or other entities that are not eligible for PA, and a facility may be partially used for eligible services and partially used for ineligible services.

Overall facility eligibility is based on the primary use of that facility. A facility must have over 50% of its space dedicated to eligible uses for the facility to be eligible as a whole. Common spaces are not included in the calculation. When a space is used for purposes both eligible and ineligible for PA funding, the primary use of that space is determined by looking at the time used for each activity. FEMA considers damage to the entire facility, however, and assistance is provided in proportion to the space dedicated to eligible services.⁶⁵

Example of Eligible and Ineligible Use

Flooding damaged several buildings at a PNP museum, which consisted of a collection of antique farm equipment displayed on the grounds. The grounds also included six cabins, which were occupied by staff members as living quarters. FEMA determined that these cabins were ineligible because they were used primarily as residences and not to preserve or exhibit historic objects of the museum.⁶⁶

Facilities with mixed uses must be primarily used for eligible activities to qualify for FEMA assistance. "Primarily used" means that over 50% of the facility space is used for eligible activities. Where the same space is used for both eligible and ineligible purposes, eligibility is determined by the amount of time the facility is used for eligible versus ineligible services.⁶⁷

FEMA will evaluate damage to the entire facility but will prorate assistance based on the percentage of space or time used for eligible purposes.

⁶⁴ DAP 9521.3, *PNP Facility*, at VII.D; PAPP, pp. 12-15 and 167-171.

⁶⁵ DAP 9521.3, *PNP Facility*, at VII.D; PAPP, pp. 12-16 and 167-171.

⁶⁶ PA Digest, p. 100; DAP 9521.3, *PNP Facility*, at VII.D; PAPP, pp. 12-15 and 65-69. Appeal Analysis, Good Earth Association,

https://www.fema.gov/appeal/283519?appeal_page=analysis

⁶⁷ PA Guide, pp.19-20. PAPP, pp. 12-15 and 167-171.

Contents within an ineligible space will not be eligible for any assistance.⁶⁸

Example of Eligible Museum

A botanical center whose mission is to carry out scientific and educational services in the field of botany was initially determined to not meet the eligibility criteria of a PNP educational facility. However, FEMA determined on second appeal that the facility's primary use was to preserve and exhibit its collection to the general public. Thus, the botanical center met the definition of an eligible PNP museum.⁶⁹

d. Common Types of Non-Profit Mixed Use Facilities

i) Community Centers

A community center as an “essential governmental service facility” must be open to the general public.⁷⁰ To be considered open to the general public, a facility must be available to the public on a non-discriminatory basis, and any access fees should be reasonable. A facility with a high initiation or usage fee, or high annual dues, would not be eligible.⁷¹

Community center facilities, including attached structures and grounds, that are established and primarily used as a gathering place for social, educational enrichment, and community service activities are eligible for assistance.⁷²

Eligible activities include:

- Social – such as board meetings, senior citizen meetings, or community picnics;

⁶⁸ PA Guide, pp.19-20. PAPPG, pp. 11-14 and 163-66.

⁶⁹ Second Appeal Brief; FEMA-1306-DR-FL, Montgomery Botanical Center (2001), <http://www.fema.gov/appeal/218795>.

⁷⁰ 44 C.F.R. § 206.221(e)(7); DAP 9521.1, *Community Center*, at VII.A.2. PAPPG, pp. 12-15,

⁷¹ DAP 9521.1, *Community Center*, at VII.A.1; PAPPG, pp. 12-15.

⁷² PA Digest, p. 21; DAP 9521.1, *Community Center*, at VII.B.4; PAPPG, pp. 12-15.

- Educational – such as seminars on personal finance, stamp collecting, or gardening;
- Community service – such as organizing clean-up projects, local government meetings, rehabilitation programs, or blood drives.⁷³

In determining eligibility, FEMA looks to the primary purpose of the facility by reviewing the organization's charter, bylaws, amendments, and other documented evidence of use. A community center need not be used exclusively for community activities; however, the majority use should be for eligible functions.⁷⁴ Those facilities not eligible as community centers for public assistance include those established or primarily used for political, athletic, or recreational activities; vocational or academic training; conferences; or similar activities.⁷⁵

Facilities primarily established or used for political or similar activities are also not eligible community centers. This includes partisan political activities; advocacy and lobbyist group activities; and activities of any other groups that primarily serve to promote a political campaign, candidate, agenda, philosophy, or cause. Finally, facilities primarily established or used for athletic, recreational, vocational training, conferences, or similar activities are not eligible community centers.⁷⁶

⁷³ DAP 9521.1, *Community Center*, at VII.B.2. For examples and analyses of community center issues, see the Appendix to DAP 9521.1; PAPP, pp. 12-15 and 167-171. .

⁷⁴ DAP 9521.1, DAP 9521.1, *Community Center*, at VII.C.

⁷⁵ *Community Center*, at VII.C; PAPP, pp. 12-15, 167-171; recreational, vocational or academic training, and conference facilities were specifically listed as examples of ineligible facilities in the *Supplementary Information* section of the final rule revising 44 C.F.R. § 206.221(e). See 58 Fed. Reg. 47,992 (1993).

⁷⁶ DAP 9521.1, *Community Center*, at VII.C; PAPP, pp. 11-14, 163-66; recreational, vocational or academic training, and conference facilities were specifically listed as examples of ineligible facilities in the *Supplementary Information* section of the final rule revising 44 C.F.R. § 206.221(e). See 58 Fed. Reg. 47,992 (1993).

ii) Religious Schools

A school owned by a religious organization may be eligible for assistance if the school is an eligible education institution.⁷⁷ It may restrict enrollment to members of its religious faith.⁷⁸ The damaged buildings must be primarily used for secular education, and the religious classes in the curriculum must not be sufficient to change the primary purpose of secular education.⁷⁹ FEMA assistance will be based on the proportion of the total time that such spaces are used for eligible purposes.⁸⁰

iii) Charter Schools

One section of the Stafford Act defines PNPs to include any PNP educational facility,⁸¹ while, another section⁸² defines a local government to include, among other things, a school district. FEMA now recognizes a charter school, as defined in the Elementary and Secondary Education Act of 1965,⁸³ as a local government applicant and not as a PNP for purposes of public assistance, including permanent repair, restoration, and replacement. A charter school applicant must provide documentation to FEMA establishing that, pursuant to state law, an authorized chartering agency has given its approval to operate a charter school.⁸⁴

e. Mixed Ownership or Occupancy

An eligible PNP organization may own a facility and use a portion of that facility for eligible services but lease the remaining portion for other purposes not considered eligible under the PA program. In other situations, a facility may be partially owned by an eligible PNP and an ineligible organization.

⁷⁷ 44 C.F.R. § 206.221(e)(1).

⁷⁸ DAP 9521.3, *PNP Eligibility*, Appendix; PAPP, pp. 12-15, 167-171

⁷⁹ 44 CFR 206.221(e)(1).

⁸⁰ DAP 9521.3, *PNP Eligibility*, Appendix; PAPP, pp. 11-14, 163-66.

⁸¹ Stafford Act § 102(11)(A), 42 U.S.C. § 5122(11)(A).

⁸² *Id.* § 102(8)(A), 42 U.S.C. § 5122(8)(A).

⁸³ PAPP, Table 5. PNP RPA Documentation Requirements, p. 132. DAP 9521.5, *Eligibility of Charter Schools* (2006), was rescinded on January 23, 2013.

⁸⁴ DAP 9521.3, *PNP Facility*, at VII.D. PAPP, pp. 15-19.

Reimbursement in either case depends upon the percentage of ownership, amount of space occupied by the applicant, and amount of space dedicated to eligible services. The PNP must own more than 50% of the facility, in addition to the requirement that more than 50% of the space be dedicated to eligible services. Again, funding will be based on the percentage of ownership by the PNP, as well as the percentage of space dedicated to eligible services.⁸⁵ A guideline for determining the eligible costs for such facilities is set out in FEMA's policy.⁸⁶

3. Federally Owned Facilities

Federal agencies are not eligible applicants under the PA program.⁸⁷ Under the Stafford Act, the President may authorize any federal agency to repair, reconstruct, restore, or replace any facility owned by the United States that is damaged or destroyed by a major disaster if he or she determines that the action "...is of such importance and urgency that it cannot reasonably be deferred..." pending the enactment of an appropriation.⁸⁸

The President did not delegate this authority in his first executive order delegation to the then FEMA Director,⁸⁹ nor did the President do so under the various subsequent executive orders to the FEMA Administrator or to the Secretary of Homeland Security.⁹⁰ This authority resides with the President alone. The practical effect of this provision is that when a federally owned facility is damaged in a major disaster, the agency need not wait for an appropriation from Congress. It can instead proceed with

⁸⁵ DAP 9521.3, *PNP Facility*, at VII.D. PAPPG, pp. 14-18.

⁸⁶ *Id.*

⁸⁷ See 44 C.F.R. § 206.222.

⁸⁸ Stafford Act § 405(a), 42 U.S.C. § 5171(a); 44 C.F.R. § 206.226(a)(1).

⁸⁹ Exec. Order 12148, *Federal Emergency Management* (1979), 44 Fed. Reg. 43,239 (1979), 3 C.F.R. 1979 Comp., p. 412.

⁹⁰ Exec. Order 12673, *Delegation of Disaster Relief and Emergency Assistance Functions* (Mar. 23, 1989), 54 Fed. Reg. 12571 (1989), 3 C.F.R. 1989 Comp., p. 309, delegated all functions vested in the President under the Stafford Act to the Director of FEMA except those functions in Sections 401 and 501 (declaration of major disasters and emergencies); Section 405 (repair, reconstruction, restoration, or replacement of federal facilities); and Section 412 (food coupons and distribution). Exec. Order No. 13,286, 68 Fed. Reg. 10619 (2003), 3 C.F.R. (2004) Comp. at 166, subsequently amended Exec. Order 12673, to reflect creation of the Department of Homeland Security and the transfer of certain functions to the Secretary of DHS.

repair and restoration if the President determines the urgency of the situation requires immediate action, and the agency may use funds appropriated to the agency for another purpose to effectuate the repairs.

Example of FEMA's Authority Regarding Federal Facility Funding

Hurricane Katrina severely damaged the federal courthouse in New Orleans. FEMA had no authority to provide assistance, and the President did not authorize restoration work under section 405 of the Stafford Act in the absence of a congressional appropriation. Stafford Act § 405, 42 U.S.C. § 5171(a); 44 C.F.R. § 206.226(a)(1). Congress ultimately appropriated funds to the U.S. Courts for the courthouse repair.

Although federal agencies are not eligible for FEMA PA as discussed previously, there are circumstances where a federally owned facility that is operated and maintained by a local government may be eligible for assistance because the local government has the legal and financial responsibility for the operation, maintenance, and repairs for the facility.

A review of the operations and maintenance agreement executed between the parties would be necessary to determine who has the legal responsibility to repair a damaged facility. Examples include roads constructed by the U.S. Forest Service and the Bureau of Indian Affairs, and reservoirs and water delivery systems constructed by the U.S. Bureau of Reclamation.⁹¹

4. Active Use at Time of Disaster

To be eligible for assistance, a facility must be in active use at the time of the disaster.⁹² This requirement also applies to a facility that is partially occupied and partially inactive. Inactive portions would not be eligible, although certain exceptions may apply.⁹³ When the ineligible repairs would benefit a non-active portion, the assistance will be prorated. For

⁹¹ PA Guide, p. 23; *See also* discussion in Section II(C)(3), *Work Eligibility, Legal Responsibility*, in this chapter (p. 5-25); PAPP, p. 79.

⁹² *See* 44 C.F.R. § 206.226(k)(2).

⁹³ DAP 9521.3, *PNP Facility*, at VII.D.1 and 2; PAPP, pp. 19.

PNP facilities, over 50% of the facility must be in active use for an eligible purpose at the time of the disaster.⁹⁴

FEMA will consider exceptions upon evidence that the facility was temporarily inoperative for repairs or remodeling, was unoccupied for a short time between tenants, or was shown to be in active use in an approved budget; or it can be demonstrated that there was intent to begin use within a reasonable amount of time. In any case, the facility must have been eligible when it was in use.

5. Alternate Use⁹⁵

If, at the time of the disaster, an applicant is using a facility for purposes other than the use for which it was originally designed, FEMA limits the eligible cost of work to restore the facility to the lesser of (1) the cost of restoring the facility to its original design and capacity, or (2) the cost of restoring the facility to the immediate pre-disaster alternate use.⁹⁶

Another consideration is whether the facility is eligible based on pre-disaster use. PA funding is for the purpose of repairing, restoring, and replacing facilities that serve a public purpose.

In the case of a PNP, the primary purpose of the facility is relevant to an eligibility determination. For example, a church might be used as a homeless shelter, while its primary purpose remained a church. It would be ineligible based on the primary or majority use. Facilities with mixed activities (eligible and non-eligible) may be eligible if the facility has over 50% of its space dedicated to eligible uses.⁹⁷

C. Work Eligibility

For all PA response or recovery, there must be an eligible item of work or project. As stated, eligible work⁹⁸ must be (1) required as a

⁹⁴ DAP 9521.3, *PNP Facility*, at VII.D.1 and 2; PAPPG, pp. 18.

⁹⁵ This term is not to be confused with “alternative project” (a form of permanent repair) or with the Alternative Procedures Pilot Programs discussed later in this chapter.

⁹⁶ See 44 C.F.R. § 206.226(k)(1).

⁹⁷ DAP 9521.3, *PNP Facility*, at VII.D.1; PAPPG, pp. 17-18.

⁹⁸ Stafford Act §§ 401(a) and 501(a), 42 U.S.C. §§ 5170(a) and 5191 (a); 44 C.F.R. § 206.223(a)(1) – (3).

direct result of the disaster; (2) located within the designated disaster area (except for sheltering and evacuation activities); and (3) the legal responsibility of an eligible applicant at the time of the disaster.⁹⁹

1. Direct Result of the Disaster

Those provisions of the Stafford Act that have been incorporated as the authority for the PA program require that the needed assistance arise from the declared event. For example, emergency work authorized by section 403 of the Stafford Act must “result from the major disaster,”¹⁰⁰ and permanent work authorized by Section 406 of the Stafford Act must be for a facility “damaged or destroyed by a major disaster.”¹⁰¹

The President’s declaration establishes an incident period, which “is the time interval during which the disaster-causing incident occurs.”¹⁰² Stafford Act assistance is provided only for work required as a result of the disaster. This means the damage or hardship to be alleviated occurred during or after the incident period. However, reasonable costs incurred for emergency protective measures in anticipation of the incident may also be eligible.¹⁰³

This may include activities such as sandbagging and constructing temporary levees to protect the community from flooding.¹⁰⁴ Similarly, emergency protective measures to alleviate or lessen threats may be performed after the incident period closes because the need for this work arises from the declared event.

⁹⁹ 44 C.F.R. § 206.223(a)(1) – (3).

¹⁰⁰ Stafford Act § 403(a), 42 U.S.C. § 5170b.

¹⁰¹ *Id.* § 406(a), 42 U.S.C. § 5172(a).

¹⁰² 44 C.F.R. § 206.32(f).

¹⁰³ PAPP, pp. 63, 161, and 203-206. For pre-2016 declarations, RP 9524.3, *Rehabilitation Assistance for Levees and other Flood Control Works* (2011)) [hereinafter RP 9524.3, *Levees*], for pre-2016 declarations, <https://www.fema.gov/publications-archive>;

¹⁰⁴ RP 9524.3, *Rehabilitation Assistance for Levees and other Flood Control Works* (2011), [hereinafter RP 9524.3, *Levees*], for pre-2016 declarations, <https://www.fema.gov/public-assistance-archived-policies>; PAPP, pp. 61, 153, and 195-198.

For instance, the cost of a temporary berm to prevent a water saturated hillside from encroaching into buildings may be eligible even though constructed after the incident period closed.¹⁰⁵ The incident period denotes only the time frame of the incident which resulted in the emergency or disaster declaration and not the period of performance.¹⁰⁶

2. Designated Area

As discussed in Chapter 3, *Declarations*, an emergency or major disaster declaration designates the counties, cities, and/or tribal areas that are eligible for assistance. Eligible work must be located within these geographic boundaries, except for emergency evacuation and sheltering costs incurred within non-designated areas or by Host States.¹⁰⁷

An eligible applicant located within the designated area therefore cannot receive assistance for its damaged eligible facilities located outside the designated area, even if such damage can be related to the same disaster event.¹⁰⁸ Such circumstances are relatively rare. More common is where a community may be split between two political jurisdictions, with one declared and the other not, creating frustration for those in the undeclared portion of the community.

3. Legal Responsibility

An eligible applicant must be legally responsible for the item of work or project for it to be eligible for disaster assistance funding.¹⁰⁹ The legal responsibility to repair a facility usually resides with the owner of the facility, unless the owner has transferred that responsibility to another party by lease or other legal instrument.

¹⁰⁵ Pre-disaster damage or deferred maintenance (i.e., neglect) of a building would not be eligible for PA funding, as this work did not arise from the event that resulted in the declaration.

¹⁰⁶ Period of performance is outlined in 44 C.F.R. § 206.204.

¹⁰⁷ See 44 C.F.R. § 206.223(a)(2); PA Guide, p. 30 and PAPP, pp. 20-21.

¹⁰⁸ 44 C.F.R. § 206.223(a)(3); PAPP, pp. 21-22.

¹⁰⁹ 44 C.F.R. § 206.223(a)(3); PAPP, pp. 20-21.

Legal responsibility for government-owned facilities is usually straightforward. Leased facilities, however, require more careful examination. A lessee's repair responsibility, if any, for disaster-related damage to a leased facility will be provided for in the facility lease agreement.

A lessee's obligations for general maintenance and repair (usually stemming from the tenant's operation and use of the leased premises and ordinary wear and tear), standing alone, do not directly address the issue of extraordinary repairs resulting from disaster-related damage and cannot be construed to obligate a tenant to make extraordinary repairs required to address partial or total destruction resulting from an "act of God."

Such a clause, however, coupled with an all-perils casualty insurance requirement and nominal rental obligation, for example, may provide sufficient support for a determination that lessee is legally responsible for repairs. A lessee may be responsible for its improvements only or the lessor may be responsible for common area damage.

A building may be the legal responsibility of an eligible applicant, but some or all of the contents may be the legal responsibility of an ineligible applicant. For example, the replacement of leased hospital equipment may be the legal responsibility of a contractor to the hospital. In such instances, replacement of the equipment is not eligible under the PA program.

In the event of damage to a facility under construction, legal responsibility for the damage must be examined carefully as FEMA must determine which entity—eligible applicant or contractor—is legally responsible for repairs.¹¹⁰

Repair work is eligible if (a) the construction contract places responsibility to repair damage on the eligible applicant during construction, or (b) the eligible applicant had accepted the construction work as complete prior to

¹¹⁰ 44 C.F.R. § 206.223(a)(3).

the disaster.¹¹¹ State law may place requirements on scope of contractor liability for such damage in public contracts to manage contract costs.¹¹²

An eligible PNP applicant must be legally responsible for disaster-related repairs whether it owns a facility or leases it. An eligible PNP applicant that leases an asset of an ineligible applicant and uses it for eligible services may be eligible for PA funding. The lease must pre-date the disaster and must clearly specify that the eligible applicant is responsible for losses and major damage to the facility, not just maintenance or minor repairs.¹¹³

Lease agreements are often poorly drafted and not always clear as to whether the lessor or lessee is legally responsible for losses and major damage to the facility. Legal review in such circumstances will be necessary. In some instances, the answer as to who has legal responsibility may turn on which party in the lease is required to carry insurance, such as an all-perils or commercial property policy to protect the facility.

Example of a PNP Lease Agreement Issue

FEMA determined a medical foundation was an eligible PNP; however, the foundation did not have legal responsibility for repairs to the office building that the earthquake damaged. At the time of the disaster, a for-profit entity affiliated with the medical foundation was the facility lessee and had legal responsibility pursuant to the lease for repairs to the space. Thus, the Inspector General recommended that funds paid to the foundation for repairs to the facility be disallowed.¹¹⁴

¹¹¹ Stafford Act § 406(e)(4), 42 U.S.C. § 5172(e)(4).

¹¹² DAP 9521.3, *PNP Facility*, at VII.G; PAPP, pp. 21-22.

¹¹³ DAP 9521.3, *PNP Facility*, at VII.G; PAPP, pp. 20-21.

¹¹⁴ DHS, Office of Inspector General [hereinafter OIG] Audit Report, Number W-02-03 (2002), *Facey Medical Foundation, Mission Hills, CA*.
https://www.oig.dhs.gov/assets/audit/OIG_W-02-03.pdf.

Example of a Determination of Concurrent Legal Responsibility

When a number of towns in the Commonwealth of Massachusetts were impacted by declared disasters FEMA-4028-DR (Tropical Storm Irene) and FEMA-4051-DR (severe storm and snowstorm in 2011), several towns requested the assistance of the Massachusetts Emergency Management Agency (MEMA) for the performance of debris removal and emergency protective measures within the towns' respective jurisdictions. While towns in Massachusetts are typically eligible applicants for debris removal and emergency protective measures because they have legal responsibility for performing such work within their jurisdictions, a determination was made that under Massachusetts' Civil Defense Act, MEMA had concurrent legal responsibility to perform debris removal and emergency protective measures in any town in the commonwealth. It was therefore determined that FEMA could reimburse MEMA for its eligible contractor costs for the debris removal and emergency protective measures, as long as the towns in which the work was performed did not also seek reimbursement for the same work.¹¹⁵

¹¹⁵ Stafford Act § 312, 51 U.S.C. § 5155.

Example of a Legal Responsibility Determination for a Rail Line Owned by a Local Government but Operated by Private Company

Private railroad companies abandoned unprofitable segments of rail line in rural areas after interstate highways were built, resulting in economic hardship to affected communities. In response to this situation, the Tennessee legislature passed a Railroad Authority Act to provide for the continuation of rail services and routes in various parts of the state. *See, e.g., Tenn. Code Ann. §§ 7-56-201 to 7-56-213 (2011)*. The Act enabled cities and counties along an abandoned railroad line to form a public authority to acquire, construct, operate, maintain, and dispose of railroad facilities, properties, and equipment, and to continue railroad service in the region as needed and feasible. The railroad authority had power to contract for maintenance and rehabilitation of the line, to issue bonds, and to contract with the private railroad company to operate the line. A state diesel fuel tax and state grants to the railroad authority funded these activities. Severe flooding declared in FEMA-1909-DR-TN caused serious damage to the rail lines. The public railroad authority applied to FEMA for PA funding to repair the damage to the rail facilities. The railroad authority was an eligible PA applicant, but FEMA had to determine whether the public authority was legally responsible to maintain and repair the facilities. The public authority's yearly audited financial statements and the agreements between the authority and the railroad company clearly established that the public authority, not the railroad company, was legally responsible for operating, maintaining, and repairing the track.

Legal Responsibility Determination Example for Leased Rail Lines Owned by a State

The State of South Dakota owned several railroad lines that were flood damaged in 2014. The state leased the railroad lines to a rail authority to operate the railroad. The rail authority later entered into a sublease with a private railroad operator. The lease agreements provided respectively that the lessee (the rail authority and the private operator) were explicitly responsible for the railroad's general maintenance and repairs. The agreements further provided that the state and the rail authority were not responsible for weather-related damage pursuant to a *force majeure* clause in the contract.

Based on the terms of the leases, FEMA determined the state retained legal responsibility for the disaster-related damage repairs because neither agreement contractually bound their respective lessees or expressly transferred legal responsibility of the disaster-related repairs to the lessees, the rail authority, or the private corporation. Absent an express transfer of legal responsibility in the lease agreement, the state, as owner of the facility, maintains its inherently legal responsibility for disaster-related damage repairs.

D. Eligible Costs

Eligible applicants with eligible work will seek FEMA grant funding for associated costs. In determining the eligibility of these costs, FEMA, like all federal agencies, follows the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, located at 2 C.F.R. Part 200.¹¹⁶ Please refer to Part Two of this chapter *Public Assistance and Grants Management Process*, for further discussion regarding these requirements.¹¹⁷

¹¹⁶ On December 26, 2014, DHS and FEMA adopted, in its entirety, the government-wide new *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance); 79 F.R.75867 (Dec. 19, 2014).

¹¹⁷ 2 C.F.R. § 200.403. *See also* PAPPG, p. 22.

Allowable costs must be:

- Reasonable and necessary to accomplish the work;¹¹⁸
- In compliance with federal, state, and local requirements for competitive procurement;¹¹⁹ and
- Reduced by applicable credits, such as anticipated insurance proceeds and salvage values.¹²⁰
- Establishing whether a cost is reasonable occurs through a competitive procurement process, as well as through:
- The use of historical documentation for similar work;
- Average costs for similar work in the area;
- Published unit costs from national cost estimating databases; and
- FEMA cost codes, equipment rates, and engineering and design services curves.

Labor, materials, equipment, and contracts awarded for the performance of eligible work must all meet the test of reasonableness; FEMA will make the final determination as to the reasonableness of cost.¹²¹

¹¹⁸ 2 C.F.R. § 200.403. *See also* PAPPG, p. 21.

¹¹⁹ § 200.406. The Stafford Act also requires FEMA to assure there is no duplication of benefit with other available assistance, including insurance. Stafford Act § 312, 42 U.S.C. § 5155. *See also* PA Guide, p. 40; PAPPG, p. 22-43.

¹²⁰ PA Guide, p. 40; PAPPG, p. 21.

¹²¹ 44 C.F.R. § 206.228(a)(2)(iii). Per FEMA Recovery Policy 9525.7, *Labor Costs-Emergency Work* (2015) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/128488>; PAPPG, pp. 23-28. SRIA amended Stafford Act Section 403 to allow for reimbursement of straight-time pay and benefits for state, tribal, and local government employees (does not include PNPs) conducting emergency protective measures under major disasters or emergencies that they do not typically perform as part of their regular job duties or that are usually performed by contractors. However, FEMA has not yet promulgated regulations to implement this provision.

1. Labor, Materials, and Equipment

Labor, materials and equipment may add up to a significant portion of eligible costs. Note that the applicant should identify disaster-related damage.

a. Force Account Labor Costs

Force account labor is labor that an applicant's employees perform rather than a contractor and may be claimed at an hourly rate when those employees perform eligible work. Labor rates include actual wages paid plus fringe benefits. Different eligibility criteria apply depending on employment status (e.g., temporary versus permanent) and type of work performed.

Generally, FEMA does not pay for straight-time (regular-time) force account labor costs of an applicant's employees performing work on debris removal (Category A) or emergency protective measures (Category B) under Sections 403 and 407 of the Stafford Act.¹²²

There is an exception for straight-time salaries and benefits of permanently employed personnel for work associated with eligible evacuation and sheltering activity.¹²³ There is also an exception for debris and wreckage removal undertaken in relation to 2012 Hurricane Sandy related federal declarations.¹²⁴ In addition, base or straight-time pay for

¹²² 44 C.F.R. § 206.228(a)(2)(iii). Per FEMA Recovery Policy 9525.7, *Labor Costs-Emergency Work* (2015) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/112581>; PAPP, pp. 22-27. SRIA amended Stafford Act Section 403 to allow for reimbursement of straight-time pay and benefits for state, tribal, and local government employees (does not include PNPs) conducting emergency protective measures under major disasters or emergencies that they do not typically perform as part of their regular job duties or that are usually performed by contractors. However, FEMA has not yet promulgated regulations to implement this provision.

¹²³ 44 C.F.R. § 206.228(a)(2)(ii), (iii). See SRIA, § 1108(b) Pub. L. 113-2 (2013), See also SRIA, § 1108(b) Pub. L. 113-2 (2013), *codified at* Stafford Act § 403(d)(1)(A), 42 U.S.C. § 5170b(d)(1)(A); <https://www.fema.gov/media-library/assets/documents/128488>

¹²⁴ SRIA, § 1102(2) Pub. L. 113-2 (2013), *codified at* Stafford Act § 428(e)(2)(D), 42 U.S.C. § 5170b(d)(1)(A). See PAPP, pp.46-47.

debris removal activity under the Stafford Act (Section 428 PA Program Alternative Procedures) is eligible for reimbursement.¹²⁵

In contrast to emergency work, the labor costs (both straight time and overtime) of permanent employees who perform permanent work on eligible facilities are reimbursable.¹²⁶ The PA Policy and Program Guide discusses the rules applicable to reassigned employees, backfill employees, temporary employees, force account mechanics, foremen and supervisors, contact supervisions, and National Guard and prison labor.¹²⁷

b. Davis-Bacon Act

The Davis-Bacon Act¹²⁸ requires every construction and repair contract in excess of \$2,000 to which the federal government “is a party” to pay all laborers and mechanics not less than the locally “prevailing wage,” as defined by the Department of Labor.¹²⁹ FEMA does not award contracts for restoration of disaster-damaged facilities. Such contracts are executed by the eligible PA applicant, and the Davis-Bacon Act does not apply to state and local contracts to which the federal government is not a party, including those for work completed using PA grant funds under the Stafford Act.¹³⁰ However, the Davis-Bacon Act does apply to construction and repair contracts awarded by other federal agencies and funded by FEMA as emergency work.

For example, if the U.S. Army Corps of Engineers (USACE) is operating under a mission assignment from FEMA and contracts directly for

¹²⁵ SRIA, § 1102(2) Pub. L. 113-2 (2013), codified at Stafford Act § 428(e)(2)(D), 42 U.S.C. § 5170b(d)(1)(A). See PAPPG, pp. 45-46.

¹²⁶ PAPPG, pp. 25-27 and 46-48

¹²⁷ PAPPG, pp. 24-25 and 45-47.

¹²⁸ Davis-Bacon Act, 40 U.S.C. §§ 3141-3144, 3146, and 3147. The Davis-Bacon Act of Mar. 3, 1931, 40 U.S.C. § 276a-5, repealed and reenacted by Pub. L. No. 107-217 (2002), codified at 40 U.S.C. §§ 3141-3144, 3146, and 3147. Accordingly, the Davis-Bacon citations in the Stafford Act and FEMA’s regulation have been superseded. See also 44 C.F.R. § 13.36(i)(5)(2014); 2 C.F.R. Part 200, Appendix II (D).

¹²⁹ 29 C.F.R. §§ 1.5 and 1.6; U.S. Department of Labor, Davis-Bacon Wage Determination Reference Material. See <http://74.218.115.26/wp-content/uploads/2010/07/4B-6.-Davis-Bacon-Reference-Material.pdf>.

¹³⁰ PA Guide, p. 44; PA Digest, p. 30; PAPPG, pp. 15-19

construction of a temporary building, the Davis-Bacon Act would apply because the USACE is a federal agency and party to the contract.

In addition, some state and local governments have state or local laws requiring a prevailing wage rate, and they incorporate these requirements as part of their normal procurement practice for all of their contracts. In such circumstances, these rates are eligible under the PA program.¹³¹

Further, the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* require recipient and subrecipient contracts to contain a provision requiring compliance with the Davis-Bacon Act when required by the grant program legislation.¹³² Only Stafford Act preparedness grants require a recipient to comply with Davis-Bacon provisions.¹³³ There is no other program legislation applicable to Stafford Act grants requiring compliance with Davis-Bacon.

Suspension of Davis-Bacon Requirements

The Davis-Bacon Act provides that “[t]he President may suspend the provisions of this subchapter during a national emergency.”¹³⁴ On September 8, 2005, President Bush issued a proclamation suspending application of the Act to contracts to be performed in the counties included in the Hurricane Katrina disaster area.¹³⁵ The application of the Act was reinstated effective November 8, 2005.¹³⁶

¹³¹ PA Guide, p. 44; PA Digest, p. 30; PAPPG, pp. 14-18.

¹³² 44 C.F.R. § 13.36(i)(5) (2014); 2 C.F.R. Part 200, Appendix II (D).

¹³³ Stafford Act § 611(j)(9), 42 U.S.C. § 5196(j)(9).

¹³⁴ Davis-Bacon Act, 40 U.S.C. § 3147.

¹³⁵ Presidential Proclamation 7924 of September 7, 2005, 70 Fed. Reg. 54,227 (September 13, 2005), <https://www.federalregister.gov/documents/2005/09/13/05-18238/to-suspend-subchapter-iv-of-chapter-31-of-title-40-united-states-code-within-a-limited-geographic>.

¹³⁶ 2 C.F.R. § 200.453; PA Guide, pp. 48-49; PAPPG, pp. 29-30.

c. Materials and Equipment

FEMA may reimburse PA applicants for the cost of supplies or material¹³⁷ used to perform eligible work and for ownership and operating costs for applicant owned equipment¹³⁸ under one of following:

- FEMA published equipment rates;¹³⁹
- State rates (rates developed using state guidelines); or
- Local rates.¹⁴⁰

2. Mutual Aid Agreements

a. Introduction

The Emergency Management Assistance Compact (EMAC) is an interstate mechanism by which states exchange resources and assistance in the event of a Presidential or gubernatorial declared emergency or disaster. EMAC establishes procedures so that a disaster-impacted state can request and receive assistance from other member states quickly and efficiently. The cost to the receiving state of such assistance may then be eligible for FEMA reimbursement.

EMAC resolves two key issues at the outset: liability and reimbursement.¹⁴¹ To be eligible for FEMA reimbursement, costs must be consistent with FEMA PA policies, regulations, and procedures.¹⁴² The receiving state is responsible for requesting FEMA assistance.

¹³⁷ 2 C.F.R. § 200.453; PA Guide, pp. 48-49; PAPP, pp. 28-29.

¹³⁸ 44 C.F.R. § 206.228(a)(1).

¹³⁹ See PA Guide, pp. 48-49, PAPP, pp. 26-29 *for an explanation of state and local rates.*

¹⁴⁵ See PA Guide, p. 51; PAPP, pp. 34-36. See also EMAC website at <http://www.emacweb.org/>.

¹⁴¹ See PA Guide, p. 51; PAPP, pp. 33-35. See also EMAC website at <http://www.emacweb.org/>.

¹⁴² *Id.*

The National Emergency Management Association (NEMA) administers EMAC in collaboration with FEMA. FEMA reimburses work done pursuant to mutual aid agreements to the extent the specific agreement between the states or entities meets the requirements of FEMA policy on mutual aid agreements and the work meets FEMA eligibility requirements.¹⁴³ Reimbursement for these costs is subject to the non-federal cost share for that disaster.

a. EMAC Provisions

EMAC is defined by its articles, which constitute the agreement on how emergency assistance will be exchanged among the member states. To join, each member state must agree to standard operating procedures for requesting and providing assistance, each state's legislature must enact EMAC legislation, and the governor must sign articles into law to become a member state.

The EMAC agreement consists of 13 articles. All members of EMAC, by adopting the language of the compact into law, agree to abide by and fulfill the articles of the compact.¹⁴⁴

The articles define, among other things:

- EMAC's purpose;
- Member state responsibilities;
- Limitations of the agreement;
- Liability arrangements;
- License and permit recognition across member states;
- Compensation and reimbursement; and
- Implementation requirements.

¹⁴³ *Id.*

¹⁴⁴ See <http://www.emacweb.org/index.php/learnaboutemac/emac-legislation>.

By agreeing to a standard legal process, member states are guaranteed reimbursement for all eligible assistance provided through EMAC. Under the compact, it is the responsibility of states requesting assistance to reimburse the states that provide it. The requesting states also are responsible for the actions of workers from assisting states because the requesting state assumes tort responsibility for out-of-state workers.

b. How EMAC is Coordinated with the Federal Response

EMAC is first and foremost a state-to-state compact; however, FEMA and EMAC leadership¹⁴⁵ have a long-standing agreement in which NEMA facilitates requests to deploy a team to coordinate EMAC activities with federal personnel whenever requested by FEMA Headquarters (HQ).¹⁴⁶

Upon such a request, an EMAC coordinating team may be deployed to the National Response Coordination Center (NRCC) at FEMA HQ in Washington, DC, or to a FEMA Regional Response Coordination Center (RRCC). To stand up a coordinating team at the NRCC or an RRCC, FEMA contacts the NEMA EMAC Coordinator, who coordinates with the NRCC or RRCC, NEMA Executive Director, and National Coordination Group to determine whether the event is at a level that would make deployment of state resources and such coordination under EMAC necessary and to complete a task order.

c. FEMA Reimbursement for Mutual Aid and EMAC Activities

FEMA recognizes mutual aid agreements between requesting and assisting entities and statewide mutual aid agreements where the state is responsible for administering the claims for reimbursement of assisting entities. In addition, FEMA recognizes the standard EMAC agreement as a valid form of mutual aid agreement between member states.

¹⁴⁵ The EMAC Committee of NEMA is the managing body of the compact and provides overall policy direction for EMAC operations. The committee comprises representatives from each member state, either the state director or his or her appointed representative.

¹⁴⁶ See *About EMAC*: <http://www.emacweb.org/>.

FEMA will reimburse all eligible costs under the PA program incurred by the requesting state through mutual aid agreements between applicants and other entities when these costs are for emergency work¹⁴⁷ and are:

- Requested by a requesting entity or incident commander;¹⁴⁸
- Directly related to a presidentially declared emergency or major disaster, or declared fire;
- Used in the performance of eligible work; and
- Reasonable costs.

The requesting entity should claim the eligible costs of the assisting entity, pursuant to the terms and conditions of the mutual aid agreement, and agree to disburse the federal share of funds to the assisting entity. FEMA will honor the reimbursement provisions in a pre-event agreement to the extent the provisions are consistent with its own policies.¹⁴⁹ Work associated with the recipient's responsibilities as the grant administrator, as outlined in FEMA regulations, is eligible.¹⁵⁰ Also, use of EMAC-provided assistance to perform these tasks is eligible mutual aid work.

When a pre-event agreement provides for reimbursement and for an initial period of unpaid assistance, FEMA will pay the eligible costs of assistance after such initial unpaid period.

¹⁴⁷ DAP 9523.6, *Mutual Aid Agreements for Public Assistance and Fire Management Assistance* (2007) for pre-2016 declarations, VII.A. 5 [hereinafter DAP 9523.6, *Mutual Aid*], the ranking official responsible for overseeing the management of emergency planning, logistics, and finances of the field response, at <https://www.fema.gov/media-library/assets/documents/128488>; PAPP, pp. 34-36.

¹⁴⁸ DAP 9523.6, *Mutual Aid Agreements for Public Assistance and Fire Management Assistance* (2007) for pre-2016 declarations, VII.A. 5 [hereinafter DAP 9523.6, *Mutual Aid*], the ranking official responsible for overseeing the management of emergency planning, logistics, and finances of the field response, at <https://www.fema.gov/media-library/assets/documents/128488>; PAPP, pp. 33-35.

¹⁴⁹ *Id.*

¹⁵⁰ DAP 9523.6, *Mutual Aid* (2007), VII.E; PAPP, pp. 34-35.

Examples of eligible emergency work include:

- Search and rescue, sandbagging, emergency medical care, and debris removal;
- Reasonable supervision and administration in the receiving state that is directly related to eligible emergency work;
- Costs to transport equipment and personnel by the assisting entity to the incident site;
- Costs incurred in the operation of the Incident Command System, such as operations, planning, logistics, and administration, provided such costs are directly related to the performance of eligible work on the disaster to which such resources are assigned;
- State Emergency Operations Center or Joint Field Office (JFO) assistance in the receiving state to support emergency assistance;
- Assistance at the NRCC and RRCC, if requested by FEMA (labor, per diem, and transportation);
- Dispatch operations in the receiving state;
- Donations warehousing and management (eligible only upon approval of the Assistant Administrator of the Disaster Assistance Directorate); and
- Dissemination of public information authorized under emergency work.

When a pre-event agreement specifies that no reimbursement will be provided for mutual aid assistance, FEMA will not pay for the costs of

assistance. When an agreement makes reimbursement discretionary, FEMA will not pay for the costs of assistance.¹⁵¹

FEMA will not reimburse costs incurred by entities that “self-deploy” (deploy without a request for mutual aid assistance by a requesting entity), except to the extent that those resources are subsequently used in the performance of eligible work at the request of the requesting entity or incident commander.

Permanent restoration work is not eligible for FEMA mutual aid reimbursement. Additionally, the reimbursement provisions of a mutual aid agreement must not be contingent on a declaration by the federal government.

Examples of ineligible work include:

- Permanent restoration work;
- Training, exercises, on-the-job training;
- Long-term recovery and mitigation consultation;
- Costs outside the receiving state that are associated with the operations of the EMAC system, except for state Emergency Operations Center or JFO assistance in the receiving state to support emergency assistance and assistance at the NRCC and RRCC, if requested by FEMA (labor, per diem, and transportation);
- Costs for staff performing work that is not eligible under the PA program;
- Costs of preparing to deploy or stand by;
- Dispatch operations outside the receiving state;

¹⁵¹ DAP 9523.6, *Mutual Aid* (2007), VII.C. 4; PAPPG, pp. 33-35.

- Tracking EMAC Incident Cost Accounting and Reporting System resources; and
- Situation reporting not associated with the costs of operating the Incident Command System.

d. Force Account Labor Reimbursement

When the force account labor costs of an assisting entity are presented, those costs will be treated as contract labor, with regular-time and overtime wages and certain benefits reimbursable as eligible costs, provided labor rates are reasonable. The force account labor costs of the assisting entity will not be treated as contract labor if the labor force is employed by the same local or state government as the requesting entity.

Straight-time and overtime costs are determined in accordance with the assisting entity's pre-disaster policies, which should be applied consistently in both disaster and non-disaster situations.

In circumstances where an assisting entity is also an eligible applicant in its own right, the determination of eligible and ineligible costs will depend on the capacity in which the entity is incurring costs. An applicant's straight-time wages are not eligible costs when the applicant is using its permanently employed personnel for emergency work in its own jurisdiction.

Requesting and assisting entities may not mutually deploy their labor forces to assist each other so as to circumvent these restrictions. The straight-time or regular-time wages or salaries for backfill personnel incurred by assisting entities are not eligible for reimbursement.¹⁵²

However, the overtime portion of the backfill salary is considered an additional cost of deploying personnel who perform eligible work and is eligible for reimbursement by FEMA.

¹⁵² Backfill is defined as replacement personnel for those personnel who cannot perform their regular duties because they are performing eligible emergency work in the requesting

e. Mutual Aid Agreements Must Be Reduced To Writing

Mutual aid agreements can be pre-disaster standing agreements made verbally or in writing post-disaster. When the parties do not have a pre-event written mutual aid agreement, or where a written pre-event agreement is silent on reimbursement, the requesting and assisting entities may verbally agree on the type and extent of mutual aid resources to be provided in the current event, and on the terms, conditions, and costs of such assistance.

This arrangement must be reduced to writing and executed by an authorized official of both the requesting and assisting entity. The agreement should be consistent with past practices for mutual aid between the parties. A written post-event agreement should be submitted within 30 days of the requesting entity's applicant's briefing.¹⁵³

Only requesting entities are eligible applicants for FEMA assistance. An assisting entity must obtain reimbursement from the requesting entity. States may be eligible applicants on behalf of requesting entities when statewide mutual aid agreements or compacts authorize the state to administer the costs of mutual aid assistance on behalf of local jurisdictions.

f. FEMA Required Documentation

Requesting and assisting entities must keep detailed records of the services requested and received. FEMA may review a sample of project costs and reserves the right to review all documentation if it deems necessary. All documentation must be provided to FEMA upon request.

A copy of the mutual aid agreement, whether pre- or post-event, must be included in the documentation. The request must also include a written and signed certification by the requesting entity certifying the types and extent of mutual aid assistance requested and received in the performance of eligible emergency work and the labor and equipment rates used to determine the mutual aid cost reimbursement request.

¹⁵³ DAP 9523.6, *Mutual Aid* at VII.D.2; PAPPG, p. 34.

Volunteer labor or the value of paid labor that is provided at no cost to the applicant is not reimbursable. To the extent the assisting entity is staffed with volunteer labor, the value of the volunteer labor may be credited to the non-federal cost share of the requesting entity's emergency work.¹⁵⁴

If a mutual aid agreement provides for an initial period of unpaid assistance or provides for assistance at no cost to the requesting entity, the value of the assistance provided at no cost to the requesting entity may be credited to the non-federal cost share of the requesting entity's emergency work.¹⁵⁵

Reimbursement for equipment provided to a requesting entity will be based on FEMA equipment rates, approved state rates, or—in the absence of such standard rates—on rates deemed reasonable by FEMA.¹⁵⁶

Reimbursement for equipment damaged or purchased and used in emergency operations will be based on FEMA policy.¹⁵⁷

g. Medical Care

EMAC can be used to provide emergency medical care, and these costs may be eligible for reimbursement as well. Reimbursement claims made by mutual aid providers must comply with applicable FEMA policy.¹⁵⁸ Public or PNP medical service providers working within their jurisdiction, however, do not qualify as mutual aid providers.¹⁵⁹

¹⁵⁴ See RP 9525.2, *Donated Resources* (2014), for pre-2016 declarations at <https://www.fema.gov/media-library/assets/documents/128488>, PAPP, pp.34-39

¹⁵⁵ *Id.*

¹⁵⁶ DAP 9523.6, *Mutual Aid* at VII.H.6; PAPP, pp. 36-39

¹⁵⁷ See DAP 9525.8, *Damage to Applicant Owned Equipment Performing Emergency Work* (2008) for pre-2016 declarations at <https://www.fema.gov/public-assistance-policy-and-guidance>; DAP 9525.12, *Disposition of Equipment, Supplies, and Salvageable Materials* (2008) for pre-2016 declarations at <https://www.fema.gov/public-assistance-policy-and-guidance>, PAPP, pp. 29-30.

¹⁵⁸ DAP 9523.6, *Mutual Aid*; PAPP, pp. 34-36. .

¹⁵⁹ DAP 9525.4, *Emergency Medical Care and Medical Evacuations* (2008) for pre-2016 declarations at <https://www.fema.gov/public-assistance-policy-and-guidance>; DAP 9523.6, *Mutual Aid*; PAPP, pp. 34-36, and 65-66.

h. National Capital Region Mutual Aid Agreement

The National Capital Region (NCR) was created pursuant to the National Capital Planning Act of 1952.¹⁶⁰ This Act defined the NCR as the District of Columbia; Montgomery and Prince George's Counties of Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties of Virginia; and all cities in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of said counties. The NCR is the fifth largest economy in the United States.

The Homeland Security Act established the Office of National Capital Region Coordination (NCRC) within the DHS.¹⁶¹ The NCRC is responsible for overseeing and coordinating federal programs for, and relationships with, state, local, and regional authorities in the NCR. In addition, the NCRC assesses and advocates for resources needed by state, local, and regional authorities in the NCR to implement efforts to secure the homeland.

Mutual aid agreements have existed in the NCR for decades. After September 11, 2001 (9/11), awareness of the need for updated mutual aid capacities and agreements, including clarification of liability issues, sharpened. Congress enacted legislation addressing mutual aid acceptable to the local and state jurisdictions as part of the Intelligence Reform and Terrorism Protection Act of 2004.¹⁶²

The NCR Mutual Aid Agreement represents the general implementing document resulting from the enacted federal legislation¹⁶³ and consolidates the 31 existing mutual aid agreements to strengthen communication, coordination, and execution of response efforts. The agreement supports all mutual aid generally provided between and among units of local government, including but not limited to police, fire,

¹⁶⁰ Pub. L. 71-231 (1930), *codified* at 40 U.S.C. § 71.

¹⁶¹ 6 U.S.C. § 462.

¹⁶² Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, § 7302 (2004). *Codified* at Stafford Act § 612, 42 U.S.C. § 5196(a).

¹⁶³ *See* 42 U.S.C. § 5196 note. *See* Pub. L. No. 108-458, 118 Stat. 3840, title VII, § 7302 (2004), as amended by Pub. L. No. 110-250, 122 Stat. 2318, § 1 (2008).

emergency management, public health, and public works, including transportation.

Under current law, the federal government has authority to enter into mutual aid agreements with state and local governments in the NCR to allow the various jurisdictions to cooperate in the event of an emergency.¹⁶⁴

E. Donated Resources

Donated resources—such as volunteer labor, equipment, and materials from third parties (defined as a private entity or individual that is not a paid employee of the Applicant or Federal, State, Territorial, or Tribal government¹⁶⁵) —are eligible to offset the non-federal cost share for eligible costs for Categories A (Debris Removal) and B (Emergency Protective Measures) if the donated resources meet the following criteria¹⁶⁶:

- The local public official or person designated by a local public official must document the donated resources.
- Donated resources must apply to eligible emergency work organized by an eligible PA applicant. FEMA will place a valuation on the donated services based on documentation of hours worked, the work site, description of work performed by each volunteer, and equivalent information for equipment and materials; and
- Donated resources must be documented on project worksheets (PWs).

¹⁶⁴ *Id.*

¹⁶⁵ 2 CFR § 200.434(d); PAPP; RP9525.2, *Donated Resources*; PAPP, pp. 36-37.

¹⁶⁶ RP9525.2, *Donated Resources*, Section VII.A; PAPP, pp. 36-39.

1. Value of Donated Resources Applied Towards State Cost Share

a. Volunteer Labor

FEMA will apply the same rate for volunteer labor (including reasonable fringe benefits) that would ordinarily be paid for similar work within the applicant's organization.¹⁶⁷ If the applicant does not have employees performing similar work, the rate should be consistent with that paid in the same labor market.¹⁶⁸ Some examples of volunteer labor are removal of eligible debris, sandbagging streams and rivers, and organized search and rescue.

To determine the value of volunteer labor, FEMA multiplies the labor rate by the number of volunteer labor hours.¹⁶⁹ FEMA may give credit may for volunteer labor in any field reasonably required for emergency work.¹⁷⁰ FEMA will not use premium rates in its determination.¹⁷¹

¹⁶⁷ 2 C.F.R. § 200.306(e-f); RP9525.2, *Donated Resources* (2014), Section VII (B) (2). For events declared prior to December 26, 2014, See 44 C.F.R. 13.24(c)(1) (2014); 2 CFR § 200.434). PAPP, Chapter 2 V.L., p. 36-37, RP 9525.2 (2007), *Donated Resources*.

¹⁶⁸ RP9525.2, *Donated Resources*; VII(B)(2); PAPP, pp. 36-38.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ RP9525.2, *Donated Resources*, Section VI (B)(3); PAPP, Chapter 2 V.L., pp. 36-38

b. Donated Materials

Only materials donated by third-party entities are eligible for credit.¹⁷² Typical donated materials include sand, dirt, rocks, and other materials associated with flood-fighting activities. To determine the value of donated materials, FEMA uses the current commercial rate for such material based on previous purchases or information available from vendors. Materials other federal agencies donate may not be included.

c. Donations of Supplies, Loaned Equipment and Space

If a third party donates supplies, FEMA will value the contribution at the market value of the supplies at the time of donation.¹⁷³ If a third party donates the use of equipment or space in a building but retains title, FEMA will use at the fair rental rate of the equipment or space.¹⁷⁴

d. Donations of Equipment (with title), Buildings and Land

If a third party donates equipment, buildings, or land, and title passes to a recipient or subrecipient, the valuation of the donated property to be offset against the non-federal cost share will depend upon the purpose of the grant or subgrant.¹⁷⁵

¹⁷² 174 RP9525.2, Donated Resources, Section VI (B)(3); PAPPG, pp. 35-36

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

e. Donations of Real Property for Construction/Acquisition

If a recipient or subrecipient donates real property for a construction or facilities acquisition project, FEMA may count the current market value of that property as cost sharing or matching.¹⁷⁶

2. Appraisals

If an appraisal is necessary to establish the market value of the land, the awarding federal agency may require the market or fair rental value to be set by an independent appraiser and the value or rate be certified by the recipient.¹⁷⁷ This recipient will also impose this requirement on subrecipients.¹⁷⁸

3. Deductions for Applicable Credits - Salvage Values

FEMA must reduce eligible project costs by any applicable salvage value gained from the disposition of raw materials or equipment. For example, disaster debris (e.g., timber, mulched debris and scrap metal) may have a market value.

III. Categories of Work

After a major disaster or emergency declaration, the Stafford Act authorizes FEMA to provide grant or direct assistance to state, tribal, and local governments, and certain PNPs.¹⁷⁹ Reasonable expenses incurred in anticipation of and immediately preceding the event's incident period may also be eligible for assistance.¹⁸⁰

FEMA has administratively divided disaster-related PA work into two major types: Emergency Work and Permanent Work. These work types are further subdivided into seven categories, designated

¹⁷⁶ 2 C.F.R. § 200.306(i); for events declared prior to December 26, 2014, see 44 C.F.R. § 13.24(f) (2014). PAPP, Chapter 2 V.L., p. 36-37.u

¹⁷⁷ 2 C.F.R. § 200.306(i); for events declared prior to December 26, 2014, see 44 C.F.R. § 13.24(g) (2014).

¹⁷⁸ *Id.*

¹⁷⁹ Stafford Act §§ 403, 406, 407, and 502; 42 U.S.C. §§ 5170b, 5172; 5173; and 5192.

¹⁸⁰ *Id.* § 424, 42 U.S.C. § 5189b.

Categories A through G.¹⁸¹ FEMA calls Categories A and B Emergency Work, and Categories C through G Permanent Work. Only Emergency Work is available under PA for an emergency declaration.¹⁸²

FEMA characterizes work authorized under Debris Removal¹⁸³ as Category A and characterizes Essential Assistance (emergency protective measures)¹⁸⁴ as Category B. FEMA characterizes Repair, Restoration, and Replacement of Damaged Facilities¹⁸⁵ as permanent work (Categories C through G), which is based on the types of facilities to be restored.

A. Emergency Work Categories

Emergency work is work necessary to meet an immediate threat to life and property and is essential to saving lives and protecting public health and safety¹⁸⁶.

The President may authorize FEMA, under an emergency or major disaster declaration, to provide DFA and grant funding for work under Categories A and B (debris removal and emergency protective measures, respectively, as noted earlier).¹⁸⁷

Please refer to Chapter 4, *Response*, Section VI, *Response Operations*, for the request process for DFA mission assignments and additional discussion on emergency work activities. For emergency work that

¹⁸¹ PA Digest, pp. 66-87; pp. 19-20. FEMA characterizes Stafford Act § 324 management costs as Category Z, 42 U.S.C. § 5165b.

¹⁸² Stafford Act § 502, 42 U.S.C. § 5192. The language for the provision of emergency work under an emergency declaration is not identical to that for a major disaster and thus may lead to some differences in the scope of eligible work.

¹⁸³ *Id.* § 407, 42 U.S.C. § 5173.

¹⁸⁴ *Id.* § 403, 42 U.S.C. § 5170b.

¹⁸⁵ *Id.* § 406, 42 U.S.C. § 5172.

¹⁹³ *Id.* §§ 403 and 502, 42 U.S.C. §§ 5170b and 5192; 44 C.F.R. §§ 206.201 (b) and 206.225; PA Guide, pp. 66, 71-74; PA Digest, pp. 17 and 46. PAPPG, pp. 43-46. The Stafford Act defines the scope of what constitutes emergency work most specifically in section 403, which pertains to a major disaster declaration. FEMA relies, however, on this specificity for guidance in authorizing emergency work for emergency declarations under section 502(b) of the Stafford Act, which provides very broad and very general authority for any assistance necessary to save lives, protect property and public health and safety, and to lessen or avert the threat of catastrophe.

¹⁸⁷ *Id.* § 403 and 502, 42 U.S.C. §§ 5170b and 5192.

subrecipients perform using contractors, they may award contracts under their own procurement procedures, provided these are in conformance with federal grant procurement standards.¹⁸⁸ See discussion under *Recipient and Subrecipient Compliance with Procurement Requirements* in Part Two, Section VI of this chapter.

1. Category A: Debris Removal

Debris removal¹⁸⁹ is often a significant activity in major disaster and emergency declarations. Indeed, the iconic visual of many disasters is debris strewn devastation. Debris removal is an essential response activity, and it hastens recovery by the community, both psychologically and logistically.

PA applicants will generally remove debris themselves through their own labor force or contractors instead of requesting a mission assignment for debris removal. For any debris operations, FEMA takes an active role that includes review of contracts for eligible scopes of work and cost reasonableness, monitoring performance, and planning for disposal and salvage.¹⁹⁰

Upon request, FEMA may issue a mission assignment to USACE to assist applicants with their execution of debris removal procurements, which may involve large dollar amounts, as well as detailed scopes of work and monitoring methodology. FEMA makes all debris removal eligibility determinations, including costs and cost reasonableness.

a. Debris Removal Alternative Procedures Pilot Program

The PA Alternative Procedures (PAAP) Pilot Program Guide for Debris Removal, which outlines the debris removal alternative procedures, was initially issued by the PA Program on June 28, 2013 and has been

¹⁸⁸ *Id.* 44 C.F.R. § 13.36(b) and 2 C.F.R. 317 and 318. See discussion in Part Two, Section VI. *Recipient and Subrecipient Compliance with Procurement Requirements*.

¹⁸⁹ Stafford Act §§ 403(a)(3)(A), 407, and 502(a)(5), 42 U.S.C. §§ 5170b(a)(3)(A), 5173 and 5192(a)(5); 44 C.F.R. § 206.224.

¹⁹⁰ PA Debris Management Guide for pre-2016 declarations; PAPPG, pp. 56-57

subsequently revised.¹⁹¹ The pilot program performance period is currently set to end June 27, 2017, to allow for additional data collection and for the completion of in-progress program evaluation needed to determine which alternative procedures should be permanently incorporated into the PA program.¹⁹² Based on the evaluation of the pilot, FEMA may discontinue the program, extend the pilot for an additional performance period, or issue regulations that would institute the program changes authorized by the law.

The pilot program for debris removal is effective for any major disaster or emergency declared on or after June 28, 2013, and until the end of the pilot program period.¹⁹³ The alternative procedures are for large projects, with the exception of reimbursement for straight-time force account labor, which can be applied to both small and large projects.

Upon the declaration of a major disaster or emergency by the President authorizing FEMA to provide debris removal assistance, FEMA provides eligible PA subrecipients within the declared area the opportunity to participate in the alternative procedures for the debris removal pilot program. It includes:

- A sliding scale for determining the federal share for removal of debris and wreckage based on the time it takes to complete debris and wreckage removal;
- Use of revenue from recycled debris without offset to the grant amount as program income;
- Reimbursement of force account labor straight or regular time and overtime wages for the employees of state, tribal, or

¹⁹¹ PAAP Pilot Program Guide for Debris Removal, Version 4 (June 28, 2016). Refer to <http://www.fema.gov/alternative-procedures> for the most current guidance, standard operating procedures, and fact sheets for this pilot program. *See also* the PAPP, pp. 46-49.

¹⁹² *Id.*

¹⁹³ Per PAAP Pilot Program Guide for Debris Removal, Version 4 (June 27, 2017). Refer to <http://www.fema.gov/alternative-procedures> for the most current information.

local governments, or owners or operators of PNP facilities performing or administering debris and wreckage removal; and

- A one-time cost share incentive to a state, tribal, or local government to have a FEMA-reviewed debris management plan accepted by the FEMA Administrator, in addition to at least one pre-qualified debris and wreckage removal contractors before the date of the major disaster declaration.¹⁹⁴

If none of those alternative procedures is elected, then standard FEMA PA procedures (outlined here) will be used.

b. Debris Removal from Public Property

Two sections of Title IV of the Stafford Act authorize DFA and grant assistance for removal of debris resulting from a major disaster—sections 403 (Category B, emergency protective measures) and 407 (Category A, debris and wreckage removal operations).¹⁹⁵

In the event of an emergency declaration under the Stafford Act, FEMA may also provide assistance for debris removal pursuant to section 502, which cross-references to section 407.¹⁹⁶ The statutory standard for debris removal in sections 403 and 502 is that which is “essential to saving lives and protecting and preserving property or public health and safety.”¹⁹⁷ The standard in section 407 is whether debris removal is “in the public interest.”¹⁹⁸ By regulation, FEMA has defined debris removal to be in the “public interest” when necessary to:

- Eliminate an immediate threat to lives, public health, and safety;

¹⁹⁴ See SRIA § 1102 Pub. L. 113-2 (2013), codified at Stafford Act § 428, 42 U.S.C. § 5189f.

¹⁹⁵ Stafford Act §§ 403(a)(3)(A) and 407, 42 U.S.C. §§ 5170b(a)(3)(A) and 5173.

¹⁹⁶ *Id.* §§ 502(a)(6) and 407, 42 U.S.C. §§ 5192 (a)(6) and 5173; 44 C.F.R. §§ 206.224 and 206.225.

¹⁹⁷ *Id.* §§ 403(a)(3)(A), 42 U.S.C. § 5170b(a)(3); and 502(a)(5), 42 U.S.C. § 5192.

¹⁹⁸ *Id.* § 407, 42 U.S.C. § 5173.

- Eliminate immediate threats of significant damage to improved public or private property;
- Ensure the economic recovery of the affected community to the benefit of the community at large; or
- Mitigate the risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired using FEMA hazard mitigation program funds to uses compatible with open space, recreation, or wetlands management practices.¹⁹⁹

Debris removal must also meet general work eligibility criteria:²⁰⁰

- The debris must have been generated by the major disaster event;
- The debris must be located within a designated disaster area on an eligible applicant's improved property or rights-of-way; and
- The debris removal must be the legal responsibility of the applicant.²⁰¹
- Examples of ineligible debris include:
- Debris from an eligible applicant's unimproved property or undeveloped land;
- Debris from a facility that is not eligible for funding under the PA Program, such as a PNP cemetery or PNP golf course; or

¹⁹⁹ 44 C.F.R. § 206.224 (a).

²⁰⁰ 44 C.F.R. § 206.223(a).

²⁰¹ Stafford Act §§ 406, 407, 42 U.S.C. §§ 5172, 5173; 44 C.F.R. § 206.223(a)(1)-(3); PA Debris Management Guide p. 21; PAPPG, p. 21,

- Debris from federal lands or facilities that are the authority of another federal agency or department.²⁰²

Debris removal may include the clearance of trees and woody debris; building components and/or contents; sand, mud, silt, and gravel; wreckage produced during conduct of emergency protective measures; and other disaster-related wreckage.²⁰³

Debris that blocks streets and highways is deemed a threat to public health and safety because it blocks passage of emergency vehicles or blocks access to emergency facilities.²⁰⁴ Debris cleared from roads and highways, including shoulders, ditches, and drainage structures, may also be eligible for the same reason. An eligible applicant must own or be responsible for maintaining the roads.

An applicant may conduct debris operations in any manner it deems appropriate, such as through:

- **Force Account Labor.** The applicant may utilize its own labor, equipment, and materials. It is important for the applicant's staff to document wage rates and hours worked by employees and equipment used to complete the eligible work.²⁰⁵
- **Mutual Aid Agreements.** The applicant may have agreements with other jurisdictions and agencies for the provision of debris management services in the event of an emergency. *See* earlier discussion in this chapter on *Mutual Aid Agreements*.
- **Contract Services.** An applicant may hire a contractor to perform such work as debris clearance, removal, disposal, reduction, recycling, and/or monitoring. Funding is limited to the scope of work necessary to remove debris that is an

²⁰²Stafford Act § 405, 42 U.S.C. § 5171; 44 C.F.R. § 206.226(a)(1); PA Debris Management Guide, p. 22; PAPPG, p. 22-23.

²⁰³ PA Guide, p. 67; PA Digest, p. 31; PAPPG, pp. 45-48.

²⁰⁴ PA Guide, p. 68; PAPPG, pp. 45-48.

²⁰⁵ *Id.* at 13; RP 9525.7, *Labor Costs – Emergency Work*. For pre-2016 declarations, *see* RP 9525.7 (2006), http://www.fema.gov/pdf/government/grant/pa/9525_7.pdf. For guidance regarding use of force account labor for debris removal under the pilot program; PAPPG, pp. 22-23, 48-52.

immediate threat to life, public health, and safety, or that poses an immediate threat of significant damage to improved public or private property. See Part Two, Section VI, *Recipient and Subrecipient Compliance with Procurement Requirements* later in this chapter.

- **Direct Federal Assistance.** When the impact of a disaster is so severe that neither the state nor local governments can remove debris on their own, including through contract, the state may request that debris removal be performed directly by the federal government.²⁰⁶ When FEMA approves DFA, it will task or mission assign an appropriate federal agency to perform work.²⁰⁷

If another federal agency has the authority to provide an applicant with assistance for debris removal operations, FEMA cannot provide funds for that project. Applicants should pursue assistance offered through those agencies.²⁰⁸

c. Debris Removal from Wetlands

Removal of debris or wreckage from a natural stream, flood channel, or waterway may be eligible because it could cause flooding from a future storm that threatens damage to improved property.²⁰⁹ In such a situation, only the clearance of debris necessary to protect against an immediate threat of damage to improved property or to protect public health and safety will be eligible.²¹⁰

Under the Emergency Watershed Protection (EWP) Program, the National Resource Conservation Service (NRCS) of the U.S. Department of Agriculture has authority to remove debris from a watershed causing a sudden impairment to the watershed and resulting in an imminent threat to life or property. This typically includes debris in channels but can

²⁰⁶ 44 C.F.R. § 206.208(a).

²⁰⁷ PA Guide, pp. 76-78; PAPPG, pp. 36-37.

²⁰⁸ PA Debris Management Guide, p. 10 and Appendix G; RP 9580.202, *Fact Sheet: Debris Removal—Authorities of Federal Agencies* (2007) for pre-2016 declarations,

²⁰⁹ RP 9523.5, *Debris Removal from Waterways* (2012) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/29912>.

²¹⁰ PA Guide, p. 68. PAPPG, pp. 53-54.

include nearby areas if a future event could create an imminent threat to life or property.²¹¹

NRCS may provide assistance under the EWP when the President declares a major disaster under the Stafford Act or when an NRCS state conservationist determines that watershed impairment exists.²¹² EWP debris removal assistance is only available when a debris-causing watershed impairment creates an imminent threat to life or property, if an applicant does not qualify for EWP Program assistance, it likely cannot qualify for FEMA debris removal assistance—the work will not satisfy the public interest standard in the Stafford Act.²¹³

Generally, FEMA has not provided funding where another federal agency has specific authority to perform the work.²¹⁴ However, in October 2012, FEMA revised its policy to allow for limited debris removal from streams where another federal agency (such as NRCS) has authority to do so but does not exercise it.²¹⁵ Limited debris removal may be eligible under the PA Program if it is:

- Reasonably necessary to eliminate an immediate threat to life, public health, and safety; or is located immediately upstream or downstream of, or in close proximity to, improved property and poses an immediate threat of significant damage to that property; and another federal agency is not providing assistance for the activity.²¹⁶

²¹¹ Flood Control Act of 1950 § 50, PL 81-515, 33 U.S.C. § 701b-1; 16 U.S.C. § 22037; 7 C.F.R. Part 624.

²¹² 7 C.F.R. § 624.6.

²¹³ Stafford Act §§ 403, 407, 502, 42 U.S.C. §§ 5170b, 5173, 5192; 44 C.F.R. § 206.224(a).

²¹⁴ See, e.g., 44 C.F.R. §§ 206.208(c)(2), which provides that if any part of work requested for a federal mission assignment falls within the statutory authority of another federal agency, FEMA will not approve that portion of the work; 206.226(a), which states that “Generally, disaster assistance will not be made available under the Stafford Act when another federal agency has specific authority to restore facilities damaged or destroyed by an event which is a declared major disaster”; and PA Guide, pp. 23-24.

²¹⁵ PA Guide, p. 68. PAPPG, pp. 53-54.

²²³ RP 9523.5, *Debris Removal from Waterways* for pre-2016 declarations; PAPPG, pp. 18-19.

Case Example:

Circumstances where FEMA may Provide Assistance where Another Federal Agency is not Providing Assistance for Debris Removal

Following Hurricane Irene in 2011 (DR-4020), disaster and flood conditions were such that local governments in Vermont did not have the capability to take the administrative steps necessary to get a project agreement in place with NRCS before completing debris removal work.

However, 33 U.S.C. § 701b-1 requires that any conservation assistance be made in accordance with plans approved by the Secretary of Agriculture in advance of restoration as a condition of financial assistance. NRCS's regulation, which implements the statute, carries forth this planning requirement at 7 C.F.R. §624.6. It was therefore impracticable or impossible for the communities to comply with the requirement.

Since this requirement was established by statute, the Vermont project was outside the scope of NRCS' statutory authority, and NRCS lacked the authority to provide the requested reimbursement. As a result, the Vermont projects were not affected by appropriations limitations and could be considered by FEMA for eligibility under section 403 or 407 as appropriate.

d. Debris Removal from Navigable Waterways

USACE has primary responsibility for the removal of debris from federally maintained navigable channels and waterways.²¹⁷ As stated previously, FEMA generally will not provide funding where another federal agency has specific authority to perform a particular type of work otherwise eligible under the PA Program.²¹⁸

²¹⁷ River and Harbor Appropriations Act of 1899, 33 U.S.C. §§ 407, 409 414, 415, 419, 701, *et seq.*

²¹⁸ *See, e.g.*, 44 C.F.R. §§ 206.208(c)(2), and 206.226(a); and PA Guide, pp. 23-24; PAPPG, pp. 17-18.

For FEMA to reimburse an applicant for the removal of vehicles and vessels, the applicant must provide supporting documentation²¹⁹ for its funding request. As with other types of debris removal, the removal of debris from waterways must be found to be in the public interest.²²⁰ In addition to establishing legal responsibility, the applicant must demonstrate one of the following:

- There is a threat to life, public health, and safety, based on a determination by the state, county, or municipal government's public health authority or other public entity that has legal authority to make such a determination; or
- There is significant threat of damage to improved property, based on a determination by the state, county, or municipal government that the removal of disaster-generated debris from a navigable waterway is cost-effective (debris removal is cost-effective if the cost to remove the debris is less than the cost of potential damage to the improved property); or
- Removal of debris is necessary to ensure economic recovery of the affected community to the benefit of the community at large, based on a determination by the state, county, or municipal government.²²¹

e. Boat Retrieval

The retrieval or removal of boats from navigable waters may be necessary where the boats present an obstruction or danger to other vessels, including emergency service providers. FEMA provides funding to eligible applicants to remove sunken vessels from non-federally maintained navigable waterways, the coastal or inland zones, or wetlands when removal is necessary to eliminate an immediate threat to life, public health

²¹⁹ 44 C.F.R. § 13.20(b)(6) (2014), 2 C.F.R. § 200.306(b)(5).

²²⁰ 44 C.F.R. § 206.224 (a).

²²¹ RP 9523.5, *Debris Removal from Waterways*, at VII.B.1. PAPPG, pp. 53-4.

and safety, or improved property, or to ensure the economic recovery of the affected community.²²²

The primary issue is the question of who bears the responsibility to remove such a vessel. Under federal law, it is the duty of the owner, lessee, or operator of a sunken craft to immediately remove it from navigable channels; failure to do so is considered abandonment of the craft, after which the craft is subject to removal by the United States.²²³ The owner, lessee, or operator is strictly liable for the full costs of removal.²²⁴

In cases where the craft is considered abandoned, USACE has primary responsibility for the removal of sunken vessels or other obstructions from federally maintained navigable waterways under emergency conditions.²²⁵ USACE will remove a vessel using its emergency authorities only if the owner, operator, or lessee cannot be identified or cannot affect removal in a safe and timely manner.²²⁶

The U.S. Coast Guard (USCG) has primary responsibility for removing—destroying, if necessary—abandoned barges greater than 100 tons, and sunken or abandoned vessels “threatening to discharge” hazardous substances or that pose a threat to the public health, welfare, or environment.”²²⁷

USACE and USCG have a Memorandum of Agreement under which the two agencies work together to determine if a sunken vessel either poses a threat to navigation or a pollution threat to public health and safety.²²⁸ If the agencies determine that the threat is to navigation, the USACE will

²²² Stafford Act §§ 403, 407, 502, 42 U.S.C. § 5170b, 5173, 5192; 44 C.F.R. §§ 206.208, 206.224.

²²³ 33 U.S.C. § 409; 33 C.F.R. Part 245.

²²⁴ *Id.*; 33 C.F.R. Part 245.45.

²²⁵ River and Harbor Appropriations Act of 1899, 33 U.S.C. §§ 407, 409, 414, 415, 419, 701, *et seq.*; 33 C.F.R. Part 245.

²²⁶ *Id.*

²²⁷ Abandoned Barge Act of 1992 § 20, 46 U.S.C. § 4701, *et seq.*; Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)(1)(B)(iii); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9604(e)(1); 33 C.F.R. Part 153.

²²⁸ Memorandum of Agreement between the Department of the Army and the U.S. Coast Guard, Marking and Removal of Abandoned Vessels and other Obstructions to Navigation, found in Coast Guard Commandant Instruction 16465.43 (April 5, 1996).

remove the vessel. If the threat is related to pollution, USCG will remove the vessel if it determines that its removal is essential to abate a pollution threat; otherwise, USCG will remove the oil and other hazardous substances while leaving the vessel in place.

Key Factors

- If any part of the damaged vessel can be used to identify an owner, the applicant should contact the owner and follow its local ordinances and state laws to demonstrate legal responsibility to remove and dispose of the vessel.²²⁹
- Owners must be given notice of their obligation to remove the boat; if a responsible party cannot be determined, notice is given through newspaper publication.²³⁰
- FEMA may fund the removal and disposal of eligible disaster-generated debris, wreckage, and sunken vessels from the coastal or inland zone, non-federally maintained waterways, and wetlands by an eligible applicant if:
 - the debris, wreckage, or sunken vessel is the direct result of a presidentially declared disaster,
 - the removal is in the public interest, and
 - another federal agency does not have more specific authority to fund the work.²³¹

²²⁹ PA Guide, pp. 23-24; RP 9523.5, *Debris Removal from Waterways*; PAPP, pp. 53-.

²³⁰ *Id.*; 33 C.F.R. Part 245.

²³¹ 44 C.F.R. § 206.223(a), 44 C.F.R. 206.224(a); 44 C.F.R. § 206.208(c)(2); Stafford Act § 203, 403, 407, 502, 312; RP 9523.5, *Debris Removal from Waterways*; PAPP, pp. 53-54.

f. Debris Removal on Federal-Aid Highways

On July 6, 2012, the President signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21).²³² A provision of MAP-21 amended the statutory authorization for the Federal Highway Administration's (FHWA) Emergency Relief Program to remove FHWA's authority to fund debris removal from federal-aid highways where Public Assistance funding is available for debris removal under a declared major disaster or emergency. The amendment was effective October 1, 2012.²³³

For emergencies or major disasters declared on or after that date, absent special appropriation, FEMA—not FHWA—will have the authority for debris removal from federal-aid highways during emergencies or major disasters in jurisdictions where the Stafford Act authorizes.²³⁴

FEMA applicants still must meet the applicable PA requirements, including specific debris removal criteria. FHWA will continue to provide debris removal funding, following their procedures and eligibility rules, for events that do not result in Stafford Act declarations, events that are authorized for IA only, or areas that are not designated for PA/Debris Removal.

There may be situations where an applicant begins debris removal work before the President has made a determination regarding a Stafford Act declaration, thus before the applicant will know which program of federal funding will be available.

Applicants in those circumstances should be sure that their actions meet the requirements of either FHWA or FEMA's PA program. Thorough and accurate documentation is the key to establishing eligibility under either program.

²⁴⁰ Moving Ahead for Progress in the 21st Century Act, (MAP-21), Pub. L. 112-141 (2012).

²³³ 23 U.S.C. § 125.

²³⁴ See FEMA Recovery Fact Sheet 9580.214, *Debris Removal on Federal-Aid Highways* (October 30, 2012) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/128488> PAPPG, pp. 45-46.

g. Removal of Debris from Public Parks and Recreation Areas

Removal of debris from parks and recreational areas available for public use is eligible when it affects public health or safety or proper utilization of such facilities. Trees frequently constitute a large part of debris in these areas. Stump removal is not eligible unless it is determined that the stump poses a hazard.²³⁵

h. Debris Removal from Private Property

In general, the cost of debris removal from private property²³⁶ is not reimbursable because it does not typically present an immediate health and safety threat to the general public. Debris removal from private property is, in the first instance, always the responsibility of individual private property owners. Other sources of funding, such as insurance, are commonly available to cover the cost of work.

If private property owners move disaster debris from private property to a public right-of-way, however, the cost of removing this debris from the public right-of-way may be reimbursed because then the debris may be construed as debris from public property,²³⁷ particularly where the Federal Coordinating Officer (FCO) makes the finding discussed in the next paragraph.

In those extraordinary circumstances where disaster debris on private property threatens public health, safety, or the economic recovery of the community, FEMA may fund such debris removal, but it must be approved in advance by the FCO.²³⁸ The FCO will work with the recipient

²³⁵ DAP 9523.11, *Hazardous Stump Extraction and Removal Eligibility* (2007) for pre-2016 declarations, RP 9580.204, *Documenting and Validating Hazardous Trees, Limbs and Stumps* (2007) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/128488>; PAPP, pp. 50-53. 241

²³⁶ Stafford Act §§ 403 and 407, 42 U.S.C. §§ 5170b and 5173; 44 C.F.R. § 206.224(b); PA Debris Management Guide at 33; DAP 9523.13, *Debris Removal from Private Property* (2007) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/128488>; PAPP, pp. 53-55

²³⁷ 44 C.F.R. § 206.224; PA Debris Management Guide, p. 34; PAPP, pp. 55-58.

²³⁸ Stafford Act §§ 403(a)(3)(A), 407(b), and 502; 42 U.S.C. §§ 5170b (a)(3)(A), 5173(b), and 5192; 44 C.F.R. §§ 206.223(a)(3) and 206.224(b); PA Guide, pp. 69-71; DAP 9523.13; PAPP, pp. 55-58.

affected by a major disaster to designate, as appropriate, those areas where debris removal from private property is in the public interest.²³⁹

Any state or local government that seeks reimbursement to remove debris from private property will, prior to commencement of work, submit a written request to the FCO that includes the following information:

i) Public Interest Determination²⁴⁰

A determination by the state, county, or municipal government's public health authority or other public entity that has legal authority to make a determination that disaster-generated debris on private property constitutes an immediate threat to life, public health, and safety, or is necessary to ensure the economic recovery of the community; or

If a threat to improved property, the basis of the determination that the removal of disaster-generated debris costs less than the cost of potential damage to the improved property; or

If necessary for economic recovery, the basis of the determination by the state, county, or municipal government that the removal of debris is necessary to ensure economic recovery of the affected community to the benefit of the community at large.

ii) Documentation of Legal Responsibility and Authorization²⁴¹

The applicant requesting assistance must demonstrate the legal basis as established by law, ordinance, or code upon which it intends to exercise its responsibility to remove disaster-related debris from private property. Governments ordinarily rely on condemnation and/or nuisance abatement

²³⁹ 44 C.F.R. § 206.224; PA Debris Management Guide, p.34; PAPPG, pp. 55-58.

²⁴⁸ *Id* § 206.224(a); DAP 9523.13, p. 3; PAPPG, pp. 55-58.

²⁴⁹ *Id* § 206.223(a)(3); DAP 9523.13, p. 3; PAPPG, pp. 55-58.

authorities to obtain legal responsibility prior to beginning debris removal work.

There may be circumstances, however, where the government determines that ordinary condemnation and/or nuisance abatement procedures are too time-consuming to address the immediate public health and safety threat. In such circumstances, applicants may follow other procedures that meet state and local legal requirements for entering private property and removing a health and safety threat.²⁴²

The applicant's legal responsibility to take action must be independent of any expectation or request of FEMA to reimburse costs incurred for private property debris removal. The applicant must confirm that a legally authorized official has ordered the exercise of public emergency powers or other appropriate authority to enter onto private property to remove or reduce threats to life, public health, and safety.²⁴³

A governmental resolution after a disaster by an applicant declaring that debris on private property constitutes a threat to public health and safety does not in itself make the debris removal eligible. The applicant should submit its established, specific legal requirements for declaring the existence of a threat. FEMA will review and determine eligibility.²⁴⁴

iii) Indemnification

Before FEMA approves debris removal from private property, the state or local government must agree in writing to indemnify FEMA from any claims arising from such removal.²⁴⁵ If FEMA approves debris removal from private property, the state and local government must ensure “unconditional authorization” with respect to rights of entry and hold

²⁴² DAP 9523.13, p. 4; PAPP, p. 57.

²⁴³ Stafford Act §§ 403(a)(3)(A), 407(b), and 502; 42 U.S.C. §§ 5170b (a)(3)(A), 5173(b), and 5192; 44 C.F.R. §§ 206.223(a)(3) and 206.224(b); PA Guide, pp. 69-71; DAP 9523.13; PAPP, pp. 55-58.

²⁴⁴ PA Guide, p. 70; DAP 9523.13; PAPP, pp. 55-58.

²⁴⁵ Stafford Act § 407(b), 42 U.S.C. § 5173(b); 44 C.F.R. § 206.9; PA Guide pp. 69-71; Debris Management Guide, p. 34; PAPP, pp. 55-56. PA Debris Management Guide, p. 34; PAPP, pp. 54-55.

harmless agreements. The applicant is required to document properly all legal processes used to gain access, as well as document applicable scopes of work.²⁴⁶

To prevent duplication of benefits, the applicant must obtain insurance information from property owners.²⁴⁷

iv) Commercial property

Debris removal from private residential property under the PA program is relatively rare, as the public interest standard is a high bar. It is an even higher bar for commercial property. It is generally expected that commercial enterprises retain insurance and/or have the financial wherewithal to remove their own debris.

An FCO may determine, however, in limited and extraordinary circumstances, that the removal of debris from private commercial property is in the public interest, generally for circumstances related to the economic recovery of the community.

For example, where the commercial district of a very small town is destroyed, the ability to rebuild that district may be so tenuous that government funding is warranted for debris removal to start the community's recovery. Such circumstances are highly fact dependent and require legal review.²⁴⁸

²⁴⁶ DAP 9523.13; PAPPG, pp. 55-58.

²⁴⁷ Stafford Act § 312, 42 U.S.C. § 5155.

²⁴⁸ 44 C.F.R. § 206.224 (a) and (b).

v) Environmental and Historic Preservation Review

While debris removal is exempt from the National Environmental Policy Act (P.L. 91-190) of 1969,²⁴⁹ as amended, 42 U.S.C. § 4231, *et seq.*, FEMA still must follow all other applicable federal laws, regulations, and executive orders relating to protecting the environment and historic preservation in conducting and funding disaster debris removal activities. FEMA uses the term “special considerations” for issues such as environmental and historic preservation requirements that affect the scope of work and funding for a project.

Applicants should identify these issues as early as possible and provide FEMA with the information necessary for review.²⁵⁰ Chapter 8, *Environmental and Historic Preservation Laws*, discusses some of these “special considerations” because they apply to PA as well as IA. *See also* Chapter 6, *Individual Assistance*, and Chapter 7, *Hazard Mitigation Assistance*.

2. Category B: Emergency Protective Measures

In addition to debris removal, FEMA can provide direct federal and grant assistance for activities before, during, and after a disaster to save lives, protect public health and safety, and prevent damage to improved public

²⁴⁹ Stafford Act § 316, 42 U.S.C. § 5159.

²⁵⁰ See 44 C.F.R. Part 9, *Floodplain Management and Protection of Wetlands*, and Part 10, *Environmental Considerations*, for pre-Aug 22, 2016, declarations and FEMA Directive (FD) 108-1, *Environmental Planning and Historic Preservation Responsibilities and Program Requirements*, issued 08/22/16, which replaces Part 10 and is available under Directives at https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx; PA Guide, pp. 127-136; PA Debris Management Guide, pp. 6-10; PAPPG, pp. 43-45.

and private property.²⁵¹ Examples of measures that may be eligible include:²⁵²

- Warning of risks and hazards;
- Search and rescue;
- Emergency evacuations;²⁵³
- Provision of shelters and emergency mass care;²⁵⁴
- Emergency temporary child care services;²⁵⁵
- Essential needs for persons affected by the outbreak and spread of an influenza pandemic;²⁵⁶
- Protection of an eligible facility;
- Security;

²⁵¹ Stafford Act §§ 402, 403, and 502; 42 U.S.C. §§ 5170a, 5170b, and 5192; 44 C.F.R. § 206.225; PA Guide, pp. 66 and 71-78; PA Digest, pp. 31 and 46; PAPPG, pp. 55-58.

²⁵² Stafford Act §§ 402, 403, and 502; 42 U.S.C. §§ 5170a, 5170b, and 5192; 44 C.F.R. § 206.225; PA Guide, pp. 66 and 71-78; PA Digest, pp. 31 and 46; PAPPG, pp. 66-70.

²⁵³ PAPPG, pp. 66-70

²⁵⁴ See PKEMRA § 689, 6 U.S.C. § 773, Functional Needs Support Services Guidance; DAP 9523.15, *Evacuation and Sheltering Costs*; PAPPG, pp. 66-70.

²⁵⁵ See FEMA Fact Sheet 9580.107, *Public Assistance for Child Care Services* (2012) for pre-2016 declarations, PAPPG, p. 71.

²⁵⁶ FEMA Fact Sheet, FP 104-009-001, *Infectious Disease Event* (May 2016) PAPPG, p. 72.

- Food, water, and other essentials at central distribution points;
- Temporary generators for facilities that provide health and safety services;
- Rescue, care, shelter, and essential needs for household pets and service animals;²⁵⁷
- Temporary facilities for schools and essential community services;²⁵⁸
- Emergency operations centers to coordinate and direct the response to a disaster;
- Demolition and removal of public and private buildings and structures that pose an immediate threat to the safety of the general public;²⁵⁹
- Removal of health and safety hazards;
- Temporary construction of emergency protection measures to protect lives or improved property, such as temporary levees²⁶⁰ or sandbagging;
- Emergency measures to prevent further damage to an ¹ Stafford Act §§ 403(a)(3)(J)(ii), 42 U.S.C. § 5170b(a)(3)(J)(ii); DAP 9523.19, *Eligible Costs Related to Pet Evacuations and*

²⁵⁸ Stafford Act § 403(a)(3)(I), 42 U.S.C. § 5170b (a) (3) (I); 44 C.F.R. § 206.221(c); PA Guide, pp. 26, 38, 66-67, 71, 76; DAP 9523.4, *Demolition of Private Structures* (2007) for pre- 2016 declarations,

http://www.fema.gov/pdf/government/grant/pa/9523_4.pdf; PAPPG pp. 71-73, 75-78.

²⁵⁸ PA Guide, p. 74; PAPPG, p. 58.

²⁵⁸ PAPPG p. 60-89.

Sheltering (2007) for pre-2016 declarations, PAPPG at 66. PNPs are generally not eligible for reimbursement for such costs, as they would generally not be considered as having legal responsibility for such services. See 44 C.F.R. §§ 206.223(a)(3). However, FEMA may reimburse STTLs for such work performed by PNPs if done on behalf of the STTL under written agreement.

- ¹ See DAP 9523.3, Provisions of Temporary Relocation Facilities (2010) for pre-2016 declarations; PAPPG, pp. 73-77.
- otherwise eligible facility;
- Restoration of access; and
- Inspections, if necessary, to determine whether structures pose an immediate threat to public health or safety.

Specific eligibility requirements may apply to the provision of emergency communications, public transportation, building inspections, snow removal assistance, Host State sheltering, demolition, and pet evacuation and sheltering.²⁶¹

**Case Example: Emergency Protective Measures on Private Property:
Sheltering and Temporary Essential Power Program (STEP)**

In the immediate aftermath of Hurricane Sandy²⁶² in October 2012, which resulted in extensive and extended power outages in New York and the Northeast, FEMA initiated the Sheltering and Temporary Essential Power (STEP) pilot program to assist state, local, and tribal governments in performing work and services to save lives, preserve public health and safety, and protect property.²⁶³

STEP provided essential power, heat, and hot water, and rudimentary temporary exterior repairs to affected residences, allowing residents to shelter in their homes pending permanent restoration work, thus reducing demand for sheltering options.²⁶⁴ The STEP pilot program was only available in areas that received major disaster declarations after Hurricane Sandy; only New York and New Jersey opted to participate. Only residential properties were eligible to receive the emergency temporary repairs under STEP.²⁶⁵

FEMA administered the program under the Public Assistance Program through DFA; reimbursement of applicants who performed the work or contracted for its performance; or a combination thereof.²⁶⁶

a. Emergency Communications

Communication capabilities may be damaged by a disaster or an emergency to the extent that government officials are unable to carry out their duties of providing essential community services or responding to the disaster. The Stafford Act authorizes FEMA to provide a temporary emergency communications system through DFA during *or in anticipation*

²⁶² For the following Hurricane Sandy declarations: FEMA-4085-DR- NY, FEMA-4086-NJ, and FEMA-4087-CT.

²⁶³ *FEMA Recovery Program Guidance, Sheltering and Temporary Essential Power (STEP)*, November 16, 2012, at *See also* PAPPG, p. 74 (Residential Electrical Meters).

²⁶⁴ Stafford Act § 418, 42 U.S.C. § 5185; 44 C.F.R. § 206.225(c); PA Guide, p. 75; PAPPG, p. 62-63.

²⁶⁵ *Id.*

²⁶⁶ *Id.*; Stafford Act § 403, 42 U.S.C. § 5170b(a)(3)(B) and (I), 5170b(a)(4).

of an emergency or major disaster,²⁶⁷ but it does not authorize grant assistance for emergency communications systems.²⁶⁸ Such communications may be provided to STTL officials and to other persons determined appropriate.²⁶⁹

b. Emergency Public Transportation

A community's public transportation system (buses, subways, trains, bridges, etc.) may be damaged by a disaster such that vital functions of community life may be disrupted. The Stafford Act authorizes FEMA to provide DFA only for temporary public transportation services to replace those affected by a major disaster only to assist a community to resume its normal pattern of life or to provide temporary services needed due to changes in the location of government or residential facilities due to the

²⁶⁷ Stafford Act § 418, 42 U.S.C. § 5185; 44 C.F.R. § 206.225(c); PA Guide, p. 75; PAPPG, p. 61.

²⁶⁸ The authorization of grant or financial assistance must be specific. No special words are required, but there must be specific indication that Congress intended to authorize financial assistance. Words typically used to demonstrate grant assistance is authorized include "grants," "contributions," and "financial assistance." United States Government Accountability Office [hereinafter GAO] Federal Appropriations Law, Volume II, 3rd Edition (Jan 2004) (GAO Red Book), at 10-1 to 10-3, 10-37, and 10-70 available at <http://www.gao.gov/legal/red-book/overview>.

²⁶⁹ Stafford Act § 418, 42 U.S.C. § 5185.

²⁷⁰ Stafford Act § 419, 42 U.S.C. § 5186; 44 C.F.R. § 206.225(d); PA Guide, p. 75; PAPPG, p. 62-63.

disaster.²⁷⁰ The transportation service will be discontinued as soon as the needs have been met.

FEMA lacks authority to provide grant assistance for longer term temporary transportation services. U.S. Department of Transportation Federal Transit Administration has broader authority to provide such services.²⁷¹

c. Building Inspections

The costs of building inspections are eligible as Category B costs, if necessary, to establish whether a damaged structure poses an immediate threat to life, public health, or safety.²⁷² The following inspections are not eligible under the PA program because these inspections go beyond the scope of a safety inspection:²⁷³

- To determine if the building was substantially damaged beyond repair under the National Flood Insurance Program (NFIP);²⁷⁴

²⁷¹ See, generally, 49 U.S.C., Part 53; <https://www.transit.dot.gov/funding/grants/grant-programs>

²⁷² Stafford Act § 403, 42 U.S.C. 5170b; 44 C.F.R. § 206.225; PA Guide, p. 78; DAP 9523.2 *Eligibility of Building Safety Inspections Supporting Emergency Work*, (2008) for pre-January 2016 declarations; PAPPG, pp. 40-41, 74-75

²⁷³ Stafford Act § 403, 42 U.S.C. 5170b; 44 C.F.R. § 206.225; PA Digest, p. 14; PA Guide, p. 76; DAP 9523.2, *Building Inspections Eligibility*; PAPPG, pp. 40-41, 74-75

²⁷⁴ However, costs for such inspections may be eligible under FEMA's Hazard Mitigation Grant Program. See Chapter 7, *Hazard Mitigation Assistance*. See also Stafford Act § 203, 42 U.S.C. § 5133; 44 C.F.R. Part 206, Subpart N, Hazard Mitigation Grant Program, 44 C.F.R. § 206.430, *et seq.*; Hazard Mitigation Assistance Unified Guidance, pp. 106-7

²⁸² PA Guide, pp. at 55 and 85; PA Digest, p. 135; PA Handbook, p. 16; PAPPG, pp. 40-41, 74-75. These costs are part of the applicant's administrative allowance (See the discussion on Management Costs in this chapter). This issue related to surveys comes up most often in evaluating utilities. See Category F, *Utilities*.

- To determine if the building should be elevated or relocated; or
- To determine if the repairs are needed to make the building habitable.

Random surveys to look for damage are not eligible costs; however, if disaster-related damage is discovered or evident during such a survey, FEMA may pay for inspections to determine the extent of damage and method of repair.²⁷⁵

When building inspections are required for FEMA-funded permanent repairs, they will be included as permanent repair costs under the facility permanent repair PW, not as eligible emergency protective measures.²⁷⁶

d. Snow Assistance

FEMA recommends a major disaster declaration by the President for snow assistance only if the event results in a record or near record snowfall.²⁷⁷ Such an event may include one or more of the following conditions: snow, ice, high winds, blizzard conditions, and other wintry conditions that cause substantial physical damage or loss to improved property. FEMA authorizes reimbursement for snow assistance costs for a continuous 48-

²⁷⁵ Stafford Act § 406; 44 C.F.R. § 206.226; PA Guide, p. 76; PA Digest, p. 14; DAP 9523.2, Building Inspections Eligibility; PAPP, pp. 39, 70-71

²⁷⁶ Stafford Act § 403, 42 U.S.C. § 5170b; 44 C.F.R. §§ 206.36, .48 and .227; PA Guide, p. 76; PA Digest, p. 122; <https://www.fema.gov/media-library/assets/documents/128488>; PAPP, pp. 81-82 and Appendix H, *Snow Assistance*, pp. 188-89.

²⁷⁷ DAP 9523.1, *Snow Policy*; PAPP, pp. 81-82.

hour time period ²⁷⁸ to address the most critical emergency needs, provided that:

- The snowfall is of record or near record amount;²⁷⁹
- The response is beyond the state and local government capabilities; and
- The action is necessary to save lives, protect public health and safety, and protect improved property.

Applicants may select a 48-hour time period during which the highest eligible costs were incurred. FEMA may extend the eligible time period of assistance by 24 hours in counties where snowfall quantities are 150% of the historical record amounts. Different applicants in the same designated county may use different 48-hour periods. However, all agencies or instrumentalities of a local government must use the same 48-hour time period.²⁸⁰

Eligible snow assistance includes snow removal, snow dumps, de-icing, and salting and sanding of roads. In addition, non-snow assistance activities related to the snowstorm, such as search and rescue, sheltering, and other emergency protective measures, are eligible outside of the 48-hour time period where appropriate.²⁸¹

Limited snow-related activities to carry out eligible emergency protective measures, such as clearing snow in the immediate area of a downed power line to repair the power line, for example, are eligible irrespective of whether snow assistance is authorized for the declaration or whether

²⁷⁸ PAPPG Appendix H, *Snow Assistance*, pp. 188-89.

²⁷⁹ DAP 9523.1, *Snow Policy* VII.F.3 at p. 6; PAPPG, pp. 81-82.

²⁸⁰ *Id.*

²⁸¹ DAP 9523.1, *Snow Policy*; PAPPG, p. 78.

the activity is within the specified 48-hour time period or in a designated county or tribal land authorized for snow assistance under the declaration.²⁸²

e. Host State Sheltering

A “Host State”²⁸³ is a state or Indian tribal government that provides sheltering and/or evacuation support to evacuees from another state for which the President declared an emergency or major disaster. For purposes of Host State sheltering, the state that received the declaration and has determined that it must evacuate and shelter its residents and pets is called the “Impact State.”²⁸⁴

Host State costs for reimbursement must meet the eligibility requirements for PA Category B, emergency protective measures.²⁸⁵ Host States may receive reimbursement for evacuation and sheltering support provided to evacuees from an Impact State in two ways: via a mutual aid agreement with the Host State or from FEMA directly.

f. Mutual Aid Agreements²⁸⁶

Assistance may be available through existing mutual aid agreements. *See* earlier discussion in this chapter on *Mutual Aid Agreements*. The Impact State may reimburse the Host State for 100% of eligible costs incurred in providing evacuation and/or sheltering support. The Impact State may also reimburse the Host State for straight-time salaries of the Host State’s

²⁸² DAP 9523.1, *Snow Policy*; PAPPG, p. 78.

²⁸³ 44 C.F.R. § 206.201(g).

²⁸³ *Id.* § 206.201(h).

²⁸⁴ *Id.* § 206.225; RP 9524.3; <https://www.fema.gov/media-library/assets/documents/128488>; PAPPG, pp. 71-72.

²⁸⁵ RP 9523.18, *Host-State*; PAPPG, pp. 71-72.

²⁸⁶ 44 C.F.R. § 206.202(f)(1)(ii). This is an exception to allowable overtime costs only for force account labor provided for emergency work set forth in 44 C.F.R. § 206.228(a)(2).

force account employees who performed eligible work.²⁸⁷ The Impact State may be reimbursed by FEMA for the eligible costs of services provided by the Host State, less its non-federal share.

g. Direct Reimbursement²⁸⁸

The Impact State makes a DFA request to FEMA for direct reimbursement of a Host State for evacuation and sheltering support.²⁸⁹ In deciding whether to award a grant to the Host State, FEMA will consider whether a Host State has sufficient capability to meet some or all of the sheltering and/or evacuation needs of an Impact State and whether, if necessary, the Host State will agree to accept Impact State evacuees via any requested mode of organized transportation.

FEMA may reimburse the Host State for 100% of eligible costs, regardless of the Impact State's cost share obligation under the declaration, provided the Impact State agrees to pay its required non-federal cost share.²⁹⁰ Straight-time salaries and benefits of a Host State's permanently employed personnel are eligible for reimbursement.²⁹¹

The statutes, regulations, policies, guidance, and procedures of the PA program apply to reimbursement under the FEMA - Host State Agreement.²⁹²

²⁸⁷ 44 C.F.R. § 206.208; RP 9523.18, *Host-State*; PAPPG, p. 72.

²⁸⁸ 44 C.F.R. § 206.208.

²⁸⁹ *Id.* § 206.223(a)(2).

²⁹⁰ *Id.* § 206.202 (f)(2); RP 9523.18, *Host-State*; PAPPG, p. 72.

²⁹¹ *Id.* § 206.202 (f)(1)(ii); RP 9523.18, *Host-State*; PAPPG p. 72.

²⁹² Fact Sheet 9580.7, *Host-State Evacuation and Sheltering Frequently Asked Questions* (2010) [hereinafter Fact Sheet, *Host-State*] (2010) for pre-2016 declarations, <https://www.fema.gov/media-library/assets/documents/128488>; PAPPG, p. 72.

The federal cost share of grant assistance to the Host State from the Impact State is based on the cost share for Category B, Emergency Protective Measures, approved for the declared event. The Impact State is responsible for the non-federal cost share, if any, of funding FEMA provides to the Host State. Therefore, Host States receive 100% reimbursement of their eligible costs.²⁹³

A grant to a Host State for sheltering and/or evacuation support is available when the Impact State requests DFA from FEMA.²⁹⁴ Reimbursing a Host State for sheltering costs is an exception to the requirement that assistance can only be provided in areas designated in the major disaster or emergency declaration.²⁹⁵

To receive this grant, a Host State must enter into a FEMA - Host State Agreement and amend its State Administrative Plan (SAP).²⁹⁶ The Host State must also submit an “Application for Federal Assistance” directly to FEMA to apply for cost reimbursement. Upon award, the Host State assumes the responsibilities of “grantee” with respect to the award, except the Impact State must accept responsibility for the non-federal cost share requirement.²⁹⁷

²⁹³ RP 9523.18, *Host-State*; PAPPG, p. 72

²⁹⁴ 44 C.F.R. § 206.208(c)(3).

²⁹⁵ *Id.* § 206.223(a)(2).

²⁹⁶ *Id.* § 206.207.

²⁹⁷ *Id.* § 206.202(f)(1).

h. Demolition

Demolition of unsafe private structures that endanger the public may be eligible as emergency work when the following conditions are met:²⁹⁸

- The structures were damaged and made unsafe by the declared disaster;
- The applicant certifies that the structures have been determined unsafe and pose an immediate threat to the public;
- The applicant establishes legal responsibility based on statute, ordinance, or code to exercise its authority to demolish the unsafe structure;
- The applicant obtains rights of entry; and
- The applicant indemnifies the federal government from claims arising from the demolition of the structures.²⁹⁹

Demolition of private structures requires approval prior to work. The structures must be found to be unsafe due to the imminent threat of partial or complete collapse. FEMA will consider whether there are more cost-effective alternative measures to eliminate threats to life, public health, and safety posed by disaster-damaged, unsafe structures, including

²⁹⁸ Stafford Act § 403(a)(3)(E), which is not restricted to private structures; 42 U.S.C. § 5170b(a)(3)(E); 44 C.F.R. 206.225; DAP 9523.4, *Demolition of Private Structures* (2007) [hereinafter DAP 9523.4, *Demolition*] for pre-2016 declarations, <https://www.fema.gov/public-assistance-archived-policies>; PA Guide, pp. 39, 69, 73, 91, 119, 131, and 133; PA Debris Management Guide; PAPPG, pp. 53-55, 71-73. Eligible PA facilities may also be demolished as part of a Section 406 project.

²⁹⁹ DAP 9523.4, *Demolition*. Note the PA Digest incorrectly applies the debris removal public interest standard from 44 C.F.R. § 206.224 to demolition; however, the correct standard is articulated in DAP 9523.4; PAPPG, pp. 55-58, 75-78. .

fencing off unsafe structures and restricting public access, when evaluating requests for demolition.³⁰⁰

Local governments must agree to hold the federal government harmless and free from damages due to performance of the work. Demolition work also requires state or local certification that the structure is unsafe, as well as having an authorized local official condemn the structure in accordance with state and local law. Demolition costs are also eligible for permanent work assistance when the work is required in support of eligible repair, replacement, or reconstruction of a project.³⁰¹

While the Stafford Act authorizes demolition separately from debris removal, there are situations in which the distinction is a fine line. For example, in the implementation of the Expedited Debris Removal³⁰² pilot program after the southern tornadoes in the spring of 2011, FEMA followed a policy of one wall standing:

If a damaged structure only had one wall left standing, it would all be considered debris and the cost of knocking over the standing wall would be considered eligible under the pilot debris program. If a structure had more than one wall standing, it would not be considered debris and it would have to be separately authorized and funded as demolition, which was outside of the purview of Expedited Debris Removal.

This is also a relevant distinction in terms of eligibility. Debris removal may be authorized when FEMA determines it to be in the public interest, which includes an economic recovery rationale, in addition to protection of health and safety.³⁰³ However, demolition is only authorized as an

³⁰⁰ DAP 9523.4, *Demolition*, at VII.C.1.b; PAPPG, pp. 52-54, 75-78.

³⁰¹ PA Guide, pp. 39 and 73; PA Digest, p. 34; PA Debris Management Guide, pp. 37-40; DAP 9523.4, *Demolition*; PAPPG, p. 103.

³⁰² Also known as “Operation Clean Sweep” for the April 2011 Alabama and Mississippi tornado disasters.

³⁰³ 44 C.F.R. § 206.224.

emergency protective measure where there are immediate threats to life and property and the unsafe structures endanger the public.³⁰⁴ FEMA has no authority to fund demolition activity that only addresses economic recovery.

i. Pet Evacuations and Sheltering

FEMA may provide reimbursement for the costs of rescue, care, shelter, and essential needs for individuals with household pets, service and assistance animals, and to the household pets and service and assistance animals themselves following a major disaster.³⁰⁵ State and local governments may conduct rescue operations for household pets directly, or they may contract with other providers for such services. Please refer to Chapter 4, *Response*, for a detailed discussion on eligible activity.

B. Permanent Work Categories

Section 406 of the Stafford Act authorizes FEMA to provide grant assistance to states, local governments, and certain PNPs for the repair, restoration, and replacement of damaged or destroyed facilities.³⁰⁶ FEMA administratively categorizes this work as “permanent work,”
Categories
C-G.³⁰⁷

³⁰⁴ Stafford Act § 403(a)(3)(E), 42 U.S.C. § 5170b(a)(3)(E); 44 C.F.R. § 206.225.

³⁰⁵ Stafford Act § 403(a)(3)(J), 42 U.S.C. § 5170b(a)(3)(J). The PKEMRA amendments to the Stafford Act specifically providing this authority for 403 assistance for major disaster declarations did not also provide such language for 502 assistance under emergency declarations. However, FEMA policy does not distinguish between major disaster assistance and emergency assistance as it relates to this assistance.

³⁰⁶ Stafford Act § 406, 42 U.S.C. § 5172.

³⁰⁷ 312. *Id.*; 44 C.F.R. §§ 206.226; PA Guide, pp. 3-6, 79-108; PA Digest, p. 95; PA Handbook, pp. 15-17; PAPP, pp. 85-86

Section 406 limits permanent work reimbursement to the cost to restore a damaged facility to its pre-disaster design, function, and capacity in accordance with applicable codes and standards.³⁰⁸ See Codes and Standards section later in this chapter. The basic criteria for permanent work are:³⁰⁹

- Design: FEMA will restore a facility to its pre-disaster design or to a design in accordance with an applicable standard.
- Function: The facility must be restored to the same function that it was performing, or designed to perform, if less costly.
- Capacity: The restored facility must operate at its pre-disaster capacity.
- Current Applicable Codes: If codes dictate a larger area—for example, a square footage requirement per student in a school—FEMA will pay to increase the size of the building.

³⁰⁸ Stafford Act § 406, 42 U.S.C. § 5172; 44 C.F.R. § 206.226; PA Guide, p. 79; PA Digest, p. 95.

³⁰⁹ PA Digest, p. 95; PAPPG, pp. 89-90.

- There may be exceptions to these criteria for Alternate³¹⁰ and Improved Projects³¹¹ as discussed later in this chapter.

1. Category C: Roads and Bridges

FEMA will provide reimbursement funding for roads (paved, gravel, and dirt) and bridges³¹² that need permanent repair or replacement as a result of damage from a declared major disaster, unless they are federal-aid roads or bridges under the authority of the FHWA.³¹³

Eligible work includes repair to surfaces, bases, shoulders, ditches, culverts, low water crossings, and other features, such as guardrails. Earthwork necessary to ensure the structural integrity of the road may be eligible. Restoration may also include upgrades necessary to meet current codes and standards. Typical standards affect lane width, loading design, and construction materials.³¹⁴

Eligible repair to bridges includes decking and pavement, piers, girders, abutments, slope protection, and approaches. Earthwork to the channel and stream banks is eligible if necessary to ensure the structural integrity of the bridge. Debris removal at the bridge site is also eligible if it could cause further damage to the structure.

³¹⁰ 44 C.F.R. § 206.203(d)(2); PA Guide, pp. 79, 111-112; PA Digest, p. 5; DAP 9525.13, *Alternate Projects* (2008) for pre-2016 declarations, <https://www.fema.gov/publications-archive>; PAPPG, pp. 107-113, 115.

³¹¹ *Id.* § 206.203(d)(1); PA Guide, pp. 79, 110-111; PA Digest, p. 71; PAPPG, pp. 107-113, 115.

³¹² Stafford Act § 102 (10)(B), 42 U.S.C. § 5122(9)(B); PA Guide, pp. 79-82; PA Digest, pp. 13 and 118; PAPPG, pp. 116-117.

³¹³ PA Guide, pp. 79-82; PA Digest, p. 118; PAPPG, pp. 90-95.

³¹⁴ 44 C.F.R. § 206.226(a)(1).

Eligible work may include upgrades necessary to meet current standards for road and bridge construction. As with roads, typical standards for bridges may affect lane width, loading design, construction materials, and hydraulic capacity.³¹⁵

2. Category D: Water Control Facilities

USACE and the NRCS have primary authority for the repair of flood control works.³¹⁶ By regulation, it is also the responsibility of NRCS to coordinate with FEMA in providing assistance in a presidentially declared major disaster area.³¹⁷ When other federal agencies (OFAs) have the specific authority to repair facilities that are also eligible under the Stafford Act, FEMA generally defers to the OFAs.³¹⁸ FEMA can help with permanent repairs for other water control facilities, such as:

- Channel alignment
- Recreation
- Navigation
- Land reclamation

³¹⁵ PA Digest, p. 13; PAPPG, pp. 90-95.

³¹⁶ Stafford Act § 102(9)(A), 42 U.S.C. § 5122(9)(A); 44 C.F.R. § 206.221(h); PA Guide, pp. 82-83; PA Digest, p. 138; RP 9524.3, *Levees*; PAPPG, pp. 118-119. In individual cases, other federal agencies [hereinafter OFAs] may dispute their responsibilities for substantive and/or funding reasons. In such an event, FEMA will coordinate with these other agencies to determine responsibility.

³¹⁷ PA Digest, p. 13; PAPPG, pp. 87-91.

³¹⁸ See 7 C.F.R. §624.5(a).

- Maintenance for fish and wildlife habitat
- Interior drainage
- Irrigation
- Erosion prevention
- Flood control³¹⁹

The facilities include dams and reservoirs, levees, lined and unlined engineered drainage channels, canals, aqueducts, sediment basins, shore protective devices, irrigation facilities, and pumping facilities. There are additional limits on eligibility for PNP irrigation facilities³²⁰ and for certain facilities built specifically for flood control.³²¹

3. Category E: Buildings and Equipment

Buildings, including contents such as furnishings and interior systems, are eligible for repair or replacement.³²² In addition to the building's contents, FEMA will pay for the replacement of pre-disaster quantities of consumable supplies and inventory, such as the replacement of library books and publications destroyed by the disaster.³²³ The goods or

³¹⁹ 44 C.F.R. § 226(a). But see Section VIII(B)(8) of RP9523.5, *Debris Removal from Waterways* (October 30, 2012) for pre-2016 declarations

at <https://www.fema.gov/publications-archive> and PAPPG, pp. 53-57, which provide a limited exception for when debris removal by an applicant may be eligible under the PA program despite another federal agency having specific authority.

³²⁰ PA Guide, pp. 82-83; PA Digest, p. 138; PAPPG, pp. 118-119.

³²¹ 44 C.F.R. § 206.226 (c) and § 206.221(e)(3); PA Digest, p. 77; PAPPG, pp. 17, 118-

³²² RP 9524.3 *Levees*; PAPPG, pp. 118-119.

³²³ Stafford Act § 102(9) and (10), 42 U.S.C. § 5122(9) and (10); 44 C.F.R. §§ 206.221(e), 206.221(h), and 206.226; PA Guide, pp. 83-85; PAPPG, pp. 119-123.

³²⁴ 44 C.F.R. § 206.226 (i).

property of another held in bailment or storage by an applicant are not eligible for reimbursement, as they are not the property of the applicant.

If disaster-related mud, silt, or other accumulated debris does not pose an immediate threat, but its removal is necessary to restore the building, its removal is eligible as permanent work. If it does pose an immediate threat, the work will fall under Category A, debris removal.³²⁴

If the applicant has insurance coverage for any facility, FEMA will deduct the amount of insurance proceeds, actual or anticipated, before providing funds for restoration of the facility³²⁵ due to the prohibition against duplication of benefits.³²⁶ See *Insurance and Duplication of Benefits* later in this chapter for a further discussion of insurance.

If an insurable building damaged by flooding is located in a Special Flood Hazard Area (SFHA) identified for more than one year, FEMA will reduce the PA grant for permanent work by the maximum amount of insurance proceeds the applicant would have received for the building and its contents even if it is not covered by flood insurance.³²⁷

³²⁵ PA Guide, p. 83; PA Handbook, pp. 15-16; PAPPG, pp. 111-112.

³²⁶ Stafford Act § 312, 42 U.S.C. § 5155; PA Guide, pp. 83, 119-123; PA Digest, p. 15; DAP 9525.3, *Duplication of Benefits*; PAPPG, pp. 21, 39-40.

³²⁷ Stafford Act § 312(a), 42 U.S.C. 5155.

³²⁷ *Id.* § 406(d), 42 U.S.C. § 5172; 44 C.F.R. § 206.252; PA Digest, p. 15.

There is a very limited exception for PNP facilities that could not be insured because they were located in a community that was not participating in the NFIP if the community agrees to participate in the NFIP within six months after the disaster declaration date.³²⁸

With regard to equipment, FEMA has discretion to reimburse applicants for replacement costs of equipment based upon the cost for refurbished equipment, rather than new equipment.³²⁹

³²⁸ 44 C.F.R. § 206.252(b). See *Insurance and Duplication of Benefits* later in this chapter.

³²⁹ Stafford Act § 305, 42 U.S.C. § 5148, *Columbia Regional Hospital v. FEMA*, 708 F.3d 893 (7th Cir. 2013).

Case Example: Replacement of Equipment

In 2008, a non-profit hospital in southern Indiana applied for and received FEMA PA after heavy flooding damaged the hospital and its equipment. FEMA determined the amount of PA funding eligible to the hospital considering its statutory requirements concerning insurance proceeds and its regulations on replacement of equipment.

The hospital disagreed with the amount of funding that FEMA determined was eligible, arguing that it was entitled to new equipment as opposed to refurbished and comparable items of the same age, capacity, and condition of the equipment that was damaged. Additionally, the hospital disagreed with FEMA's reduction in funding due to insurance duplication of benefits concerns and challenged that, despite having \$25 million in insurance benefits that covered both eligible and ineligible FEMA expenses, the hospital did not actually use any of the \$25 million on FEMA eligible expenses and therefore, there was no duplicative benefit.

The hospital appealed both decisions twice through FEMA's administrative process. The appeals were denied by FEMA. The hospital initiated a lawsuit against FEMA, which eventually came before the United States Court of Appeals for the Seventh Circuit.

The Court ruled as follows:

- 1) As to the hospital's replacement of equipment argument, the Court found that FEMA had discretion to calculate the replacement costs based upon the cost for refurbished equipment, rather than new equipment.
- 2) Regarding the hospital's insurance argument, the Court found that FEMA's insurance allocation decision was an interpretative rule exempt from notice and comment.
- 3) The Court found that the hospital did not show that it had a legitimate claim of entitlement to FEMA assistance that would give rise to a protectable property interest under the Due Process Clause and that even if it had shown such entitlement, FEMA provided sufficient due process in this case.

FEMA's Motion for Summary Judgment was granted.³³⁰

4. Category F: Utilities

FEMA will fund the repair or restoration of utilities³³¹ owned by public and certain PNP entities. Typical utilities include:

- Water treatment plants and delivery systems;
- Power generation and distribution facilities, including natural gas systems, wind turbines, generators, substations, and power lines;
- Sewage collection systems and treatment plants; and
- Communications.

The costs to operate a utility facility or provide service may increase due to the disaster. These costs are usually not eligible for reimbursement and are considered increased operating costs.³³² However, the cost to establish temporary emergency services in the event of a utility shut-down may be eligible as emergency work. The loss of revenue when a utility service is shut down due to the disaster is not an eligible cost for reimbursement.³³³

Emergency power repairs may involve miles and miles of power lines with intermittent damage, making it difficult to quantify the work needed for emergency power restoration. Due to the critical nature of restoring power following a disaster and because exigent circumstances do not permit delays related to fully assessing the damage before repair work begins, FEMA may permit “time and equipment” contracts (e.g., time and

³³⁰ *Columbia Regional Hospital v. FEMA*, 708 F.3d 893 (7th Cir. 2013).

³³¹ Stafford Act § 102, 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221(e)(2) and (h) and 206.226; PA Guide, pp. 10, 18, 21, 54-55, 66, 85; PA Digest, pp. 17 and 135; PA Handbook, p. 16; Fact Sheet 9580.6, *Electric Utility Repair – (Public and Private Nonprofit)* (2009) for pre-January 2016 declarations.; PAPPG, pp. 124-127.

³³² PA Guide, pp. 54-55; PAPPG, pp. 43-44, 61.

³³³ PA Guide, pp. 54; PAPPG, pp. 75, 206.

materials contract).³³⁴ See Part Two of this chapter, Section VI(B)(2)(b), *Time and Materials Contracts* for more information. As discussed there, such contracts should be avoided but may be allowed for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed; it has been determined that no other contract is suitable; and the contract includes a ceiling price that the contractor exceeds at its own risk.³³⁵

Category F refers to the permanent repair of utility systems. Although work to restore power to customers following disasters is time sensitive, akin to emergency work, most of the work performed would be permanent (not temporary) because it constitutes a permanent repair to a damaged facility. FEMA categorizes electric utility work as follows:

- Temporary work to restore power to all facilities capable of receiving it is Category B, emergency protective measures. In these situations, the utilities make permanent repairs later to bring the damaged components into compliance with appropriate codes and standards.
- Work to restore the damaged facilities to pre-disaster condition in accordance with applicable codes and standards is Category F, Utilities (permanent work). Utilities may complete permanent repairs immediately after the disaster occurs or after temporary repairs are completed.³³⁶

³³⁴ **Rural** electrical cooperatives, municipal utilities, and public power districts generally provide the materials used in repairing their systems; accordingly, instead of “time and material” contracts, they use “time and equipment” contracts. PA Fact Sheet 9580.6, *Electric Utility Repair*; PAPPG, p. 206. Generally, such emergency work is limited to no more than 70 hours; however, power restoration is given special consideration because the type of work is best suited to a “time and materials” (or more commonly, a “time and equipment” contract) than unit price or lump sum contract.

³³⁵ 2 C.F.R. § 200.318(j); See also 44 C.F.R. §13.36(b)(10) (2014); however, there is no analogous section in 2 C.F.R. Part 215 (2013) for colleges, hospitals, or non-profits for pre-Uniform Guidance procurements.

³³⁶ PA Fact Sheet 9580.6, *Electric Utility Repair*; PAPPG, pp. 117-119, 198.

Case Example: Provision of power restoration through 100% federal cost share during Hurricane Sandy

In 2012, Hurricane Sandy left countless residents and businesses in New Jersey, New York, and Connecticut without power. The lack of electricity posed an imminent threat to the public health and safety and property. Due to immediacy and severity of the threat, the President authorized 100% federal cost share, including DFA, for emergency power restoration for 15 days pursuant to 44 C.F.R. §206.47(d).

This assistance was offered after FEMA determined that (1) the power companies were unable to execute the power restoration work themselves in a timely manner; (2) continued interruption/lack of power would result in an immediate threat to the health and safety of the community; and (3) provision of the assistance was beyond state and local capability.

Permitted use of this authority was limited to transporting, equipping, and, when necessary, temporarily sheltering power restoration teams and providing equipment and activities necessary for temporary power generation (including pumps and debris removal). Adjustments to 100% federal share are extremely rare and are unlikely outside of the extraordinary circumstances of an event like Hurricane Sandy.

Example of a Three-Stage Power Restoration Project

The power facility on the Island of Tutuila, American Samoa, suffered major damage in the 2009 earthquake and tsunami disaster that disrupted power island-wide. Phase 1 consisted of a Category B mission assignment to the USACE for the temporary placement of generators to provide immediate but limited power. Phase 2 consisted of Category B grant assistance for the lease of a temporary turnkey power facility to provide sufficient, uninterrupted power for the island pending the repair/replacement of the damaged facility. Phase 3 consisted of Category F grant assistance for the permanent repair of the damaged facility.

5. Category G: Parks, Recreational Areas, and Other Facilities

Publicly owned facilities in this category³³⁷ that are generally eligible include:

- Playground and picnic equipment;
- Swimming pools, golf courses, and tennis courts;
- Piers and boat docks;
- Beaches (*see* criteria later in this section);
- Mass transit, such as rail systems;
- Supporting facilities, such as roads, buildings, and utilities, that are located in parks and recreational areas;
- Golf courses;
- Fish hatcheries; and
- Other facilities that do not fit in Categories C-F.³³⁸

PNP recreational facilities are not eligible for permanent repair/replacement work.³³⁹

³³⁷ Stafford Act § 102(9) and (10), 42 U.S.C. § 5122 (9) and (10); 44 C.F.R. § 206.221(e) (h); PA Guide, pp. 20, 66, 68, 74, 86-87; PA Digest, pp. 12 and 92; PAPPG, pp. 126-129.

³³⁸ PA Guide, pp. 86-87; PA Digest, p. 92; PAPPG, p. 126.

³³⁹ PA Guide, p. 86; PA Digest, p. 92; PAPPG, p. 12, Table 3. *PNP Ineligible Facilities*, p. 15, and Appendix B, *Private Nonprofit Facility Eligibility Examples*, pp. 171-174.

a. Beaches

Beaches are eligible for permanent repair only if they are improved beaches and have been routinely maintained prior to the disaster.³⁴⁰ A beach is considered to be an “improved beach” if it has been constructed by the placement of sand to a designed elevation, width, grain size, and slope and has been maintained in accordance with a maintenance program involving the periodic re-nourishment of sand.

FEMA requires the following from an applicant before approving assistance for permanent restoration of a beach:

- Design documents and specifications, including analysis of grain size;
- As-built plans;
- Documentation of regular maintenance or nourishment of the beach; and
- Pre- and post-storm profiles of the beach.³⁴¹

The placement of sand on a beach from periodic dredging operations is not considered a regular beach maintenance plan. Such activities are considered maintenance of the channel, not the beach.³⁴²

b. Trees and Ground Cover

Trees and ground cover are not eligible for replacement. This restriction applies to trees and shrubs in recreation areas, such as parks, as well as

³⁴⁰ 44 C.F.R. § 206.226(j)(2); PA Guide, pp. 74, 86-87; PA Digest, p. 12; PAPPG, pp. 127-128.

³⁴¹ PA Guide, pp. 86-87; PA Digest, p. 12; PAPPG, pp. 127-128.

³⁴² PAPPG, pp. 127-128.

trees and shrubs associated with public facilities. However, such plantings may be eligible for replacement when:

- Grass and sod replacement is an integral part of the repair or replacement of an eligible recreational facility (e.g., publicly owned sports fields); or
- They are part of the restoration of an eligible facility and are necessary to stabilize slopes, erosion control, or minimize sediment runoff; or required for the mitigation of environmental impacts.³⁴³

IV. Permanent Repair/Replacement

A. In General

The Stafford Act recognizes that disasters may destroy buildings and infrastructure and that replacement of destroyed structures may be essential.³⁴⁴ FEMA's regulations provide that if disaster damage does not exceed 50% of the cost of replacing a facility, then the facility is repairable.³⁴⁵

Conversely, if the disaster damage is greater than 50% of the cost of repairing a facility, then the facility is eligible for replacement. Exceptions exist for historic preservation of structures and may

³⁴³ RP 9524.5, *Trees Plantings Associated with Facilities* (2013) for pre-2016 declarations; PAPPG, pp. 126-127.

³⁴⁴ Stafford Act §§ 406(a), (c), and (e); 42 U.S.C. § 5172(a), (c), and (e).

³⁴⁵ 44 C.F.R. § 206.226(f). DAP 9524.4, *Repair vs. Replacement of a Facility under 44 C.F.R. §206.226(f) (The 50 Percent Rule)* (2009) [hereinafter DAP 9524.4, *50 Percent Rule*] for pre-2016 declarations. PAPPG, pp. 101-104.

depend on whether it is possible to meet current codes and standards.³⁴⁶

FEMA guidance explains the process for determining whether replacement may be appropriate.³⁴⁷ Often it is a challenge for FEMA and the applicant to determine what elements of the structure should be included in the cost analysis.³⁴⁸

B. Alternate Projects

An applicant has the flexibility to determine that funds to repair an eligible facility damaged by a disaster could be of better use if applied to an alternate project.³⁴⁹ More specifically, an applicant must have determined that “the public welfare would not be best served by repairing, restoring, reconstructing, or replacing any public facility owned or controlled by the state or local government.”³⁵⁰

An applicant has additional flexibility in being able to apply the funding to multiple projects.³⁵¹ All alternate projects must be within the declared disaster area.

³⁴⁶ 44 C.F.R. § 206.226(f)(3).

³⁴⁷ PA Guide, p. 36-38; PAPPG, pp. 101-115.

³⁴⁸ RP. 9526.1, *Mitigation Funding* at VII.B. *See also* DAP 9524.4, *50 Percent Rule*; PAPPG, pp. 99-103. DAP 9525.13,

³⁴⁹ Stafford Act § 406(c), 42 U.S.C. § 5172(c); 44 C.F.R. § 206.203(d)(2) *Alternate Projects* for pre-2016 declarations; PAPPG, pp. 85, 109-110.

Id. § 406(c)(1)(B)(i) and (ii), 42 U.S.C. § 5172(c)(1)(B)(i) and (ii).

³⁵⁰ Stafford Act § 406(c), 42 U.S.C. § 5172(c); 44 C.F.R. § 206.203(d)(2);

³⁵¹ *Id.* § 406(c)(1)(A), 42 U.S.C. § 5172(c)(1)(A).

Alternate projects may include:

- repair or expansion of other public facilities;
- construction of new facilities;
- demolition of the original structure;
- purchase of capital equipment;
- funding of cost-effective hazard mitigation measures in the area affected by the disaster;
- funding project shortfalls due to mandatory NFIP reductions on applicant buildings in floodplains; and supplemental funds used on an improved project.

1. STTLs

Alternate projects for governmental entities are eligible for 90% of the lesser of:

- The approved federal share; or
- The approved federal share of the actual costs of completing the alternate project.³⁵²

2. PNPs

Alternate projects for PNP entities are eligible for 75% of the lesser of:

- The approved federal share of the estimated eligible costs associated with repairing the damaged facility to its pre-disaster design; or

³⁵² *Id.* § 406(c)(1)(A), 42 U.S.C. § 5172(c)(1)(A); 44 C.F.R. § 206.203(d)(2)(ii).

- The approved federal share of the actual costs of completing the alternate project.³⁵³

C. Improved Projects

When performing permanent restoration work on a damaged facility, PA applicants may decide to make improvements to the damaged facilities beyond simple restoration to pre-disaster design and function. For example, an applicant may wish to replace a fire station that had one bay with a new fire station with three bays, or to lay asphalt on a gravel road.

FEMA regulations authorize such improved projects (i.e., projects that incorporate improvements while retaining the original pre-disaster function) but limit FEMA funding to that which restored pre-disaster function and capacity.³⁵⁴

An applicant may request an improved project for either small or large projects. *See PA Process* later in this chapter for a discussion of small and large projects. The improved facility must maintain the original pre-disaster function and at least the pre-disaster capacity. PA funding for improved projects is limited to the federal share of the estimated costs of repairing or replacing the damaged facility to its pre-disaster design or the actual costs of completing the improved project, whichever is less.³⁵⁵

The balance of funding is a non-federal responsibility. This includes any costs required solely because of the improvements (for example, increased costs to comply with codes and standards, or environmental or historic preservation requirements attributable solely to improvements and not to repairs of the original facility).

FEMA may also provide assistance with hazard mitigation measures under the PA program for the original facility but not if the improved

³⁵³ *Id.* § 406(c)(2)(A), 42 U.S.C. § 5172(c)(2)(A); 44 C.F.R. § 206.203(d)(2)(iii).

³⁵⁴ 44 C.F.R. § 206.203(d)(1).

³⁵⁵ PA Guide, p. 111; PA Digest, p. 71; PAPPG, pp. 102-108. 109-11

project involves a completely new facility.³⁵⁶ FEMA must review and approve any project that result in significant change to the pre-disaster configuration of a facility, including a different location, facility footprint, or size, prior to construction to ensure compliance with environmental and historic review.³⁵⁷

Further, subrecipients must obtain the recipient/state's approval for an improved project prior to the start of construction. The time limits associated with repairing the damaged facility to its pre-disaster condition also apply to improved project construction.

D. Permanent Work Alternative Procedures Pilot Program

The *Public Assistance Alternative Procedures Pilot Guide for Permanent Work*, which outlines the permanent work alternative procedures, was initially issued by the PA Program on May 20, 2013, and has been revised.³⁵⁸ It is FEMA's intent the alternative procedures program remain in place as a pilot until FEMA promulgates regulations that reflect the program changes the law authorizes. The

³⁵⁶ RP 9526.1, *Hazard Mitigation Funding under Section 406 (Stafford Act)* for pre-2016 declarations; PAPP, pp. 103-108110-115. Also refer to the subsequent discussion in this chapter on *Hazard Mitigation Measures in PA Permanent Work Projects*.

³⁵⁶ The statute provides for a declaration date of January 29 2013, (Stafford Act § 428(a), 42 U.S.C. § 5189f(a); however, the initial pilot program guidance did not issue until May 20, 2013, which became the effective declaration date for eligible projects.

³⁶⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Public Assistance Alternative Procedures Pilot Guide for Permanent Work* (Version 3) (June 28, 2015), See also PAPP, pp. 20-2

pilot program for permanent work is effective for any major disaster or emergency declared on or after May 20, 2013.³⁵⁹

FEMA may also approve subgrants using the alternative procedures for major disasters or emergencies declared before May 20, 2013, if construction has not begun.³⁶⁰ The alternative procedures contained in the *Public Assistance Alternative Procedures Pilot Guide for Permanent Work* are limited to large projects.³⁶¹

For permanent work, FEMA is currently piloting the following procedures:

- Grants based on fixed estimates. The subrecipient agrees to be responsible for actual costs that exceed the estimate. Additional procedures under this pilot are not available unless the project is based on a fixed estimate.
- An in lieu contribution (i.e., alternate project) without the reduction of assistance to eligible applicants as stated in sections 406(c) (1) and (2) of the Stafford Act. (See standard procedure in Part One, Section IV(B), *Alternate Projects*, earlier in this chapter.)

³⁵⁹ *Public Assistance Alternative Procedures Pilot Guide for Permanent Work* (Version 3), p. 2. A large project is a subgrant with a total estimated cost that exceeds the monetary threshold established in Section 422 of the Stafford Act and 44 C.F.R. §206.203(c). For major disasters and emergencies declared on or after October 1, 2016 (Fiscal Year 2017), the threshold is \$125,500. See <http://www.fema.gov/public-assistance-resources-and-tools> for the most current threshold.

³⁶⁰ *Id.*

³⁶¹ *Public Assistance Alternative Procedures Pilot Guide for Permanent Work* (Version 3), p. 2. A large project is a subgrant with a total estimated cost that exceeds the monetary threshold established in Section 422 of the Stafford Act and 44 C.F.R. §206.203(c). For major disasters and emergencies declared on or after October 1, 2016 (Fiscal Year 2017), the threshold is \$123,100. See <http://www.fema.gov/public-assistance-resources-and-tools> for the most current threshold.

- Consolidating a subrecipient's damaged facilities as a single project based upon fixed estimates.
- Permitting a subrecipient to use all or part of the excess grant funds for cost-effective mitigation activities that reduce the risk of future damage, hardship, or suffering from a major disaster, and other management activities to improve future PA operations or planning.
- Availability upon request of an independent expert panel to validate, based on applicable regulations and policies, the Administrator's or certified cost estimate prepared by the subrecipient's professionally licensed engineers when the project has an estimated eligible federal share of at least \$5 million.³⁶²
- Upon request, consider the applicant's properly conducted and certified cost estimate prepared by professionally licensed engineers to the extent the estimates comport with applicable regulations, policies, and guidance.

While FEMA does not require all features of the permanent work alternative procedures listed to be selected to participate in the pilot program, a subrecipient must agree to participate in the grants based on fixed estimates procedure before having access to any of the other permanent work alternative procedures.

Review of the *Public Assistance Alternative Procedures Pilot Guide for Permanent Work*³⁶³ is necessary to have a full understanding of FEMA's guidance on permanent work projects authorized under the PA Program.

If a subrecipient does not elect to use the permanent work alternative procedures, (discussed in detail in the *Public Assistance Alternative Procedures Pilot Guide for Permanent Work*), then standard FEMA PA permanent work procedures (outlined here) will be in effect for

³⁶² Prior to the enactment of SRIA Pub. Law. 113-2 (2012), FEMA had the authority to accept subgrantee estimates and had done so when appropriate.

³⁶³ See PAPPG, pp. 46-48; Public Assistance Alternative Procedures Pilot Guide for Permanent Work.

eligible work. A subrecipient may apply the permanent work alternative procedures to certain facilities, and choose to have other work funded under PA's standard permanent work procedures.

V. Codes and Standards

A. In General

The Stafford Act authorizes FEMA to reimburse the costs of repair and replacement based on the design of the facility as it existed immediately before the disaster event but also in “conformity with codes, specifications, and standards . . . applicable at the time at which the disaster occurred.”³⁶⁴ Improvements and upgrades are eligible provided they are required by a properly promulgated code, specification or standard.

Moreover, Stafford Act Section 323 of the makes PA funding for repair and replacement contingent upon the work being carried out in accordance “with applicable standards of safety, decency, and sanitation and in conformity with applicable codes, specification, and standards....”³⁶⁵ FEMA may also require safe land use and construction practices.³⁶⁶

If a facility is eligible for replacement, funding will be based on the cost to construct the new facility according to the pre-disaster design and in compliance with current codes for new construction.³⁶⁷ Code upgrades associated with repair projects must be triggered by the repair in question. Federal, state, and local repair or replacement standards that change the pre-disaster design of facilities must:

- Apply to the type of repair or restoration required;

³⁶⁴ Stafford Act § 406(e), 42 U.S.C. § 5172(e).

³⁶⁵ *Id.* § 323 (a)(1), 42 U.S.C. § 5165a (a)(1).

³⁶⁶ *Id.* § 323(a)(2), 42 U.S.C. § 5165a (a)(2); 44 C.F.R. § 206.400. *See also* FEMA Recovery Policy, FP-104-009-4, *Public Assistance Required Minimum Standards* (Sept. 30, 2016), <https://www.fema.gov/media-library/assets/documents/124326>.

³⁶⁷ DAP 9527.4, *Codes*, VII C 1.b; PAPPG, pp. 74, 85, 89-90, 92, 116.

- Be appropriate to the pre-disaster use of the facility;
- Be found reasonable, in writing, and formally adopted and implemented on or before the disaster declaration date or be a legal federal requirement applicable to the type of restoration;
- Apply uniformly to all similar types of facilities within the jurisdiction; and
- Have been enforced during the time the standard was in effect.³⁶⁸

If FEMA determines that a code meets all five criteria, the work and associated costs, including any eligible upgrades triggered by the code, may be eligible for funding.³⁶⁹ Code upgrades that are ineligible pursuant to the five criteria, but that will enhance a facility's ability to resist similar damage in a future event, may be eligible under Section 406, Hazard Mitigation, discussed later in this chapter.³⁷⁰

Applicable codes, specifications, and standards³⁷¹ include any disaster resistant building code that meets the minimum requirements of the NFIP,³⁷² as well as being substantially equivalent to the recommended provisions of the National Earthquake Hazards Reduction Program.³⁷³ In addition, the applicant will need to comply with any other applicable requirements, such as the Coastal Barrier Resources Act;³⁷⁴ Executive Order 11,988, Floodplain Management; and Executive Order 12,699,

³⁶⁸ 44 C.F.R. § 206.226(d). PAPP, p. 93-5.

³⁶⁹ Stafford Act § 406(e), 42 U.S.C. § 5172(e); 44 C.F.R. § 206.226(d); DAP 9527.4, *Codes*; PAPP, pp. 74, 85, 89-90, 92, 116.

³⁷⁰ *Id.*

³⁷¹ 44 C.F.R. § 206.221(i). PAPP, p. 93-5.

³⁷² Flood Disaster Protection Act of 1973, Pub. L. 93-234 (1973), codified as amended at 42 U.S.C. §§ 4002, 5154, and 5172; 44 C.F.R. §§ 206.251(d) and 206.400(b). PAPP, p. 93-5, 95-98.

³⁷³ Earthquake Hazards Reduction Act of 1977, Pub. L. 95-124 (1977), codified as amended at 42 U.S.C. §§ 7701-7709; 44 C.F.R. § 206.400(b). PAPP, p. 93-5.

³⁷⁴ Coastal Barrier Resources Act, Pub. L. 97-348 (1982), codified as amended at 16 U.S.C. §§ 3501-3510. PAPP, p. 93-5, 95-98.

Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction.³⁷⁵

B. PA Minimum Standards Requirement

FEMA's Public Assistance Program requires the integration and use of the hazard-resistant provisions of the International Code Council's International Building Code (IBC), the International Existing Building Code, and/or the International Residential Code as a minimum design standard for all eligible building restoration projects where the design standard is triggered.³⁷⁶

Hazard-specific requirements under the new minimum standards include but are not limited to³⁷⁷ wind, flood, and seismic resistant requirements for buildings located in areas that trigger such requirements under the IBC. In addition, in areas where tornado shelter design wind speeds are 250 mph or greater, the applicant must incorporate a storm shelter or safe room (to International Code Council 500 requirements) for elementary and secondary schools with occupant loads of 50 or more, Emergency Operations Centers, 911 call stations, fire stations, rescue stations, ambulance stations and police stations.

These disaster-resistant standards are minimum standards. If the applicant has a building located in an area without adopted codes or with locally adopted codes, specifications, or standards that omit or weaken the disaster-resistant provisions in the IBC, the applicant must, at a minimum, incorporate the standards required by this policy. Costs associated with conforming to these minimum standards will be eligible for PA funding at the cost share for the disaster.

If locally applicable codes or standards trigger a more stringent disaster-resistant upgrade than those required by the IBC or an

³⁷⁵ Exec. Order 12,699 (1990), amended by Exec. Order 13,286 (2003). *See also*, DAP 9527.1 Seismic Safety – New Construction (2007). PAPP, p. 98.

³⁷⁶ FP-104-009-4, *Public Assistance Required Minimum Standards*; PAPP, p. 93-5.

³⁷⁷ *See the Replacement Language for PA Program and Policy Guide* at

<https://www.regulations.gov/#!documentDetail;D=FEMA-2016-0007-0002>; PAPP, p. 93-5.

upgrade that is not related to reducing disaster risk, FEMA determines the eligibility of the costs to comply with the local standards according to the criteria outlined in Section V(A).

Case Example: Facilities for Which FEMA May Reimburse for Upgrades to Meet Current Codes, but Not Relocation Costs

A police station in Alabama was destroyed by a tornado in April 2011. The facility could not be rebuilt on the same site, as there was insufficient square footage on the site to meet Alabama Administrative Code requirements for an on-site sewer treatment system (Alabama Administrative Code 420-3-1-.09(1)(a)). The applicant sought PA funding to replace the police station—along with the upgraded sewer treatment system at a different, larger site—and sought reimbursement for the cost to acquire the new site.

FEMA determined that the costs for the sewer treatment system at the new site were eligible, since the upgrades were required by state standards. However, even though the facility was technically relocated to a different site, the land acquisition costs were not eligible because the applicant did not meet the regulatory criteria for relocation of a facility under 44 C.F.R. § 206.226(g)(1).

C. Unified Federal Environmental and Historic Preservation Review³⁷⁸

□

SRIA amended the Stafford Act to direct the President, in consultation with the Council of Environmental Quality and the Advisory Council on Historic Preservation, to “establish an expedited and unified interagency review process to ensure compliance with environmental and historic requirements under federal law relating to disaster recovery projects, in order to expedite the recovery process, consistent with applicable law.”³⁷⁹ This unified process aims to coordinate and streamline the environmental and historic preservation reviews to

³⁷⁸ See also DOLR Chapter 8, *Environmental and Historic Preservation Laws*.

³⁷⁹ Stafford Act § 429, 42 U.S.C. § 5189(g), SRIA, P.L. 113-2, (2013).

expedite planning and decision making for disaster recovery projects.³⁸⁰

In September 2015, FEMA published the Unified Federal Environmental and Historic Preservation (EHP) Review Guide for Federal Disaster Recovery Assistance Applicants (Applicant Guide) to assist applicants (e.g., state, local, and tribal governments, small businesses, and individuals) in complying with EHP requirements and to expedite the review process where multiple agencies may be involved in funding or permitting a disaster recovery project.³⁸¹

When two or more federal agencies are involved with a project, or if any applicant EHP coordination has occurred, relevant environmental and cultural resource considerations may have already been identified and addressed in previous EHP project planning activities. FEMA is able to utilize and/or adopt EHP documentation if that documentation addresses the scope of the FEMA-approved activity and FEMA verifies that it meets FEMA's EHP compliance requirements.

Applicants should identify for FEMA whether their project will involve another federal agency or agency with delegated federal authority and provide any relevant information to help streamline and inform the EHP review.

VI. Insurance and Duplication of Benefits

A. Insurance Requirements in PA

Three key provisions in the Stafford Act relate to insurance and PA program permanent work:

- A requirement to obtain and maintain insurance as a condition of receiving PA grant funding for permanent work;³⁸²

³⁸⁰ See <https://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters>; PAPPG, pp. 107-108

³⁸¹ See the Unified Federal Environmental and Historic Preservation Review Library at <https://www.fema.gov/media-library/assets/documents/98911>.

³⁸² Stafford Act § 311, 42 U.S.C. § 5154.

- A prohibition on duplication of disaster assistance benefits (from any source, including insurance proceeds);³⁸³ and
- Deductions from grant funding for certain uninsured facilities located in a Special Flood Hazard Area (SFHA) identified for more than one year.³⁸⁴

In addition, the National Flood Insurance Act of 1968,³⁸⁵ as amended by the Flood Disaster Protection Act of 1973, requires the purchase of flood insurance as a condition of federal financial assistance for construction or acquisition in an SFHA.³⁸⁶

Except for cases where flood damage occurs in an SFHA, FEMA does not require applicants to have insurance on their facilities before first requesting PA funding. However, with limited exception, FEMA will automatically reduce PA permanent work assistance for insurable facilities located in an SFHA after a flood event regardless of whether the building previously received disaster assistance.³⁸⁷

FEMA regulations waive the requirement to obtain insurance when the eligible damage (before any reductions) for a project is less than \$5,000.³⁸⁸

³⁸³ *Id.* § 312, 42 U.S.C. § 5155.

³⁸⁴ *Id.* § 406(d), 42 U.S.C. § 5172(d).

³⁸⁵ *NFIA*, Pub. L. No. 90-448, (1968) (codified as amended at 42 U.S.C. §§ 4001-4129).

³⁸⁶ Flood Disaster Protection Act of 1973, Pub. L. 93-234 § 102(a), (1973); codified as amended at 42 U.S.C. § 4012a (a). *See also* 42 U.S.C. § 4003(a)(3)-(4) (defining “financial assistance” and “financial assistance for construction or acquisition”).

³⁸⁷ *See* 44 C.F.R. 206.250(d) and 206.252(a).

³⁸⁸ 44 C.F.R. §§ 206.252(d), 206.253(d). *See also* PA Guide, p. 123; PAPPG, p.89.

³⁹⁶ *Id.* § 311(a)(1)-(2), 42 U.S.C. § 5154(a)(1)-(2); 44 C.F.R. § 206.252(d) (facilities damaged by flood) and § 206.253(b)(1) (facilities damaged by disasters other than flood). *But see* the discussion of State Insurance Commissioner certifications in subsection (1)(b) immediately below.

1. Requirement to Obtain and Maintain Insurance

a. Effect on Future PA Grants

The Stafford Act requires applicants who receive assistance to repair, restore, and replace damaged facilities to obtain and maintain reasonably available, adequate, and necessary insurance to protect against future loss to such facilities.³⁸⁹ The insurance must, at a minimum, equal the amount of eligible project costs, including any hazard mitigation measures taken and protect the facility against future loss from the same peril.³⁹⁰ While PA permanent work encompasses a broad range of facility types, FEMA places the insurance requirement only on buildings and their contents, equipment, and vehicles.³⁹¹

FEMA will deobligate a current PA grant if an applicant fails to obtain and maintain the required insurance prior to closeout.³⁹² The applicant must

³⁸⁹ 44 C.F.R. §§ 206.252(d) and 206.253(b)(1) (2013). Note that the language describing applicant-required insurance differs depending on whether the cause of the peril is related to a flood or non-flood event. For a flood event, the applicant must maintain insurance “in the amount of eligible disaster assistance.” For a non-flood event, the applicant must maintain insurance “based on the eligible damage that was incurred...” In practice, PA treats the differences in language the same in both the flood and non-flood provisions. Insurance required is based on the amount of the PA funding received from FEMA.

³⁹⁸ Public Assistance Policy on Insurance, FP 206-086-1[Hereinafter FP 206-086-1, *PA Policy on Insurance*] (2015), which was not superseded by the PAPPG, at <https://www.fema.gov/media-library/assets/documents/107564>; PAPPG, pp. 84-85.

³⁹⁰ Stafford Act § 311 (a)(1)-(2), 42 U.S.C. § 5154(a)(1)-(2); 44 C.F.R. § 206.253(b)(f) (2013). *See also* PA Appeal FEMA-1426-DR-GU, *Guam Department of Education Southern High School A/C System* (2010). The applicant claimed that the requirement to obtain and maintain insurance coverage was only applicable to receiving FEMA assistance in future events, not the current one. FEMA disagreed, stating that § 311 of the Stafford Act requires applicants, as a condition of receiving assistance, not only to obtain and maintain such types and extent of insurance as may be reasonably available, adequate, and necessary to protect against future loss, but additionally, 44 C.F.R. § 206.253 states that “Assistance under § 406 of the Stafford Act will be approved only on the condition that the subgrantee obtain and maintain . . . insurance” In this case, the applicant failed to obtain the required insurance coverage and FEMA deobligated the grant funding.

submit proof of purchase of the required insurance in the form of a binder or policy to FEMA.

If an applicant cannot obtain insurance prior to grant approval (e.g., because the facility is being reconstructed), the applicant may provide a commitment letter to document the outstanding insurance requirement for the replacement facility. In those cases, the applicant must insure the property when the applicant resumes legal responsibility or when the scope of work is complete.

The applicant must then provide proof of insurance for the rebuilt facility to the recipient as soon as possible after the insurance is purchased. FEMA will verify proof of insurance prior to grant closeout to ensure that an applicant has complied.

In a subsequent disaster, the failure of an applicant to obtain and maintain insurance previously required by FEMA means that facility is not eligible for PA permanent work in future major disasters.³⁹³ In addition, FEMA may be required to recoup previously provided funding because obtaining insurance was a condition of the previous grant.

The Stafford Act does not require applicants to obtain or maintain insurance on temporary facilities. If applicants purchase such insurance, FEMA will not reimburse any associated costs (e.g., premiums, deductibles).³⁹⁴

b. Modifying the Obtain and Maintain Requirement and State Insurance Commissioners

Federal agencies may promulgate regulations that interpret and implement statutory authority granted to them, but they may not ignore, override,

³⁹³ Stafford Act § 311(b), 42 U.S.C. § 5154(b); 44 C.F.R. § 206.253(f) (2013). FP 206-086-1, *PA Policy on Insurance*, Section VII, Part 1, G and H, pp. 7-8.

³⁹⁴ PA Guide, p. 123; PAPPG, pp. 88-89

waive, or otherwise act outside that authority.³⁹⁵ The plain language of the Stafford Act prohibits FEMA from waiving the “obtain and maintain” requirement.³⁹⁶

An applicant may request that FEMA modify the insurance requirement if the applicant establishes that:

- The applicant attempted to obtain insurance and finds that level of insurance is not reasonably available;
- The applicant used an alternative approach that provides adequate protection against future loss (for example, a sufficient level of mitigation); or
- The required insurance is not necessary to protect against future loss.³⁹⁷

The Stafford Act prohibits FEMA from requiring insurance beyond the type or extent certified as reasonable by the state insurance commissioner responsible for regulation of such insurance.³⁹⁸ Generally, the states

³⁹⁵ *Cf. Nat'l Cable & Telecomms. Assn v. Brand X Internet Servs.*, 545 U.S. 967, 982–84 (2005), finding no deference to agency interpretations where court finds statute to be unambiguous; and *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). (“[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

³⁹⁶ See 42 U.S.C. § 5154(b), prohibiting waiver of insurance maintenance requirement under section 301 of Stafford Act, *Waiver of Administrative Conditions*.

³⁹⁷ FP 206-086-1, *PA Policy on Insurance*, Section VII, Part 1, D, p. 5.

³⁹⁸ Stafford Act § 311(a)(2), 42 U.S.C. § 5154(a)(2); 44 C.F.R. §§ 206.252(d), 206.253(b)(1), (c); FP 206-086-1, *PA Policy on Insurance*, Section VII, Part 1, E, pp. 6–7. See also PA Appeal FEMA-1577-DR-CA, *City of Los Angeles* (2008): “In making a determination with respect to availability, adequacy, and necessity . . . the President shall not require greater types and extent of insurance than are certified to him as reasonable by the appropriate state insurance commissioner responsible for regulation of such insurance. For the applicant to receive a waiver of insurance requirements under §311 of the Stafford Act, it must present a certification signed by the California State Insurance Commissioner that flood insurance for its facilities is not reasonably available. The certification must be based on the grounds of availability, adequacy, or necessity for the applicant to receive a waiver. This letter was signed by a DOI (Department of insurance) analyst rather than the California State Insurance Commissioner . . .” FEMA denied this appeal.

regulate multiple lines of insurance (e.g., property, liability, life, automobile) as intrastate commerce.³⁹⁹

This regulation function generally includes licensing insurers, reviewing premium rates and insurance products (e.g., forms), assessing the financial health of insurers, and maintaining a guaranty fund (funded via assessments on admitted insurers).⁴⁰⁰

State insurance commissioners regulate “admitted insurers” (i.e., companies conducting business within state boundaries) and, in certain situations, “surplus lines” insurance (i.e., companies conducting business across state boundaries).⁴⁰¹

Based on this, the Stafford Act generally vests the state insurance commissioners with the ability to certify whether or not the type and extent of insurance required is reasonable. However, state insurance commissioners cannot issue certifications concerning insurance available through the NFIP. State insurance commissioners do not regulate the

³⁹⁹ See generally McCarran-Ferguson Act of 1945, Pub. L. 79-15(1945), codified as amended at 15 U.S.C. §§ 1011-1015, stating congressional preference that states regulate “business of insurance.” State insurance commissioners have primary responsibility in regulating admitted insurers, which are licensed by the state. Commissioners have a more limited role for the non-admitted market (e.g., surplus lines); see Non-admitted and Reinsurance Reform Act of 2010, Pub. L. No. 111-203 (2010), codified at 15 U.S.C. § 3201-3206, *et seq.* (establishing regulation and taxation rules for surplus lines insurers).

⁴⁰⁰ See, e.g., GAO-14-136, Property and Casualty Insurance: Effects of the Nonadmitted and Reinsurance Reform Act of 2010 5 (2014), available at <http://www.gao.gov/assets/670/660245.pdf>.

⁴⁰¹ The Nonadmitted and Reinsurance Reform Act of 2010 establishes taxation and regulatory responsibility in either (a) the “home state” of the insured (not the insurer), or (b) if the risk is located entirely outside the state of the insured, the state to which the greatest extent of the taxable premium is allocated.

NFIP.⁴⁰² As a result, the state insurance commissioner is not “responsible for regulation of” the NFIP, and Section 311’s deference to the state insurance commissioner’s certification of reasonableness does not apply with respect to flood insurance available under the NFIP.⁴⁰³ Moreover, Congress established the NFIP to make a level of flood insurance reasonably available.

When eligible costs exceed the maximum amount of flood insurance available under the NFIP (currently up to \$500,000 for buildings and up to \$500,000 for contents), a certification from the commissioner could

⁴⁰² See, e.g., *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 175-176 (2d Cir. 2012) and *McGair v. Am. Bankers Ins. Co.*, 693 F.3d 94, 99 (1st Cir. 2012), holding interpretation of insurance policies issued pursuant to National Flood Insurance Program [hereinafter NFIP] is a matter of federal law; PA Appeal FEMA-1763-DR-IA, *City of Keokuk, George M. Verity Tow Boat Museum* (Feb. 29, 2010), denying waiver because FEMA determined flood insurance under NFIP was available; PA Appeal FEMA-1606-DR-TX, *Texas Parks and Wildlife Department* (Feb. 21, 2008), finding state insurance commissioner cannot waive obtain and maintain requirement for flood damage because Congress created NFIP to provide reasonable flood insurance. See also *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1983), referring to NFIP as a “child of Congress, conceived to achieve policies which are national in scope...”

⁴⁰³ 42 U.S.C. § 5154(a)(2). See, e.g., PA Appeal FEMA-1763-DR-IA, *City of Keokuk, George M. Verity Tow Boat Museum* (2010). The applicant had stated it tried for the past 30 years to obtain flood insurance for the facility and provided a letter from its insurance carrier stating that the facility was uninsurable under the NFIP. The facility was a boat that had been dry-docked since 1961, had cables attached to concrete pylons buried in the ground to permanently anchor it, was hard wired for electricity, and had plumbing running to it. FEMA determined that the museum met the definition of a building (found at 44 C.F.R. § 206.251(b)) for purposes of the NFIP and therefore flood insurance under NFIP was available. FEMA denied the appeal. See, e.g., PA Appeal FEMA-1606-DR-TX, *Texas Parks and Wildlife Department* (2008). The applicant submitted a letter from the Texas Commissioner of Insurance who certified that although insurance was available, the type, amount, and extent of insurance FEMA was requiring was not reasonable and requiring it would be contrary to public policy. The applicant requested that FEMA accept the commissioner’s certification, thereby eliminating the requirement that the applicant purchase insurance on its damaged facilities. The applicant also stated, “We find no authority under federal or state law for a FEMA official to overrule the certification of the Texas Insurance Commissioner that certain insurance requirements are not reasonable.” In denying the appeal, FEMA stated that § 311 of the Stafford Act requires applicants that receive assistance under § 406 of the Stafford Act to obtain and maintain insurance in the amount of eligible damage to the facilities. FEMA also pointed out that NFIP insurance was reasonably available and that the applicant’s request was not consistent with the intent of § 311 of the Stafford Act because Congress created the NFIP to provide flood insurance at reasonable rates throughout the country. Therefore, because NFIP was available, an insurance commissioner cannot certify that flood insurance is not available at a reasonable cost.

reduce the portion of flood insurance coverage FEMA would otherwise require above standard flood insurance policy (SFIP) limits.⁴⁰⁴

In a certification, a state insurance commissioner should identify the facility or facilities to which the certification applies and the specific types and extent of insurance that is reasonable to protect against future loss to the properties.⁴⁰⁵ Certifications should include supporting documentation, such as:

- Market conditions, including level of competition and relative size within the state and declared area;
- Reasonable risk management practices based upon the applicant's function, size, and operating budget; and
- Information related to the hazard and classes of property, including the extent of policy limits and relative premium costs.⁴⁰⁶

It is extremely rare for no amount of insurance to be reasonably available for an insurable facility. A state insurance commissioner may certify that the full amount that FEMA requires is not reasonably available but will certify a lower amount that is reasonably available. FEMA will then use

⁴⁰⁴ See generally 44 C.F.R. Part 61 (setting standard flood insurance policy [hereinafter SFIP] terms, e.g., definitions, coverage types, conditions, and exclusions). The regulations implementing Section 311 for facilities damaged by flood state the Regional Administrator [hereinafter RA] shall not require greater types and amounts of insurance than are certified as reasonable by a state insurance commission, but this restriction only applies to insurance requirements exceeding SFIP coverage limits of \$500,000 for buildings and \$500,000 for contents. See 44 C.F.R. § 206.252(d) (2013), and 44 C.F.R. Part 61, App. A.

⁴⁰⁵ Section 311(a)(1) applies the obtain/maintain requirement on a per property basis. See 42 U.S.C. § 5154(a)(1). Therefore, when applying a determination with respect to the availability, adequacy, and necessity of the types and extent of insurance that is required for that property, this needs to be made on a property-by-property basis. A statewide or citywide determination, for example, would not reasonably show that the state insurance commissioner determined that the types and extent of insurance required to cover the "property to be replaced, restored, repaired, or constructed with such assistance" is not reasonably available, adequate, or necessary.

⁴⁰⁶ FP 206-086-1, Public Assistance *Policy on Insurance*, Section VII, Part 1, E.2, pp. 6-7; PAPPG, pp. 88-89.

that lower amount as the amount that the applicant is required to obtain and maintain.

Once the type and extent of insurance is established, the applicant is free to meet that requirement in the manner that works best for it. This means the applicant has full discretion with regards to the amount of risk it retains as part of its insurance policy (i.e., deductibles or self-insured retentions), whether the policy obtained covers PA-ineligible losses (e.g., business interruption), and what coverage type it uses (e.g., individual policies, blanket policies, SFIPs, insurance pools, etc.).⁴⁰⁷

In a subsequent disaster, FEMA will reduce assistance by the amount of the applicant's previous insurance requirement.

Certifications apply only to the current declared event. FEMA does not consider prior certifications when establishing insurance requirements for subsequent disasters. Likewise, FEMA will not accept a retroactive certification that attempts to certify that a level of insurance that the applicant agreed to obtain and maintain in a previous disaster was not reasonably available. In those circumstances, by accepting the previous grant, the applicant agreed to obtain and maintain that level of insurance as a condition of the grant.

2. Automatic Reduction in Special Flood Hazard Areas (SFHAs)

The Stafford Act requires FEMA to reduce funding for any facility located in an SFHA that has been identified for more than one year, if that facility is subsequently damaged or destroyed by a flood.⁴⁰⁸ The reduction FEMA

⁴⁰⁷ FEMA previously prohibited the use of blanket coverage or insurance pools for flood disasters on the grounds that such coverage was not available under the SFIP and because the language in 44 C.F.R. § 206.253(b)(2) specified that such coverage was acceptable for other-than-flood disasters. However, in 2013, FEMA determined that such prohibition was not required because (a) the PA insurance regulations for flood disasters at 44 C.F.R. § 206.252 do not prohibit the use of blanket coverage or insurance pools, and (b) the NFIP on accordance with the Flood Disaster Protection Act; see 44 C.F.R. §§ 59.2(a), 59.4(c), incorporating guidance on private flood insurance contained in 54 Fed. Reg. 29,666 (July 13, 1989). FEMA's new *PA Policy on Insurance* does not distinguish between flood and non-flood for the purpose of blanket coverage or insurance pools.

⁴⁰⁸ 42 U.S.C. § 5172(d)(1).

must apply is the lesser of the value of the facility on the date of damage or the maximum amount of proceeds such a facility would have received under a Standard Flood Insurance Policy (SFIP).⁴⁰⁹

The only exception is for PNP facilities that do not have flood insurance because of the local government's failure to participate in the NFIP.⁴¹⁰ To qualify for that exception, the local government must agree to participate in the NFIP within six months of the major disaster declaration date, and the PNP must then purchase the required flood insurance to comply with the requirements to obtain and maintain insurance.⁴¹¹

3. Prohibition on Duplication of Benefits

The Stafford Act duplication of benefits provision requires FEMA to reduce the amount of assistance provided to the applicant by the amount of financial assistance it will receive under any other program, from insurance proceeds, or from any other source.⁴¹²

FEMA cannot provide disaster assistance for damage or losses covered by insurance, as this would be a prohibited duplication of benefits.⁴¹³ Therefore, prior to approval of a PA grant for flood or non-flood events, the recipient must notify FEMA of any entitlement to an insurance settlement or recovery.⁴¹⁴

The owners of insured facilities must provide FEMA, through the state public assistance officer, the policies, declarations, insuring agreements, conditions, exclusions, and Statements of Loss (including settlement information) for every facility the current disaster damaged. The applicant must also provide FEMA a list of all facilities for which PA funding was received previously and for which insurance was previously required to be

⁴⁰⁹ Stafford Act § 406(d), 42 U.S.C. § 5172(d)(2).

⁴¹⁰ 42 U.S.C. § 5172(d)(3). *See also* FP 206-086-1, *PA Policy on Insurance*, Section VII. Part 2, B, p. 10.

⁴¹¹ 44 C.F.R. § 206.252(b).

⁴¹² Stafford Act § 312(a), 42 U.S.C. 5155(a).

⁴¹³ *Id.*

⁴¹⁴ 44 C.F.R. §§ 206.252(c) and 206.253(a).

purchased. Additionally, if a flood caused the damage, the applicant must identify all facilities located in the SFHA.

Case Example: Duplication of Available Benefits

Following severe snowstorms in January 1999 and December 2000, the City of Chicago received over \$7 million in PA funds from FEMA for reimbursement of snow removal costs at O'Hare Airport. In 2004, FEMA deobligated the funds after a DHS Office of Inspector General (OIG) audit determined that the FEMA assistance constituted a duplication of benefits. The city had already recovered over \$5 million from airlines operating out of O'Hare and Midway under use agreements with certain airlines under which the airlines provided the city with funds for maintenance and operation of the airport, including for snow and ice removal. The audit also found the city failed to charge the airlines an additional \$2.6 million in additional snow and ice removal costs that the airlines were contractually obligated to reimburse the city for under the use agreement.

After exhausting FEMA's administrative appeals process, the city sued FEMA,⁴¹⁵ seeking to recover the deobligated funds. The court agreed with FEMA's argument that funds the city received from the airlines under the use agreements for snow and ice removal constituted a duplication of benefits with PA funds under Stafford Act § 312, even though they were not insurance proceeds or government assistance funds, holding that the Stafford Act's prohibition of duplicate benefits from any other "program" or source" was broad enough to include funds received under the contractual relationship the city had with the airlines under the use agreements for snow and ice removal.⁴¹⁶

⁴¹⁵ The airlines filed suit against FEMA as a plaintiff in intervention.

⁴¹⁶ *City of Chicago v. FEMA*, 2013 U.S. Dist. LEXIS 41633 (E.D. IL, 2013.)

4. Deduction of Insurance Proceeds from the PA Grant

FEMA is required to deduct all insurance proceeds available for eligible PA grants, regardless of whether the insurance proceeds were for emergency or permanent work.⁴¹⁷

- If the facility is receiving federal disaster assistance for the first time and the applicant has not completed negotiations with the insurance company at the time it develops the PW, FEMA will estimate the anticipated insurance proceeds and deduct the estimated amount, with the final deduction equaling the actual amount of available insurance.⁴¹⁸
- If the facility carried a requirement to obtain and maintain insurance from a prior disaster, FEMA will deduct the higher of the previous amount of assistance or the level of insurance coverage for eligible losses.

When an insured applicant has not yet received the insurance proceeds, FEMA may provide PA funding on the condition that the applicant agrees to repay to FEMA all duplicative assistance upon receipt.⁴¹⁹ FEMA uses this authority sparingly, however, as advancing PA financial assistance against

⁴¹⁷ See, e.g., PA Appeal FEMA-1603-DR-LA, Housing Authority of New Orleans (2009). The applicant's position was that the Stafford Act does not explicitly authorize insurance reductions for emergency work under § 403, as it does under § 406. The applicant also stated that insurance monies received would be insufficient to cover all losses and that it would apply any insurance proceeds received towards permanent work activities, resulting in no duplication of benefits for the emergency work. FEMA stated that § 312(a) of the Stafford Act provides that requirements to reduce insurance proceeds from eligible assistance apply to both emergency and permanent work. In another appeal, FEMA, reaching a similar result, stated that the category of work does not determine the applicability of the requirement for the purchase of insurance. See, PA Appeal FEMA-1426-DR-GU, Guam Department of Education, Southern High School A/C System (2010).

⁴¹⁸ There can be a dispute over the meaning of "available." See, e.g., Office of the Inspector General's Audit, 1008-DR-CA Santa Monica Hospital Medical Center (2009). The applicant accepted a negotiated settlement of \$46.7 million, which was the present value of the \$50 million the applicant was eligible to receive over time. For purposes of the PA grant reduction in this case, the OIG was of the opinion that the applicant received the equivalent of \$50 million in insurance, and FEMA, in its appeal decision, agreed.

⁴¹⁹ Stafford Act § 312(b)(1), 42 U.S.C. § 5155(b)(1).

a future insurance recovery may discourage an applicant from taking reasonable measures to seek an appropriate insurance settlement.

If FEMA obligates PA funds for work that it subsequently finds to be covered by insurance, FEMA must deobligate the funds.⁴²⁰ Final accounting will occur at closeout.

Note that depreciation (i.e., the difference between FEMA eligible costs and final loss valuations that insurers use) is an eligible uninsured loss.⁴²¹

B. Allocation between Eligible and Ineligible Work

In the case of an insurance policy that covers eligible and ineligible work, such as a property insurance policy that includes business interruption coverage, FEMA will apportion the anticipated recovery to be deducted from eligible costs between the two coverages based on:

- Proceeds per type of loss as specified by the applicant's policy or settlement documentation;
- Policy limits for categories of loss as specified in the applicant's policy; or
- Ratio of total eligible losses to total ineligible losses.⁴²²

If the facility has an existing requirement to maintain insurance from a prior disaster, all proceeds up to type and extent required by FEMA

⁴²⁰ *Id.* § 312(c), 42 U.S.C. § 5155(c). *See also* FP 206-086-1, *PA Policy on Insurance*, Section VII, Part 2, A, pp. 8-9.

⁴²¹ *Id.*

⁴²² FEMA previously prohibited the use of blanket coverage or insurance pools for flood disasters on the grounds that such coverage was not available under the SFIP and because the language in 44 C.F.R. § 206.253(b)(2) specified that such coverage was acceptable for other-than-flood disasters. However, in 2013, FEMA determined that such prohibition was not required because (a) the PA insurance regulations for flood disasters at 44 C.F.R. § 206.252 do not prohibit the use of blanket coverage or insurance pools, and (b) the NFIP on accordance with the Flood Disaster Protection Act; *see* 44 C.F.R. §§ 59.2(a), 59.4(c), incorporating guidance on private flood insurance contained in 54 Fed. Reg. 29,666 (July 13, 1989). FEMA's new *PA Policy on Insurance* does not distinguish between flood and non-flood for the purpose of blanket coverage or insurance pools.

will be apportioned to eligible work. Above the amount required by FEMA, proceeds will be apportioned as previously described.

C. Self-Insurance

As discussed previously, the Stafford Act requires applicants to obtain insurance on damaged insurable facilities (e.g., buildings, equipment, contents, and vehicles) to receive PA grant funding.⁴²³ Moreover, the applicant must maintain insurance coverage to be eligible for PA funding for any future disasters.⁴²⁴

The Stafford Act allows states and tribes⁴²⁵ to satisfy the insurance purchase requirement for state-owned facilities if it maintains a plan of self-insurance.⁴²⁶ Through policy, FEMA also allows other, non-state applicants to meet the requirement through self-insurance. Any applicant requesting to use self-insurance must submit the request, in writing, to FEMA at the time the applicant accepts assistance or prior to closeout.⁴²⁷ The applicant's self-insurance plan must be deemed acceptable by FEMA.

A plan should specify:

⁴²³ Stafford Act § 311(a), 42 U.S.C. § 5154(a).

⁴²⁴ Stafford Act §§ 311(b), 42 U.S.C. § 5154(b), 401, 501; Disaster Relief Appropriations Act of 2013, Pub. L. 13r-1, H.R. 152 § 1110 (amending sections 401 and 501 of the Stafford Act to provide for an option for the chief executive of a federally recognized Indian tribe to make a direct request to the President for a major disaster or emergency declaration and amends some other sections of the Stafford Act to incorporate "tribal" into references to state and local governments).

⁴²⁵ Stafford Act §§ 401, 501; Disaster Relief Appropriations Act of 2013, Pub. L. 13r-1, H.R. 152 § 1110 (401, 501; Disaster Relief Appropriations Act of 2013, Pub. L. 13r-1 (updating the definitions of "tribe" in the Stafford Act to reflect the nation-to-nation recognition of tribes by removing federally recognized Indian tribal government from the definition of local government, and defining Indian tribal government in its own right consistent with FEMA's current regulatory definition of the term; the section also provides that combination references to state and/or local government throughout the Stafford Act are deemed to include Indian tribal government).

⁴²⁶ *Id.* § 311(c), 42 U.S.C. § 5154(c).

⁴²⁷ FP 206-086-1, *PA Policy on Insurance*, Section VII, Part 1, C.1, pp. 4-5; PAPPG, pp. 84-85.

- The authority to develop, implement, and enforce the plan;
- The financial arrangement used to fund the plan and pay for losses;
- How funds will be distributed;
- The hazards/perils covered;
- An inventory of the properties covered in the plan, including location and estimated replacement cost of each specific property; and
- Commercial property and/or reinsurance, including blanket policies, SFIP, insurance policies, or a combination thereof that provide additional coverage.⁴²⁸
- For properties located in an SFHA:⁴²⁹
- For the purposes of complying with the requirements of Section 311 of the Stafford Act and this policy, FEMA will only consider approving a self-insurance plan for any property located in an SFHA once the applicant has otherwise met the flood insurance purchase requirements of the National Flood Insurance Act.
- Only the federal insurance administrator has the authority to approve self-insurance plans to meet the statutory requirement to purchase flood insurance up to the maximum limit of coverage provided by the NFIP for state-owned structures and their contents in an SFHA.
- Determinations from the federal insurance administrator that a state's plan of self-insurance exempts it from the flood

⁴²⁸ *Id.*

⁴²⁹ FP 206-086-1, PA Policy on Insurance, Section VII, Part 1, C.1.b, p. 5.

insurance purchase requirement of the National Flood Insurance Act do not constitute approval of a self-insurance plan:

- For any other hazard; or
- That meets the requirements of Section 311 of the Stafford Act and this policy.

D. Private Property Debris Removal and Insurance

Debris removal on private property may be an eligible cost where the public health, safety, or economic recovery of the community is threatened and if FEMA approves this work before it begins.⁴³⁰ Debris removal by an applicant or by a federal agency through DFA would constitute a duplication of benefits if the private property owner has property insurance that covers debris removal.

The state or local government must agree in writing to indemnify FEMA from all claims arising from the private property debris removal. This indemnification normally must include signed agreements from property owners providing that they will pursue and credit back to FEMA any available insurance proceeds they receive.⁴³¹ *See Debris Removal from Private Property* in this chapter for a discussion of private property debris removal.

E. Assistance Available from Other Federal Agencies

The Stafford Act's duplication of benefits provision applies not just to insurance, but also to any part of a loss for which an applicant will receive assistance from any other program or from any other source.⁴³² This necessarily includes circumstances where applicants may receive funding to repair facilities from another federal agency. In addition to the duplication of benefits provision in the Stafford Act, federal appropriations law restricts the government from using a more general funding authority to augment the appropriations that

⁴³⁰ 44 C.F.R. § 206.224(b); *See also* 44 C.F.R. 206.208(c)(2).

⁴³¹ PA Guide, p. 70; PAPPG, pp. 40-42, 56, 77.

⁴³² Stafford Act § 312, 42 U.S.C. § 5155. *See also* Chapter 6, *Individual Assistance*, for a discussion of duplication of benefits.

Congress authorized to address a particular purpose under other, more specific or primary authorities.⁴³³

Consequently, FEMA has promulgated a regulation providing that if another federal agency has specific primary statutory responsibility to provide disaster assistance to certain facilities, FEMA does not provide assistance under the Stafford Act.⁴³⁴

Examples of such authority are:

- United States Army Corps of Engineers (USACE) has the authority to provide permanent restoration of damaged flood control works, such as levees, floodwalls, flood control channels, and dams designed for flood control.⁴³⁵
- United States Department of Agriculture - Natural Resource Conservation Service (NRCS) - under the Emergency Watershed Protection Program, also has authority to repair flood control works,⁴³⁶ similar to the USACE.
- United States Department of Interior - Bureau of Indian Affairs - provides resources, such as road maintenance grants,⁴³⁷ that may help tribal recovery.⁴³⁸
- United States Department of Transportation - Federal Highway Administration (FHWA) assists with the repair of

⁴³³ Application of this principle is based on the authority provided, and it is not affected by the extent to which funds may actually be available. *See, e.g.,* 63 Comp. Gen. 422 (1984); 36 Comp. Gen. 386 (1956). Moreover, general appropriations may not be used as a back-up for a more specific appropriation. *See* 20 Comp. Gen. 272 (1940).

⁴³⁴ 44 C.F.R. § 206.226(a); *See* discussion of OFAs in PA Guide, pp. 23-26. *See also* Section VIII (B) (8) of FEMA Recovery Policy RP9523.5, *Debris Removal from Waterways* (October 30, 2012) at for pre-2016 Declarations, and PAPPG, pp.53-54, which provides a limited exception for when debris removal by an applicant may be eligible under the PA program despite another federal agency having specific authority.

⁴³⁵ 33 U.S.C. § 701, *et seq.*

⁴³⁶ 33 U.S.C. § 701b, River and Harbors Act of 1950, Pub. L. No. 81-516 (1950), codified as amended at 33 U.S.C. § 101, *et seq.*

⁴³⁷ 25 C.F.R. § 170, *et seq.*; 23 U.S.C. §§ 101(a), 202, 204, 308; 25 U.S.C. § 47; 25 U.S.C. § 450.

⁴³⁸ PAPPG, pp. 79, 110.

federal-aid roads and bridges damaged during disasters.⁴³⁹ Rural or minor collection routes are not covered are eligible for FEMA assistance.

In July 2012, Congress amended the statutory authorization for the FWHA's Emergency Relief Program to remove FHWA's authority to fund debris removal from federal-aid highways where PA funding is available for debris removal under a declared major disaster or emergency.⁴⁴⁰ As such, emergencies or major disasters declared after October 1, 2012, FEMA, not FHWA, has the authority for debris removal from federal-aid highways during emergencies or major disasters in jurisdictions where debris removal is authorized under the Stafford Act.

- Department of Housing and Urban Development (HUD) - FEMA has had authority since 2008⁴⁴¹ to fund both emergency work and permanent repair of all disaster-damaged public housing authority facilities unless Congress appropriates funds to HUD for emergency capital needs to repair, restore, or replace certain public housing authority facilities damaged in presidentially declared major disasters. Alaskan Native and American Indian public housing entities may apply directly to FEMA for disaster assistance, though they are otherwise funded by Bureau of Indian Affairs.⁴⁴²
- United States Department of Education (ED) - notwithstanding FEMA's general prohibition on providing funding where another federal agency has specific authority, there is a specific exception for

⁴³⁹ 23 U.S.C. § 120(e).

⁴⁴⁰ Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141 (July 6, 2012), codified at 23 U.S.C. § 120(e).

⁴⁴¹ The Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289 (2008), repealed Section 9(k) of the Housing Act, codified at 42 U.S.C. § 1437(g).

⁴⁴² Recovery Fact Sheet 9580.205, *Public Assistance Funding to Public Housing Facilities* (2010) for pre-2016 Declarations; PAPPG, pp. 15-18.

the repair of elementary and secondary education facilities, which are otherwise eligible for assistance from the Department of Education.⁴⁴³ The exception does not cover increased operating expenses or replacement of lost revenue.

VII. Hazard Mitigation Measures in PA Permanent Work Projects

Section 406(e) of the Stafford Act authorizes, as an eligible cost, the work necessary to conform to codes, specifications, and standards, including “hazard mitigation criteria required by the President.”⁴⁴⁴ The Stafford Act thus allows FEMA to consider PA funding for mitigation measures that go beyond the scope of work required to return a damaged facility to its pre-disaster design and function.⁴⁴⁵

These mitigation measures are often called “Section 406 hazard mitigation” or “406 mitigation” after the PA section of the Stafford Act that authorizes them, as distinguished from Hazard Mitigation Grant Program (HMGP) measures authorized by Section 404 of the Stafford Act, or “404 mitigation.”⁴⁴⁶

FEMA may use Section 406 hazard mitigation funding to provide protection to parts of a facility that were disaster damaged and thus eligible for Section 406 assistance.⁴⁴⁷ HMGP, authorized by Section 404, is a stand-alone and much broader program where funding may be provided to undamaged facilities and projects. See DOLR Chapter

⁴⁴³ 44 C.F.R. § 206.226(a)(2).

⁴⁴⁴ Stafford Act § 406(e)(1)(A)(ii), 42 U.S.C. § 5172(e)(1)(A)(ii).

⁴⁴⁵ See Stafford Act § 101, 42 U.S.C. 5172, which states the congressional intent to encourage “...hazard mitigation measures to reduce losses from disasters...”

⁴⁴⁶ Compare Stafford Act § 406, 42 U.S.C. § 5172 with Stafford Act § 404, 42 U.S.C. § 5170c, for mitigation measures as a consequence of a major disaster declaration. See discussion of the distinctions between §§ 404 and 406 in the section titled *Differences between Section 406 and Section 404 Hazard Mitigation Measures* later this chapter. See also Stafford Act § 203, 42 U.S.C. § 5133 (available as a grant when the President has not made a disaster declaration).

⁴⁴⁷ RP 9526.1, *Hazard Mitigation Funding under Section 406 (Stafford Act)* [hereinafter <http://www.fema.gov/media-library/assets/documents/128488>; PAPP, pp. 99-101. <https://www.fema.gov/media-library/assets/documents/111781>].

7, *Hazard Mitigation Assistance*, for a discussion of the Section 404 program.

This section will discuss the requirements for approval of Section 406 mitigation funding measures as follows: Part A discusses project eligibility requirements; Part B discusses cost-effectiveness requirements; and Part C discusses the key differences between mitigation under Sections 406 and 404 of the Stafford Act.

A. Eligibility

For hazard mitigation measures to be approved, FEMA must review the measures for eligibility,

Additional factors include ensuring that the measures are technically feasible, compliant with environmental and historic preservation, and cost-effective.⁴⁴⁸ The following are requirements and considerations for eligibility under Section 406.

1. Disaster Damage

Mitigation measures eligible under Section 406 must be appropriate to the disaster damage and must prevent future damage similar to that caused by the declared event.

2. Applicable Damaged Elements

Mitigation measures under Section 406 must be applied only to the disaster-damaged element(s) of a facility.⁴⁴⁹ When conducting repairs to a *portion* of a system, this criterion is particularly important.

⁴⁴⁸ 44 C.F.R. §206.226(e); RP 9526.1 *Hazard Mitigation Funding*; PAPP, pp. 88-89.

⁴⁴⁹ RP 9526.1, *Hazard Mitigation Funding*; PAPP, pp. 98-101

**Example: When a Facility is Not Eligible for
Section 406 Mitigation Funding**

If floodwaters inundate a sanitary sewer, block manholes with sediment, and damage some of the manholes, cost-effective mitigation to prevent blockage of the damaged manholes in future events may be eligible; however, work to improve any undamaged manholes that are part of the system is not eligible. Similarly, raising the height of an existing berm that was not damaged in an event but surrounds a damaged facility does not meet the requirement of being part of a damaged facility; thus, it is not eligible for Section 406 mitigation funding. **Note:** While the elevation of the referenced berm is not eligible for Section 406 funding, the work may be eligible under the Section 404 mitigation program.

3. Upgrades to Meet Codes and Standards

Under Section 406, eligible costs may only include work that is required to return the damaged facility to its pre-disaster design.⁴⁵⁰ In repairing the facility to its pre-disaster design, FEMA will include those costs incurred to repair damaged portions of a facility in conformance with current codes and standards.⁴⁵¹

Some activities, which may be required by a code or standard in jurisdictions, may be eligible as 406 hazard mitigation in areas where the PA codes and standards requirements are not met, if the activities meet the underlying requirements for 406 hazard mitigation. However, not all work to meet any given code or standard would qualify for 406 mitigation, and the requirement that the mitigation be applicable to the damaged elements remains.

⁴⁵⁰ Stafford Act § 406(e), 42 U.S.C. § 5172(e); 44 C.F.R. § 206.226.

⁴⁵¹ PAPP, pp. 86, 93.

4. Not for Replacement Buildings

Mitigation funding under Section 406 is eligible for repair (not replacement) projects.⁴⁵² This includes improved project⁴⁵³ that involve the replacement of the facility on the same site or an alternate site.⁴⁵⁴

B. Determining Cost-effectiveness

Mitigation measures must be cost-effective.⁴⁵⁵ Cost-effectiveness is determined by evaluating the cost of mitigation measures under the following categories:⁴⁵⁶

1. 15% of Total Eligible Cost of Eligible Repair Work

Mitigation measures may total up to 15% of the total eligible cost of the repair work on a particular PA project. The total cost to repair the initial damaged facility under the PA Program is calculated against the total cost of the mitigation measures proposed to improve the damaged elements of that facility. If the cost for the mitigation measure is no more than 15% of

⁴⁵² Facilities eligible for replacement are not eligible for mitigation measures under 44 C.F.R. §§ 206.226(e) and 206.226(f)(1). (Note also that an applicant may not apply the cost of hazard mitigation measures towards an alternate project under 44 C.F.R. § 206.203(d)(2). The reason for this interpretation is that mitigation measures must be applied to the damaged elements of the facility; whereas, the alternate project is a different facility or different use of a facility than that of the pre-disaster facility. One exception, however, may allow applicants to use “funds contributed for alternate projects” towards “hazard mitigation measures.” 44 C.F.R. 206.203(d)(2)(iv).

⁴⁵³ 44 C.F.R. 206.203(d)(1); *See also* Part One, Section IV(C), *Improved Projects* in this chapter, which discusses “improved projects” in further detail.

⁴⁵⁴ *Id.*; *See also* RP 9526.1, *Hazard Mitigation Funding*; PAPPG, pp. 98-101, and Appendix J, pp. 192-197.

⁴⁵⁵ 44 C.F.R. 206.226(e); RP 9526.1, *Hazard Mitigation Funding*, PAPPG, pp. 98-101

⁴⁵⁶ RP 9526.1, *Hazard Mitigation Funding*, Appendix A; PAPPG, pp. 98-101, and Appendix J, pp. 192-197.

the total eligible cost of eligible repair work, then the mitigation project is considered cost-effective.⁴⁵⁷

2. Pre-determined Cost-effective Mitigation Measures

Certain mitigation measures have been pre-determined as cost-effective, as long as the mitigation measure does not exceed 100% of the eligible cost of the eligible repair work on the project. Examples of a few such hazard mitigation projects are:⁴⁵⁸

- Protection from high winds. Example: Facilitates in hurricane prone areas may install hurricane straps or clips to their roofs to reinforce the roof and prevent blow off in future events.
- Protection of utilities. Example: Elevation of HVAC and electrical control panels, located in the facilities basement, when the facility is in a flood prone area.
- Protection of drainage crossings and revetments. Example: Replacement of culverts;⁴⁵⁹ on improved banks, installation of headwalls and wing walls, as well as gabion baskets and geo-textile fabric installation on shoulders to control erosion.

3. Cost-Benefit Analysis (CBA)

For measures that do not fall within the previously described categories, the applicant or state must demonstrate, through an acceptable Cost-

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ However, culverts need to be considered with regard to a total drainage system and should not be upgraded without a watershed hydrology study with an emphasis on downstream effects and NFIP regulations. See RP 9526.1, Hazard Mitigation Funding, Appendix A; PAPP, pp. 98-101, and Appendix J, p. 192-197.

Benefit Analysis (CBA) methodology, that the measure is cost-effective.⁴⁶⁰ The CBA will be based on a comparison of the total project cost to the proposed projected benefits of the mitigation measures.⁴⁶¹ FEMA takes into consideration certain factors to determine if a hazard mitigation measure is feasible. They are:⁴⁶²

- Damage to the facility and its damaged contents;
- Emergency protective measures required as a result of that damage;
- Temporary facilities required due to the damage;
- Casualty (loss of life and injury); and
- Loss of function

Example 1

The applicant increased the cost of a PA project to repair a flood-damaged lift station by adding a hazard mitigation component to improve sanitary drainage. The applicant argued that 1) its drainage improvements would mitigate flood damage; and 2) the cost-benefit analysis was over 1.0, which is considered cost-effective. FEMA denied the appeal because the hazard mitigation project did not directly relate to the damaged elements of the facility and was therefore ineligible regardless of the CBA result.⁴⁶³

⁴⁶⁰ RP 9526.1, *Hazard Mitigation Funding at VII.B*; PAPP, pp. 93-96, and Appendix J, pp. 189-194.

⁴⁶¹ FEMA determines cost-effectiveness. When FEMA performs a cost-benefit analysis, it employs a qualified FEMA hazard mitigation specialist utilizing the methods

⁴⁶² RP 9526.1, *Hazard Mitigation Funding at VII.B*; PAPP, pp. 98-101, and Appendix J, pp. 192-197

⁴⁷¹ Second Appeal Brief, FEMA-1766-DR-IN PA ID # 081-UZMC8-00; Johnson Memorial Hospital PW # 2002; Hazard Mitigation (2010).

Example 2

An eligible facility had some windows blown out by a hurricane that was a declared major disaster. Section 406 PA hazard mitigation funding may be used to upgrade the disaster-damaged windows with wind resistant windows; however, funding to upgrade undamaged windows would not be eligible for 406 mitigation. Such funding could come from the Section 404 statewide hazard mitigation program.

C. Differences between Section 406 and Section 404 Hazard Mitigation Measures

The Stafford Act provides for two types of disaster⁴⁶⁴ funding for hazard mitigation measures: statewide mitigation programs⁴⁶⁵ and mitigation for disaster-damaged facilities.⁴⁶⁶

While Section 406 applies to restoration projects administered under the PA Program, Section 404 provides hazard mitigation grants directly to states and local governments to implement long-term hazard mitigation measures after a major disaster declaration through the HMGP.⁴⁶⁷

⁴⁶³ Second Appeal Brief, FEMA-1766-DR-IN PA ID # 081-UZMC8-00; Johnson Memorial Hospital PW # 2002; Hazard Mitigation (2010).

⁴⁶⁴ The Stafford Act also authorizes pre-disaster mitigation funding through section 203. Pre-disaster mitigation funding is a stand-alone non-disaster grant program funded annually outside of the Disaster Relief Fund. *See* Chapter 7 *Hazard Mitigation Assistance* for more information.

⁴⁶⁵ Stafford Act § 404, 42 U.S.C. § 5170c.

⁴⁶⁶ *Id.* § 406, 42 U.S.C. § 5172.

⁴⁶⁷ Chapter 7, *Hazard Mitigation Assistance*, discusses § 404 in more detail.

Program implementation, project application, and funding limits differ between the two programs, as shown in the following table.

Table 5-1: 404/406 Mitigation Chart

Section 404 Mitigation compared to Section 406 Mitigation		
	404 Hazard Mitigation	406 Hazard Mitigation
Implementation	Separate program run by the state.	Implemented for restoration projects through the PA Program.
Project application	Applies to structural measures and non-structural measures (such as planning, property acquisition, and drainage projects).	Must apply to a damaged element of the facility and does not apply to buyouts of affected private property to protect from future risk.
Coverage	Available throughout the state in most disasters.	Applies to eligible restoration projects upon request.
Funding calculations and limitations	The formula for calculating the HMGP allocation for states with a standard state mitigation plan is based on 15% of the first \$2 billion of estimated aggregate amounts of disaster assistance. For amounts greater than \$2 billion, a sliding scale is used to make allocation determinations. States with enhanced mitigation plans are eligible for a 20% HMGP formula.	No program-wide limits in funding; proposed hazard mitigation measure(s) must be cost-effective and approved for each eligible restoration project.

VIII. PA Related Grant and Loan Programs

A. Fire Management Assistance Grant (FMAG) Program

Although organizationally a distinct grant program separate from the PA Program, FEMA manages the FMAG program out of the Public Assistance Branch of the Recovery Division. As discussed in Chapter 3, FMAGs may be authorized for the mitigation, management, and control of any fire or fire complex on public or private forest land or grassland that threatens such destruction as would constitute a major disaster.⁴⁶⁸

FMAGs are distinct from major disaster or emergency declarations; however, once an FMAG is declared, the program operates in a similar manner to normal PA. The FMAG recipient is generally the state, although an Indian tribal government may elect to serve as recipient.⁴⁶⁹

After an FMAG declaration, FEMA and the recipient enter into a FEMA-State (or Tribal) Agreement that states the understandings, commitments, and conditions under which FEMA provides federal assistance.⁴⁷⁰ As in the regular PA program, eligible applicants are state, tribal and local governments;⁴⁷¹ and these entities may apply for assistance through the recipient.⁴⁷²

All FMAGs are provided at a 75% federal cost share. Unlike regular PA, there is no mechanism for adjusting the cost share.⁴⁷³ Eligible

⁴⁶⁸ Stafford Act § 420, 42 U.S.C. § 5187; *Fire Management Assistance Grant Program Guide*, FEMA P-954 (Feb. 2014), at <https://www.fema.gov/media-library/assets/documents/92379>. For more information on FMAG declarations, see Chapter 3, *Declarations*.

⁴⁶⁹ See 2 C.F.R., § 200.1 for a definition of “recipient.” FEMA FMAG regulations do not provide for direct requests from tribes. The SRIA amendments to the Stafford Act added tribes as distinct entities to the FMAG authority, which does not address how requests are made.

⁴⁷⁰ *Id.* § 204.25.

⁴⁷¹ Unlike the regular PA program, PNPs are not eligible applicants. Entities such as PNP fire departments may receive reimbursement but only through a contract, compact, or similar agreement with an eligible applicant.

⁴⁷² 44 C.F.R. § 204.41.

⁴⁷³ *Id.* § 204.61.

costs essentially mirror PA Category B, emergency protective measures.⁴⁷⁴ FEMA will reimburse for activities undertaken for the mitigation, management, or control of a declared fire or fire complex.⁴⁷⁵

Generally, such work must take place during the incident period of the declared fire; however, certain pre-positioning costs are eligible when the Regional Administrator (RA) approves them.⁴⁷⁶ Recipients and applicants are subject to federal grant procurement requirements.⁴⁷⁷ Appeals of FMAG eligibility requirements follow the same process as PA appeals.⁴⁷⁸

⁴⁷⁴Although direct federal assistance (DFA) is available for a FMAG through Stafford Act Section 420(c), which allows FEMA to use the authority provided under Section 403 of the Stafford Act, FEMA has rarely provided DFA for FMAGs.

⁴⁷⁵ 44 C.F.R. § 204.42. This section provides more information regarding specific costs.

⁴⁷⁶ *Id.* § 204.42(e)(2).

⁴⁷⁷ *Id.* § 204.63.

⁴⁷⁸ *Id.* § 204.54.

Mitigation Assistance under Fire Management Assistance Grants (FMAG) Pilot Program

The Fiscal Year 2015 Homeland Security Appropriations Act⁴⁷⁹ contained a provision (Section 570) authorizing the President to provide Hazard Mitigation Grant Program (HMGP) Assistance under Stafford Act Section 420 Fire Management Assistance Grant (FMAG) declarations from March 4, 2015, through September 30, 2015. In September 2015, FEMA established a FMAG-HMGP pilot to implement this provision. Under the FMAG-HMGP pilot, assistance was restricted to mitigation projects in the burn area; however, assistance was authorized for mitigation of any hazard within the burn area, not just wildfires. HMGP funding amounts were based on a national aggregate calculation of the average cost of historical FMAG declarations in the previous five years. For the pilot, \$331,166 was available for state and tribal applicants with standard state or tribal hazard mitigation plans and \$441,555 for applicants with enhanced state or tribal hazard mitigation plans. Except as specified in the pilot, the usual HMGP eligibility requirements for applicants and projects applied.

Continuing resolutions extended the authority and the pilot through December 18, 2015, when the Consolidated Appropriations Act 2016⁴⁸⁰ was enacted. Authority for FMAG-HMGP assistance was not included in that Act, so the pilot was discontinued at that time. While interest in providing HMGP for FMAGs remains in Congress, as of publication, no authority has been enacted for it.⁴⁸¹

B. Community Disaster Loans (CDLs)

Although a distinct loan program separate from the Public Assistance Program, organizationally, FEMA manages the Community Disaster Loan (CDL) program out of the Public Assistance Branch of the Recovery Division. The Stafford Act authorizes FEMA to make CDLs to

⁴⁷⁹ Pub. L. 114-4 §570, 129 Stat. Ann 74 (2015).

⁴⁸⁰ Pub. L. No. 114-113 (2015).

⁴⁸¹ See, for example, section 314 of the FEMA Disaster Assistance Reform Act of 2015, H.R. 1471, 114th Cong. 2nd sess. (2015), as passed by the House.

help local governments⁴⁸² that have incurred significant revenue losses due to a presidentially declared major disaster⁴⁸³ if necessary for a local government to perform its governmental functions.⁴⁸⁴

This section discusses the traditional CDL Program, applicable to all major disasters.⁴⁸⁵ CDLs may not be used for work eligible under the PA Program but are discussed in this chapter because they are used for local governmental operations and administratively managed within the PA Program.

The CDL Program for local governments began in 1970 as a program of community disaster grants. In 1974, Congress replaced the grant program with a program of community disaster loans.⁴⁸⁶

⁴⁸² Under Stafford Act § 102(8), “local government” includes virtually any political subdivision of a state, as well as Indian tribes and Alaskan native villages that do not meet the definition of Indian tribal government in § 102(6). Stafford Act §103 also provides that references local government in §417 include Indian tribal government as appropriate.

⁴⁸³ The Stafford Act authorizes CDLs only under major disaster declarations; however, 44 C.F.R. § 206.363(b)(1) erroneously refers to major disasters and emergencies. CDLs are not authorized for emergency declarations.

⁴⁸⁴ Stafford Act § 417, 42 U.S.C. § 5184.

⁴⁸⁵ Congress passed a Special CDL Program to address the unprecedented and widespread financial losses suffered by communities across the Gulf States as a result of hurricanes Katrina and Rita in 2005. The Community Disaster Loan Act of 2005, Pub. L. No. 109-88 (2005), codified, as amended, at Stafford Act § 417, 42 U.S.C. § 5184, authorized FEMA to transfer funds appropriated in the Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. 109-62 (2005), to support up to \$1 billion in loan authority to assist communities impacted by Hurricanes Katrina and Rita. Loans issued by FEMA under the 2005 Act are referred to as Special Community Disaster Loans. For these Special CDLs, the 2005 CDL Act altered three elements from the traditional CDL Program: (1) it removed the \$5 million limit on individual loans; (2) it restricted use of the loans “to assist local governments in providing essential service;” and (3) it prohibited loan cancellation. Subsequently, in 2007, Congress reversed course and allowed loan cancellation. *See* The U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, § 4502(a), 119 Stat. 2061 (2007), Stafford Act § 417(c)(1), 42 U.S.C. § 5148. For more information on Special CDLs, *see* the implementing regulations at 44 C.F.R. §§ 206.370-377.

⁴⁸⁶ The regulations for the CDL Program are in 44 C.F.R. 206, Subpart K, 44 C.F.R. §§ 206.360- 206.367.

1. Eligibility

FEMA may make CDLs available to any local government that:

- Is located within the area declared eligible for assistance;⁴⁸⁷
- Suffers a substantial loss of tax or other revenues as a result of a major disaster;⁴⁸⁸
- Has demonstrated need for financial assistance to perform its governmental functions;⁴⁸⁹ and
- Is not in arrears with respect to any loan payments due on previous loans.⁴⁹⁰

FEMA will consider whether the local government is responsible for providing essential municipal operating services to the community and whether it maintains an annual operating budget.⁴⁹¹ In addition, state law must not prohibit the local government from incurring indebtedness resulting from a federal loan.⁴⁹²

2. Loan Amount

The loan amount is based on need. No loan may be greater than \$5 million and otherwise may not exceed:

- 25% of the annual operating budget of the local government for the fiscal year in which the disaster occurs; or
- 50% of the annual operating budget for the fiscal year in which the major disaster occurs, if the disaster related revenue

⁴⁸⁷ 44 C.F.R. § 206.363(a).

⁴⁸⁸ See 44 C.F.R. § 206.363(b)(2)(i) and (ii) for criteria FEMA uses to assess size of revenue loss.

⁴⁸⁹ See *Id.* § 206.363(b)(3)(i)-(ix) for criteria FEMA uses to assess demonstrated need for financial assistance.

⁴⁹⁰ Stafford Act § 417(c)(2), 42 U.S.C. § 5184(c)(2); 44 C.F.R. § 206.363(b)(1).

⁴⁹¹ 44 C.F.R. § 206.363(a)(2).

⁴⁹² *Id.* § 206.363(a)(1).

loss is 75% or more of the local government's annual operating budget.⁴⁹³

3. Loan Applications and Loan Administration

The local government must submit its application through the state, which then must certify to FEMA that the local government is legally qualified to assume the proposed debt under state law. FEMA's regulations do not take into account a tribal government as a local government wanting to directly apply to FEMA or a tribal agency applying through the tribal government and not the state. The applicant must justify its application based on need and develop it from financial information contained in its annual operating budget.⁴⁹⁴

If FEMA approves the loan, the applicant and FEMA will execute a promissory note, and FEMA will disburse CDL funds according to the loan schedule in the promissory note.

4. Loan Terms

The interest rate on the loan is equal to the rate for five-year maturities as determined by the monthly U.S. Treasury Schedule of certified interest rates on the date the promissory note is signed.⁴⁹⁵ FEMA may approve the loan only in either the fiscal year in which the major disaster occurred or the following fiscal year, and FEMA may approve only one for any local government for a single disaster.⁴⁹⁶ The standard loan term is five years; however, FEMA may extend the loan based on the local government's financial condition.⁴⁹⁷

⁴⁹³ Stafford Act § 417(b), 42 U.S.C. § 5184(b); 44 C.F.R. § 206.361(b).

⁴⁹⁴ The specific requirements for demonstrating the insufficiency of revenues to meet the local operating budget are in 44 C.F.R. § 206.364.

⁴⁹⁵ *Id.* § 206.361(c).

⁴⁹⁶ *Id.* § 206.361(d).

⁴⁹⁷ *Id.* § 206.361(e).

5. Use of Funds

The CDL recipient may only use CDL funds for existing governmental functions or to expand those functions to meet disaster-related needs.⁴⁹⁸ Local governments may not use CDL funds for capital improvements, for the repair or restoration of damaged facilities, or as the non-federal share of any federal program.⁴⁹⁹

6. Loan Cancellation

The Stafford Act mandates the cancellation of all or any part of a CDL if the local government's revenues during the three fiscal years after the disaster are insufficient, as a result of the disaster, to meet its operating budget.⁵⁰⁰ FEMA regulations set forth the specific requirements for demonstrating the insufficiency of revenues to meet the local operating budget.⁵⁰¹

The local government must apply for loan cancellation through the governor's authorized representative to the FEMA RA prior to the expiration of the loan. The Assistant Administrator for Recovery will make the determination whether to cancel all or any part of the CDL, and any amount cancelled becomes a grant. The local government must still repay any portion of the loan that is not cancelled.⁵⁰²

The existence or cancellation of a CDL has no effect on any other Stafford Act grant or assistance, except that a local government may not be eligible for additional CDLs if they are in arrears on required CDL repayments.⁵⁰³ FEMA may, however, use another agency's funds awarded to an applicant to offset a delinquent loan from grant funds.⁵⁰⁴

⁴⁹⁸ 44 C.F.R. § 206.366(b).

⁴⁹⁹ *Id.* § 206.361(f).

⁵⁰⁰ Stafford Act § 417(c), 42 U.S.C. § 5184(c); the specific requirements for demonstrating the insufficiency of revenues to meet the local operating budget are set forth in 44 C.F.R. § 206.366.

⁵⁰¹ 44 C.F.R. § 206.366.

⁵⁰² *Id.* § 206.366(d).

⁵⁰³ Stafford Act § 417(c) and (d), 42 U.S.C. § 5184(c) and (d); 44 C.F.R. § 206.361(h).

⁵⁰⁴ Administrative offset is available under 44 C.F.R. § 206.367(b)(6).

Note: In the aftermath of Hurricanes Harvey⁵⁰⁵, Irma⁵⁰⁶, and Maria⁵⁰⁷, Congress appropriated additional funding for the CDL program.⁵⁰⁸

In the Supplemental Appropriations legislation, Congress set aside the provisions of Stafford Act §419(c)(1) with regard to debt forgiveness for CDLs made to Puerto Rico and the U.S. Virgin Islands, and localities within their jurisdiction, following Hurricanes Irma and Maria. “That notwithstanding section 417(c)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5184(c)(1)), loans to a territory or possession, and instrumentalities and local governments thereof, may be cancelled in whole or in part only at the discretion of the Secretary of Homeland Security in consultation with the Secretary of the Treasury.”⁵⁰⁹

Part Two: Public Assistance and Grants Management Process

I. New Grant Terminology under the Uniform Guidance

The government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) enacted in 2014 ⁵¹⁰ includes new terminology for terms commonly used in FEMA PA regulations and guidance, such as “award” and “subaward” instead of “grant” and “subgrant” and “recipient” and “subrecipient” instead of “grantee” and “subgrantee.” These terms and definitions, as well as the definitions found at 2 C.F.R. Part 200, are applicable to FEMA administration of Public Assistance programs going forward.

- On December 26, 2014, FEMA published interim policy guidance regarding application of the new Uniform Guidance,

⁵⁰⁵ DR-4332-TX (2017)

⁵⁰⁶ DR-4335-USVI (2017)

⁵⁰⁷ DR-4339-PR (2017).

⁵⁰⁸ PL 115-72 (2017).

⁵⁰⁹ *Id.*

⁵¹⁰ 2 C.F.R. §3002.

including application of the changed terminology.⁵¹¹ That guidance and terminology has since been incorporated into the PAPPG. In general, the grant terminology referenced in the current PA regulations, policy and guidance and as defined in 44 C.F.R. 206.201 must be read in conjunction with the corresponding definitions found in 2 C.F.R. Part 200.⁵¹²

- *Closeout:* Closeout means the process by which FEMA or the pass-through entity determines that all applicable administrative actions and all required work of the federal award have been completed and takes actions as described in 2 C.F.R. § 200.343.⁵¹³
- *Federal award:* The federal award is the federal financial assistance that a non-federal entity receives directly from FEMA or indirectly from a pass-through entity.⁵¹⁴

⁵¹¹ Public Assistance Program Interim Guidance on 2 C.F.R. Part 200, Section VII(D) Definitions. This site also contains interim guidance for FMAGs. *See also* Stafford Act § 406(e), 42 U.S.C. § 5172(e); 44 C.F.R. §§ 206.228, 206.202(d), and 13.22 (2014), or 2 C.F.R. Part 200, whichever is applicable. Note that 2 C.F.R. Part 200 has also superseded OMB circulars, 2 C.F.R. (2013), which defined allowable costs for different governmental and non-profit entities: Circular A-87 for state, tribal and local governments; Circular A-122 for PNPs other than institutions of higher education, hospitals and any other organization specifically exempted; and Circular A-21 for educational institutions. *See also* PA Guide, pp. 40-67 and generally the 9500 series Disaster Assistance Policies (DAP) 9525.1-9525.16 for pre-2016 declarations at <https://www.fema.gov/media-library/assets/documents/128488>; PAPPG, pp. 22-43.

⁵¹² *See* the current 9570 series PA standard operating procedures at <https://www.fema.gov/media-library/assets/documents/128488>

⁵¹³ 2 C.F.R. § 200.16

⁵¹⁴ 2 C.F.R. § 200.38.

- *Non-federal entity:* A non-federal entity is a state, local government, Indian tribal government, or nonprofit organization that carries out a federal award as a recipient or subrecipient.⁵¹⁵
- *Pass-through entity:* A pass-through entity is a state or Indian tribal government that provides a subaward to a subrecipient to carry out an activity under the PA Program.⁵¹⁶
- *Period of performance:* The period of performance is the time during which the non-federal entity may incur new obligations to carry out the work authorized under the federal award.⁵¹⁷
- *Recipient:* A recipient is a state or Indian tribal government that receives a federal award directly from FEMA to carry out an activity under the PA Program. A pass-through entity can also be a recipient. A recipient cannot be a subrecipient.⁵¹⁸
- *State:* Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands., and any agency or instrumentality thereof exclusive of local governments “⁵¹⁹
- *Subaward:* A subaward is an award provided by a pass-through entity to a subrecipient, for the subrecipient to carry out part of a federal award received by the pass-through entity. It does not mean payments to a contractor or payments to an individual

³¹⁵ 2 C.F.R. § 200.69.

⁵¹⁶ 2 C.F.R. § 200.74.

⁵¹⁷ 2 C.F.R. § 200.77.

⁵¹⁸ 2 C.F.R. § 200.86.

⁵¹⁹ 2 C.F.R. § 200.90.

that is a beneficiary of a federal program. In the PA Program, each PW carried out by a subrecipient is a subaward.⁵²⁰

- *Subrecipient*: A subrecipient is a non-federal entity that receives a subaward from a pass-through entity to carry out part of the PA program. The term subrecipient does not include an individual that is a beneficiary of the federal program⁵²¹

In general, the following grant terminology referenced in the current PA regulations, policy and guidance and as defined in 44 C.F.R. 206.201 must be read in conjunction with the corresponding definitions found in 2 C.F.R. Part 200.⁵²²

- *Applicant*: All references to an applicant in PA Program regulations, policy and guidance are subject to the requirements of a subrecipient, as defined in 2 C.F.R. § 200.93 with respect to funds an applicant receives from a state or Indian tribal government to carry out activities funded by the PA Program.⁵²³ (However, please note that state or tribe that is a direct recipient/grantee can also be an applicant, not just subrecipients/subgrantees. They can have damage to their own facilities and then have their own projects.)
- *Subgrant*: All references to *subgrant* in existing PA Program regulations, policy and guidance are subject to the requirements of a *subaward*, as defined in 2 C.F.R. § 200.92; and to the requirements of *federal awards*, as defined in 2 C.F.R. Part 200, with respect to funds a *subgrantee* receives from a pass-through entity.⁵²⁴
- *Subgrantee*: All references to *subgrantee* in existing PA Program regulations, policy and guidance are subject to the

⁵²⁰ 2 C.F.R. § 200.92.

⁵²¹ 2 C.F.R. § 200.93.

⁵²² Public Assistance Program Interim Guidance, Section VII(B) *Terminology References*.

⁵²³ Public Assistance Program Interim Guidance, Section VII(B)(1) *Applicant*.

⁵²⁴ *Id.*, Section (VII)(B)(2) *Subgrant*.

requirements of a *subrecipient*, as defined in 2 C.F.R. § 200.93; and to the requirements of *non-federal entities*, as defined in 2 C.F.R. § 200.69.⁵²⁵

- *Grant:* All references to *grant* in existing PA Program regulations, policy and guidance are subject to requirements of a *federal award*, as defined in 2 C.F.R. § 200.38.⁵²⁶
- *Grantee:* All references to *grantee* in existing PA Program regulations, policy, and guidance are subject to the requirements of a *recipient*, as defined in 2 C.F.R. § 200.86; to the requirements of a *non-federal entity*, as defined in 2 C.F.R. § 200.69; and to the requirements of a *pass-through entity*, as defined in 2 C.F.R. § 200.74, with respect to the *grantee's* role in administering the award to *subgrantees*. References to *grantee* may include requirements of both a *recipient* and/or *pass-through entity*, depending on whether the *grantee* is administering a *subgrant*.⁵²⁷

II. Steps in Process for the PA Applicant: The Recipient, Subrecipient, and Applicant

The “recipient” (grantee)⁵²⁸ is the government to which FEMA awards a PA award (grant)⁵²⁹ and will generally be the state for which the disaster or emergency was declared; however, a tribal government may choose to be a recipient.

The applicant is the state agency, local government, or eligible PNP submitting an application to the recipient for assistance under the award.⁵³⁰ Subrecipients (subgrantees) are the governments or other entities that receive FEMA PA funding through a subgrant from the

⁵²⁵ *Id.*, Section (VII)(B)(3) *Subgrantee*.

⁵²⁶ *Id.*, Section (VII)(B)(4) *Grant*.

⁵²⁷ *Id.*, Section (VII)(B)(5) *Grantee*.

⁵²⁸ See 44 C.F.R. § 206.201(e), *Public Assistance Program Interim Guidance*, Section (VII)(B)(2) *Grantee*.

⁵²⁹ See *Id.* § 206.201(e), *Public Assistance Program Interim Guidance*, Section (VII)(B)(4) *Grant*.

⁵³⁰ See *Id.* § 206.201(a), *Public Assistance Program Interim Guidance*, Section (VII)(B)(1) *Applicant*.

state.⁵³¹ The subrecipient is accountable to the recipient, and the recipient is accountable to FEMA for the use of the funds provided. The terms “applicant” and “subrecipient” are often used interchangeably.⁵³²

A. The PA Process⁵³³

FEMA has developed a series of standard operating procedures that provide guidance for the Agency, states, and applicants on each step of the PA process.⁵³⁴ The PA process begins with the joint Preliminary Damage Assessments (PDAs) by federal, state, and local officials to determine the impact and magnitude of disaster damage and the resulting unmet needs of the public and PNP sectors and the community as a whole.⁵³⁵ The PDA findings are an essential element of the governor’s request for a declaration.⁵³⁶ Chapter 3, *Declarations*, discusses PDAs in detail.

One of the first events in the PA process, following a declaration that includes authorization for the PA program, is the applicant briefing.⁵³⁷ The state conducts this briefing for all potential PA applicants to explain application procedures, administrative requirements, funding,

⁵³¹ See *Id.* § 206.201(o), *Public Assistance Program Interim Guidance*, Section (VII)(B)(3) *Subgrantee*.

⁵³² The applicant applies for assistance; a subrecipient receives a subaward from the recipient for. The PA regulations may refer to applicant or subgrantee depending on the context. The PA appeals regulations found at 44 C.F.R. §206.206 refer to applicant, subgrantee, and grantee. 44 C.F.R. Part 13 (2014): *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments* uses the terms grantee and subgrantee.

⁵³³ PA is in the process of revising and streamlining this process.

⁵³⁴ See the current 9570 series PA standard operating procedures at <https://www.fema.gov/9500-series-policy-publications>.

⁵³⁵ 44 C.F.R. § 206.33.

⁵³⁶ *Id.* § 206.37(b).

⁵³⁷ PA Guide, pp. 91-92; PAPPG, p.131. There may be more than one briefing, depending on size of the declared area and the number of possible applicants.

and program eligibility criteria.⁵³⁸ FEMA personnel attend the meeting to answer questions about the PA Program.

Each applicant must submit a Request for Public Assistance (RPA)⁵³⁹ to the recipient notifying FEMA of its intent to apply for PA to receive reimbursement for PA eligible costs.⁵⁴⁰ The RPA is the official application for FEMA's disaster assistance.⁵⁴¹

Among other general information, applicants are required to identify themselves on the RPA as a state, local government or PNP, and provide the location of damage. The RPA starts the grant process and opens the case management file, which contains general claim information as well as records of meetings, conversations, phone messages, and any special issues or concerns that may affect funding. The RPA must be submitted to the RA within 30 days after designation of the area where the damage occurred.⁵⁴²

At this point in the PA process, FEMA determines whether the applicant is eligible and whether the facility is eligible. Once an applicant files an RPA, FEMA PA staff work with the applicant to

⁵³⁸ The state may request INF for emergency work that must be performed immediately and paid for within 60 days after the declaration. *See* discussion of INF later in this chapter.

⁵³⁹ FEMA Form 90-49.

⁵⁴⁰ 44 C.F.R. § 206.202(c).

⁵⁴¹ PAPP, p.131.

⁵⁴² *See* 44 C.F.R. § 206.202(c).

identify the scope of eligible work and derive an estimate of associated costs for each project (project formulation).⁵⁴³

The first meeting between the applicant, the state PA representative, and FEMA is called the kickoff meeting.⁵⁴⁴ The kickoff meeting provides a much more detailed review of the PA Program. A kickoff meeting is held for each applicant. The FEMA Project Specialist, who will be working with the applicant, will also be at this meeting. FEMA's Public Assistance Coordination (PAC) Crew Leader conducts the meeting.

The purpose of this meeting is to advise the applicant of eligibility and documentation requirements. The PAC Crew Leader also discusses special considerations, which include insurance issues, hazard mitigation opportunities, and compliance with environmental and historic preservation laws, including floodplain management issues.

An applicant has 60 days from the first substantive meeting, usually the kickoff meeting, to identify and report damaged facilities to FEMA.⁵⁴⁵ The PW⁵⁴⁶ is the primary form used to document the location of damaged facilities, a description of damage, the scope of work to repair the damage, and a cost estimate.⁵⁴⁷

⁵⁴³ PAPPG, pp. 134-142. See also the *Public Assistance Program Field Operations Pocket Guide* (April 2014),

⁵⁴⁴ PA Handbook, pp. at 21-22; PAPPG, pp. 132-33

⁵⁴⁵ 44 C.F.R. § 206.202(d)(1)(ii).

⁵⁴⁶ FEMA Form 90-91; however, the electronic PW form is no longer utilized as all PWs must be entered directly into the PA computer system.

⁵⁴⁷ 44 C.F.R. § 206.201(l); PA Guide, pp 96-97; PA Handbook, pp. 17-33; PA Digest, p. 105; PAPPG, p. 134.

The PW becomes the basis for the FEMA grant. FEMA may determine that PA funding is allowed—in accordance with the Stafford Act, FEMA regulations, and FEMA policies—for a project in whole or in part, or is not allowed for a project in whole or in part.

The RA may extend the 30-day and 60-day time limitations described previously when the recipient justifies and makes a request in writing based on extenuating circumstances beyond the recipient's or subrecipient's control.⁵⁴⁸

During this phase, projects are divided into small and large projects based on the monetary threshold established in the Stafford Act, which is adjusted annually. (FY 2018: less than \$125,500 for small projects)⁵⁴⁹ The Stafford Act provides simplified procedures for small projects allowing for grants based on estimates.⁵⁵⁰

⁵⁴⁸ 44 C.F.R. § 206.202(f)(2).

⁵⁴⁹ <https://www.fema.gov/public-assistance-indicator-and-project-thresholds>; PA Handbook, pp. at 21-22; PAPP, pp. 132-33

⁵⁵⁰ 44 C.F.R. § 206.202(f)(2).

FEMA or the applicant will prepare a PW for each project, identifying the eligible scope of work and a cost estimate for the eligible work.⁵⁵¹ Applicants may prepare the PW for small projects, but FEMA assigns project specialists to assist applicants to prepare large project PWs. When the estimated cost of work on a project is less than the established minimum PA grant amount which is adjusted annually (FY 2018: \$3,140), FEMA does not consider the work eligible for reimbursement under the PA program.⁵⁵²

The PW must completely describe the scope of eligible work necessary to repair the damage and the scope of work must correspond to the cause of damage.⁵⁵³ If part of the work is completed prior to project approval, the PW should separate that documentation from the work remaining.⁵⁵⁴

The PW should also document other information pertinent to the scope of work, for example:

- Eligible codes and standards;
- Evidence of pre-disaster damage;
- Reports of pre-disaster deficiencies;

⁵⁵¹ Stafford Act § 422, 42 U.S.C. § 5189; 44 C.F.R. § 206.203(c). The small project threshold for disasters declared on or after October 1, 2017, is less than \$125,500, <https://www.fema.gov/public-assistance-indicator-and-project-thresholds>.

⁵⁵² *Id.* § 206.202(d)(2). This amount is updated for inflation each fiscal year. The minimum PA grant amount disasters declared on or after October 1, 2017 is \$3,140. Refer to <https://www.fema.gov/public-assistance-indicator-and-project-thresholds> for the appropriate small and minimum PA project grant thresholds which is based on the fiscal year for the declaration date of the event in question.

⁵⁵³ PA Guide, p. 101; PAPPG, p. 134.

⁵⁵⁴ 44 C.F.R. § 206.202(d).

- Ineligible work, such as maintenance, inactive facilities, responsibilities of OFAs, etc.;
- Hazard mitigation proposals;
- Descriptions of improved project proposals;
- Special equipment or construction needs; and
- Description of the entire complex, if the project only affects a part.⁵⁵⁵

While FEMA may base the initial obligation of funds on estimated costs, final costs for all large projects are based on the actual cost of the work done.⁵⁵⁶ The three primary methods of determining cost are time and materials, unit costs, and contracts.

FEMA uses a cost estimating format (CEF) for large projects⁵⁵⁷ to estimate the total cost.⁵⁵⁸ The CEF should only be used on large projects that are 90% or less complete. Projects greater than 90% complete are not required to be estimated using the CEF. Instead, the actual costs of the eligible work are used with an extension of those costs to cover the remaining work.

If the work is complete at the time of the request, reimbursement is based on reasonable actual costs. If the work is not complete, FEMA

⁵⁵⁵ *Id.*

⁵⁵⁶ 44 C.F.R. § 206.205(b); PAPPG, p. 145. There are special procedures for Stafford Act Section 428 projects capping the project estimate and allowing for use of cost underruns. In addition, consolidated 428 projects also allow for flexibility in use of funds. *See* Part One of this chapter for additional discussion regarding the 428 Alternative PA Procedures Pilot Programs. *See also* the policy guidance at <https://www.fema.gov/alternative-procedures>

⁵⁵⁷ 44 C.F.R. § 206.203 (c)(1). For FY 2018, a large project is considered any individual project where the approved estimate of eligible costs is \$125, 5100 or greater. *See* Declarations Unit intranet site at: <https://intranet.fema.net/org/orr/PDD/declarations/Pages/default.aspx>

⁵⁵⁸ Cost Estimating Format for Large Projects Standard Operating Procedure, 9570.8 (not superseded by the PAPPG).

obligates funds based on estimates. The state is responsible for progress payments to the applicant as actual costs are documented. Final payments will be based on documentation of payroll information, equipment logs, or usage records and by other records, such as invoices, receipts, or work orders prepared by the applicant. Under current regulations, if an applicant's actual costs come in under the CEF estimate, the difference between the estimate and actual costs will be deobligated and returned to FEMA.⁵⁵⁹

PA Alternative Procedures Pilot Programs⁵⁶⁰

These procedures allow recipients or subrecipients, in cases where actual costs are below estimated costs, to use all of part of excess funds in permanent repair or replacement work to fund:

- cost-effective activities that reduce the risk of future damage, hardship, or suffering from a major disaster,
- other activities to improve future PA operations or planning;

For debris removal work projects, these procedures allow recipients or subrecipients to use excess funds for:

- debris management planning;
- acquisition of debris management equipment for current or future use; and
- other activities to improve future debris removal operations, as determined by the Administrator

Recipients are responsible for informing subrecipients about the status of their applications, including notification of FEMA approval of

⁵⁵⁹ 44 C.F.R. §§ 206.207, 206.228.

⁵⁶⁰ Stafford Act § 428, 42 U.S.C. §§ 5189f. *See also* <https://www.fema.gov/alternative-procedures> for the most current guidance.

subrecipients' PWs and estimates of when FEMA will make payments.⁵⁶¹ Recipients must also pay the full amount due to subrecipients, including the state matching fund contribution, as soon as practicable after FEMA approves payment.⁵⁶²

The recipient is accountable to FEMA as grant administrator for all funds provided under the PA program, including:

⁵⁶¹ *Id.* § 206.200(b)(2)(i).

⁵⁶² *Id.* § 206.200(b)(2)(ii).

- Providing technical advice and assistance to eligible subrecipients;
- Providing state or tribal support for project identification activities including small and large projects and validating small projects; and
- Ensuring that all potential applicants are aware of PA grant funding availability, and submitting the necessary documents for grant award.⁵⁶³
- State Administrative Plan (SAP)

Before disaster strikes, each state must have in place a comprehensive plan, which it reviews and updates annually as appropriate, under which it will administer FEMA PA grants.⁵⁶⁴

The plan must, at a minimum, include the following details:

- The state agency with primary responsibility for PA program administration;
- The staffing functions and the sources of staff to fill the functions; and
- Management and oversight responsibilities of each staff function.

The SAP must provide comprehensive procedures for each phase of the PA Program from post-incident damage assessments to PA Program closeout.⁵⁶⁵ The specific contents required for SAPs are set forth in FEMA regulations.⁵⁶⁶ An approved plan must be on file with FEMA before

⁵⁶³ *Id.* § 206.202(b).

⁵⁶⁴ *Id.* § 206.207(b).

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

awards will be approved in a future major disaster; further, the recipient must incorporate the administrative plan into its state emergency plan.⁵⁶⁷

III. Public Notice, Comment, and Consultation Requirements

A. New or Modified Policies

FEMA must provide notice and an opportunity for comment before adopting any new or modified policy governing the PA Program that could result in a significant reduction of assistance.⁵⁶⁸ Any policy subject to this requirement applies only prospectively to a major disaster or emergency declared on or after the date on which the policy is adopted.⁵⁶⁹

Example: When FEMA revised its Snow Assistance and Severe Winter Storm Policy,⁵⁷⁰ it was determined that the revision would likely result in a significant reduction in assistance. As a result, FEMA published the draft policy for comment;⁵⁷¹ in response to the comments received and to address additional changes to the policy, FEMA published a second proposed revision for comment on July 24, 2008.⁵⁷² FEMA published the final policy in November 6, 2009.⁵⁷³

As a matter of practice, FEMA currently publishes notice of all proposed revisions to PA policies in the *Federal Register* to allow for public comment.

⁵⁶⁷ 44 C.F. R. § 206.207(b) (3) and (4).

⁵⁶⁸ Stafford Act § 325(a)(1), 42 U.S.C. § 5165c(a)(1).

⁵⁶⁹ *Id.* § 325(a)(2), 42 U.S.C. § 5165c(a)(2).

⁵⁷⁰ DAP 9523.1, *Snow Assistance and Severe Winter Storm Policy* (2009), which has since been superseded by the PAPPG, <http://www.fema.gov/media-library-data/1388162386239-1304135edc760b20e603e532c4835ad9/9523%201%20Snow%20Assistance%20and%20Severe%20Winter%20Storm%20Policy.pdf>

⁵⁷¹ On September 17, 2002, FEMA published a first proposed revision in the *Federal Register* for comment. See 67 Fed. Reg. 58,608 (2002).

⁵⁷² 73 Fed. Reg. 43,243 (2008).

⁵⁷³ 74 Fed. Reg. 57,409 (2009).

B. Interim Policies

Before adopting any “interim” policy under the PA Program to address specific conditions that relate to a declared disaster or emergency, i.e., a “disaster specific” policy, FEMA must solicit, to the maximum extent practicable, the views and recommendations of recipients and subrecipients with respect to the major disaster or emergency if the interim policy is likely to:

“(A) result in a significant reduction of assistance to applicants with respect to the major disaster or emergency; or (B) to change the terms of a written agreement to which the Federal Government is a party concerning the declaration of the major disaster or emergency.”⁵⁷⁴

These requirements to provide notice, comment, and consultation do not confer a legal right of action on any party.⁵⁷⁵

C. Public Access

The Stafford Act requires FEMA to promote public access to policies governing the implementation of the PA Program.⁵⁷⁶ Pursuant to this requirement, FEMA provides the states, tribal, and local governments with more and better information about the PA Program through the Internet, newly published materials, and training opportunities, and the production of a standard applicant’s briefing package. Access to all current PA policies is available on FEMA’s website.⁵⁷⁷

⁵⁷⁴ Stafford Act § 325(b)(1), 42 U.S.C. § 5165c(b)(1).

⁵⁷⁵ *Id.* § 325(c), 42 U.S.C. § 5165c(c).

⁵⁷⁶ Stafford Act § 325(b), 42 U.S.C § 5165(c).

⁵⁷⁷ See <http://www.fema.gov/public-assistance-local-state-tribal-and-non-profit>.

IV. Management Costs

A. Introduction

1. Management Costs versus Direct Administrative Costs

Administrative costs are separated into two groups—direct and indirect costs—by Office of Management and Budget (OMB) Circular A-87.⁵⁷⁸ As discussed previously, in promulgating its regulations implementing section 324 of the Stafford Act, FEMA interpreted the language “any indirect costs, administrative expenses, and any other expenses not directly chargeable to a specific project” as addressing indirect, not direct, administrative costs.⁵⁷⁹ Consequently, direct administrative costs do not fall within the definition of management costs and are not covered in the management costs regulation at 44 C.F.R. Part 207.

a. Direct administrative costs

As established by FEMA policy, direct administrative costs, which are those “activities and costs that can be directly charged to a project with proper documentation,”⁵⁸⁰ are charged to the PW the same as any other project costs.⁵⁸¹ Examples of direct administrative costs include:⁵⁸²

- activities to collect damage data, invoices, estimates, and support documentation related to a specific project;

⁵⁷⁸ OMB Circular A-87, 2 C.F.R. Part 225. As discussed previously, for all disasters declared on or after December 24, 2014, 2 C.F.R. Part 200 provides the Uniform Administrative Requirements for federal awards.

⁵⁷⁹ 44 C.F.R. § 207.2.

⁵⁸⁰ *Id.* § 207.6(c).

⁵⁸³ PAPP, pp. 38-39.

⁵⁸⁴ PAPP, pp. 38-39. For pre-2016 declarations see DAP 9525.9 “Section 324 Management Costs and Direct Administrative Costs” (2008) at; DAP 9529.9, Memo on Reasonable Costs (2009) at <https://www.fema.gov/publications-archive> at and Direct and Administrative Activity List (2011) at http://www.fema.gov/pdf/government/grant/pa/9525_9_pa_indirect_direct_administrative_activity_list.pdf.

- travel expenses related to a specific project;
 - activities to evaluate the impact of hazard mitigation measures, insurance coverage, historic preservation, environmental impact, and flood risk for a specific site or project;
 - activities to document funding, scope of work, and other impacts resulting from mitigation, alternate, improved, or other funding requests for a specific project;
 - activities related to visiting, surveying, and assessing sites for a specific project; activities related to estimating project costs for a specific project;
 - activities to respond to grant review, inspection, or closure document requests from the recipient for a specific project; preparing new versions of the PW; and
 - activities related to the closeout process of a specific PW.
- b. Indirect administrative costs (i.e., eligible management costs)

Indirect administrative costs, which are referred to as “management costs” at FEMA because of section 324 of the Stafford Act, are those costs that, while properly documented, cannot be attributed to any single project.⁵⁸³ Indirect costs must comply with 44 C.F.R. Part 207 and be addressed in the recipient’s approved SAP for PA.⁵⁸⁴

Examples of indirect administrative costs⁵⁸⁵ include:

- Costs associated with the applicant briefing, kickoff meeting, and preliminary cost estimates;

⁵⁸³ 44 C.F.R. 207.2.

⁵⁸⁴ 44 C.F.R. 206.207(b) and 207.7(b).

⁵⁸⁵ *Id.*

- travel and expenses in general, not tied directly to a specific project;
- assisting subrecipients in completing forms necessary to request assistance;
- preparing PWs for small projects;
- assisting the Project Specialist (Project Officer) in completing PWs for large projects;
- collecting cost data and developing cost estimates;
- bid review;
- invoice review and approval;
- meetings with FEMA and recipient officials regarding the overall program;
- PA programmatic compliance reviews; and
- PW exit briefing for the overall program.

B. Management Cost Grants for Events Declared After November 13, 2007 (Interim Rule)

The State Administrative Plan (SAP)

Management costs funds are available to PA recipients—state or Indian tribal governments—that receive PA grants pursuant to presidentially declared major disasters and emergencies. If both a state and a tribal government serve as recipients, each is eligible for management cost grants and awards.⁵⁸⁶

Before FEMA provides any management cost grants, however, the SAP for that state must have a process in place for how the state will treat

⁵⁸⁶ *Id.* § 207.2; DAP 9525.9 (VII)(c)(3); PAPPG, pp. 37-38.

the management costs of its subrecipients and how the state will “pass through” management cost funds to the subrecipient. The recipient has the discretion to decide these details.

The SAP must address, in detail, the amount of the grant it will spend while the project is being completed, at closeout, and during audit procedures.⁵⁸⁷ The SAP should also include “the reasonable percentage or amount of pass-through funds for management costs . . . that the recipient will make available to subrecipients, and the basis, criteria, or formula for determining the subrecipient percentage or amount.”⁵⁸⁸

1. How Costs Are Calculated

For major disasters, the maximum amount that FEMA will reimburse for management costs cannot exceed 3.34% of the federal share of projected eligible program costs, not including DFA. That percentage is 3.90% for emergency declarations.⁵⁸⁹ Regardless of the percentage, the amount of a management cost grant pursuant to a single declaration is capped at \$20 million.⁵⁹⁰ The \$20 million management cost cap is the total across both the PA and HMGP programs across a declared disaster.⁵⁹¹

Grants for management costs are only for incurred eligible costs. The 3.34% and 3.90% thresholds are figures above which FEMA will not fund incurred costs. Applicants do not automatically receive an additional 3.34% or 3.90% addition to their grant to account for management costs. All management costs must be reasonable and necessary.

The recipient and subrecipient must document all costs expended for management costs. FEMA will deobligate any unused funds, and the recipient must return them to FEMA.⁵⁹² FEMA will not pay management

⁵⁸⁷ *Id.* § 207.7(b).

⁵⁸⁸ *Id.* § 206.207(b)(iii)(K).

⁵⁸⁹ 44 C.F.R. § 207.5(b)(4)(i-iii).

⁵⁹⁰ *Id.* § 207.5(c). The \$20 million dollar cap may be waived pursuant to the process in place for changes to the lock-in amount discussed in Subsection (2), *The Lock-In Process*.

⁵⁹¹ 2 CFR § 200.434(d). PAPPG, Chapter 2 V.N.1., p. 38, *Grant Management and Administration, Section 324 Management Costs*.

⁵⁹² DAP 9529.9

costs of less than \$1,000.⁵⁹³ Finally, there is no requirement for a recipient to request management cost funding.

2. The Lock-In Process

The process of determining the management cost amount is known as “lock-In.” The FEMA Office of Chief Financial Officer will determine⁵⁹⁴ and make available a maximum amount for management costs based on program projections. This lock-in amount acts as a ceiling for all funds available to both the recipient and subrecipients.⁵⁹⁵

The lock-in letter is provided to the recipient between 30 and 35 days from the date of declaration. The recipient must then submit an initial management cost funding request, in the form of a PW, to the RA. No additional documentation is needed with this initial request. FEMA must receive this request before it will provide management cost funds.⁵⁹⁶ FEMA will then obligate 25% of the locked-in amount to the recipient.⁵⁹⁷

FEMA does not require detailed justification and documentation to support these anticipated management costs until 120 days after the date of the declaration.⁵⁹⁸ This window of time alleviates the burden on the recipient and affords it the opportunity to provide a more thorough and accurate picture of the costs.

⁵⁹³ *Id.*; 44 C.F.R. § 207.4(b)(1); PAPPG, pp. 38-39, 148-149.

⁵⁹⁴ *Id.*; 44 C.F.R. § 207.4(b)(1); PAPPG, pp. 36-37, 141-142.

⁵⁹⁵ 44 C.F.R. § 207.5(b).

⁵⁹⁶ *Id.* § 207.7(c).

⁵⁹⁷ *Id.* § 207.5(b)(1).

⁵⁹⁸ *Id.* § 207.7(d).

The recipient can also request additional time to submit this documentation in “extraordinary circumstances.”⁵⁹⁹

The documentation must include the following:

- a description of activities;
- personnel requirements;
- other management costs;
- recipient’s plan for expending the funds;
- recipient’s plan for monitoring the funds;
- recipient’s plan for ensuring sufficient funds are budgeted for grant closeout;
- percentage of funds that will be “passed-through” to subrecipient; and
- the basis, criteria or formula for determining the “pass-through.”⁶⁰⁰

FEMA will deny costs that lack sufficient documentation.⁶⁰¹ After the recipient gives the detailed documentation to FEMA, the agency will approve or reject the request within 30 days. If rejected, the recipient has 30 days to resubmit documentation; for reconsideration and approval.⁶⁰²

⁵⁹⁹ 44 C.F.R. § 207.7(d)(1-3); DAP 9525.9, at (VII)(c)(2); PAPPG, pp. 141-142.148-149
⁶⁰⁰ 44 C.F.R. § 207.7(d)(1-3); DAP 9525.9, at (VII)(c)(2); PAPPG, pp. 141-142.

⁶⁰¹ PA Appeal, *Los Angeles County Courts, Central Jail Arraignment Court Building*, PA ID # 037-91032, FEMA-1008-DR-CA (2009); applicant’s argument that its regular employees did the work but its financial system did not allow it to track these costs held irrelevant; 44 C.F.R. § 207.7(d)(1).

⁶⁰² 44 C.F.R. § 207.7(d).

FEMA will not obligate the balance of the lock-in costs until it approves the documentation.

At six months from date of declaration, FEMA will revise the lock-in amount and will provide this revised projection to the recipient for its planning purposes.⁶⁰³ At this time, if the recipient can justify the amount, the recipient can request an interim obligation.

The RA and the Chief Financial Officer must both approve such interim funding. If approved, the new amount FEMA obligates will “not exceed an amount equal to 10 percent of the six-month lock-in amount, except in extraordinary circumstances.”⁶⁰⁴

Finally, 12 months after date of declaration, FEMA will determine the final lock-in amount⁶⁰⁵ and give notice to the recipient. Upon notice of this final lock-in amount, the recipient must submit a final management cost funding request to the RA. The recipient must attach any necessary revisions, including supporting documentation to this final funding request.⁶⁰⁶ FEMA will then obligate the remaining amount of the grant.⁶⁰⁷

The recipient must document management costs on a Category Z PW.⁶⁰⁸ The recipient must use and attach associated forms, if relevant, to the PW, including appropriate OMB forms. If the recipient submits a written request with justification to FEMA through the RA, FEMA may change the lock-in amount and extensions to the lock-in time-periods and interim obligations of funding, and may even adjust the \$20 million cap.⁶⁰⁹

The recipient must retain all supporting documentation, including all source records, for three years from the date of submission of the final financial status report to FEMA.⁶¹⁰ If any litigation, claim, negotiation, audit, or other action involving the records begins before the expiration of

⁶⁰³ *Id.* § 207.5(b)(2).

⁶⁰⁴ *Id.* § 207.7(e).

⁶⁰⁵ *Id.* § 207.5(b)(3).

⁶⁰⁶ *Id.* § 207.7(f).

⁶⁰⁷ *Id.* § 207.5(b)(3).

⁶⁰⁸ 44 C.F.R. § 207.7(c)(1); DAP 9529.9, (VII)((D)(3) (November 13, 2007); PAPPG, pp.148-149.

⁶⁰⁹ *Id.* § 207.5(e).

⁶¹⁰ *Id.* §§ 207.8 (f) and 13.42 (2014), 2 C.F.R. 200.333(a).

the three-year period, the recipient must retain the records until completion of that action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.⁶¹¹

3. Recipient Duties

The recipient has primary responsibility for grants management costs activities and accountability of the management cost grant or award.⁶¹² The recipient has the responsibility to assure and properly document⁶¹³ that management cost funding is only used for costs related to the administration of the PA or HMGP Program, as applicable.

The recipient is responsible for administering the management cost funds and addressing procedures to ensure that the subrecipient properly implements the projects and closeout in accordance with program time frames and guidance.⁶¹⁴ The recipient must make sure it and the subrecipient comply, not only with specific regulations regarding management costs, but also with rules regarding federal agency grants and awards.⁶¹⁵

Additionally, there are uniform audit requirements that apply to federal grants in general, including management cost grants.⁶¹⁶ The recipient must also include provisions in its SAP to determine the amount of management cost funding to be passed through to the subrecipient for its costs in administering these projects.⁶¹⁷

FEMA's regulations require the recipient to provide quarterly progress reports to the RA.⁶¹⁸ These quarterly reports should address the amount and percentage of management costs expended compared to the percentage of work completed on the disaster.

⁶¹¹ *Id.* § 13.42 (b)(2). 2 C.F.R. 200.333.

⁶¹² *Id.* § 207.8(a).

⁶¹³ *Id.* § 207.6(a).

⁶¹⁴ *Id.* § 207.4(c)(1).

⁶¹⁵ *Id.* § 207.4(a); see Part Two, Section VI, *Recipient and Subrecipient Compliance with Procurement Requirements*, in this chapter; PAPPG, pp. 148-149.

⁶¹⁶ *Id.* § 207.8(e); See also 44 C.F.R. § 13.26 (2014), See 2 C.F.R. Part 200, Subpart F.

⁶¹⁷ *Id.* § 207.4(c)(2).

⁶¹⁸ *Id.* § 207.8(c).

For major disasters, the recipient has eight years from the date of the major disaster declaration to expend a grant for management costs or 180 days after the latest performance period date of a PW that does not concern management costs, whichever is sooner. For emergencies, that time period is two years or 180 days after the latest non-management cost PW, whichever is earlier.⁶¹⁹ FEMA's Chief Financial Officer may extend these periods upon the written request of the recipient, justifying the extension with a recommendation from the RA.⁶²⁰

The recipient is also responsible for resolving questioned costs that may result from audit findings during the three year-record retention period and returning to FEMA any disallowed costs from ineligible activities.⁶²¹ FEMA will deobligate any unexpended management funds. Such funds are not available for another project; the recipient must return them to FEMA.

C. Management Costs for Grants Declared before November 13, 2007⁶²²

Many of the general concepts outlined previously, such as the definition of management costs and the responsibilities of the recipient/grantee, are equally applicable to PA management cost grants for events declared before November 13, 2007.⁶²³

For these earlier events, however, the management cost calculation is very different. For those events declared by the President on or before November 13, 2007, FEMA used three separate methods under two separate authorities to reimburse administrative and management costs for the PA and HMGP programs:

⁶¹⁹ 44 C.F.R. § 207.8(b).

⁶²⁰ *Id.* § 207.8(3).

⁶²¹ *Id.* § 207.8)(d) and (f).

⁶²² See, e.g., 44 C.F.R. § 207.9(b)(1); DAP 9525.11, *Payment of Contractors for Grant Management Tasks* (pre-January 2016 declarations); PA Guide, pp. 64-65; PAPPG, pp. 38-39, 148-149.

⁶²³ See, e.g., 44 C.F.R. § 207.9(b)(1); DAP 9525.11, *Payment of Contractors for Grant Management Tasks* (pre-January 2016 declarations); PA Guide, pp. 64-65; PAPPG, pp. 37-39, 141-142.

1) A sliding scale that covered:

- a. For recipients, ⁶²⁴ certain enumerated extraordinary costs incurred to manage the grants, such as the costs for project applications, final audits, and damage survey reports;⁶²⁵ and
- b. For subrecipients, ⁶²⁶ necessary costs of requesting, obtaining, and administering federal assistance.⁶²⁷

2) A category called “State Management Administrative Costs,” which was for recipients only,⁶²⁸ and included administrative costs directly attributable to a particular project but not explicitly enumerated in Stafford Act 406(f).⁶²⁹

⁶²⁴ 44 C.F.R. § 207.9(b)(1)(i)(A)-(D).

⁶²⁵ *Id.* § 207.9(b)(1)(1)(i). While overtime pay and per diem and travel were eligible, regular time labor costs (those base wages for an applicant’s employees) for recipients were expressly disallowed.

⁶²⁶ *Id.* § 207.9(b)(2)(i)-(iv).

⁶²⁷ *Id.* § 207.9(b)(2)

⁶²⁸ *Id.* § 207.9(b)(1)(ii).

⁶²⁹ 42 U.S.C. 5172(f). *See also* 2 CFR part 225 and PAPPG, pp. 38-39, 141, 147.

3). Indirect Costs, which were for recipients only,⁶³⁰ that provided for costs that could not be directly attributable to a particular project.

V. Special Funding Procedures

A. Immediate Needs Funding and Expedited Payments

Generally, FEMA completes a PW and obligates the federal share via transfer of funding into Smartlink, where it is available for drawdown by the recipient. Where the project scope of work has not already been completed, this obligation is the equivalent of an “advance payment,” which is required by the Common Rule⁶³¹ if the recipient and subrecipients maintain or demonstrate the willingness and ability to maintain procedures to minimize the time that may elapse between the transfer of the funds and when the recipient or subrecipient disburses the funds.⁶³²

⁶³⁰ 44 C.F.R. § 207.9(c)(1) and (2).

⁶³¹ 44 C.F.R. § 13.21(c) (2014), 2 C.F.R. § 200.305, 44 C.F.R. § 206.204(b).

⁶³² *Id.*

⁶³³ See PAPPG page 135

While Immediate Needs Funding and Expedited Payments for debris removal as described here remain as options, FEMA has found that expediting PWs for Emergency Work (debris removal or emergency protective measures) based upon estimated costs from the applicant is the most effective way to provide funding quickly.⁶³³

1. Immediate Needs Funding

Immediate Needs Funding (INF) is a variation of the advanced funding FEMA typically provides based on a completed scope of work memorialized in a PW in cooperation with the recipient and subrecipient.⁶³⁴ With INF, funding is provided, however, for “urgent needs” requiring payment within the first 60 days after a disaster declaration, in a manner that avoids burdening applicants “during peak crisis operations” with completion of the ordinary PW scope of work process.⁶³⁵ For detailed information, see the Immediate Needs Funding

2. Expedited Payments

In 2006, Congress amended the Stafford Act to require that FEMA provide “expedited payments” for debris removal.⁶³⁶ These payments are required to be not less than 50% of the initial estimate of the federal share of

⁶³⁴ Standard Operating Procedure 9570.7, Immediate Needs Funding (1999), p. 2, at <http://www.fema.gov/pdf/government/grant/pa/sopin.pdf>.

⁶³⁵ Safe Port Act § 610, Pub. L. No. 109-347 (2006), codified, as amended, at Stafford Act § 407(e), 42 U.S.C. § 5173(e).

⁶³⁶ See Stafford Act § 407(e)(2), 42 U.S.C. § 5173(e)(2). There is no provision in statute or regulations on the timing of payments for emergency protective measures (Category B).

assistance to be provided not later than 60 days after the estimate and not later than 90 days after the applicant applies for debris removal assistance.⁶³⁷

Although FEMA already provided advance payments for debris removal under federal grant rules for advance payments such as INF, Congress clearly expects FEMA to provide funding even more quickly for debris removal.

B. Advance of Non-Federal Share

The Stafford Act and its implementing regulations authorize FEMA to advance or loan to a state, tribal government, local government, or applicant the portion of PA for which the state or tribal government is responsible pursuant to the cost-sharing provisions of the Stafford Act.⁶³⁸ Between 1992 and 1996, FEMA issued 13 loans under this program. The last three loans were provided in 1996 to the U.S. Virgin Islands following Hurricane Marilyn, which totaled \$10,521,000.

Starting with the FY 2013 President's Budget, funds have not been requested for non-federal share loans due to lack of use, and no funds have been appropriated by Congress.

VI. Recipient and Subrecipient Compliance with Procurement Requirements

A. Introduction

Recipients and subrecipients often use contractors to help them carry out projects. Although the federal government is not a party to a recipient's or subrecipient's contract, it plays a large role in a recipient's or subrecipient's contracting out of its PA funding.

⁶³⁷See Stafford Act § 407(e)(2), 42 U.S.C. § 5173(e)(2). There is no provision in statute or regulations on the timing of payments for emergency protective measures (Category B).

⁶³⁸Stafford Act § 319, 42 U.S.C. § 5162; 44 C.F.R. § 206.45.

Recipients and subrecipients must comply with the procurement requirements imposed by federal law, executive orders, and federal regulations, and these requirements will control over non-federal authorities (such as state or local rules for contracting) to the extent they conflict with federal requirements.⁶³⁹ This includes the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* enacted at 2 C.F.R. Part 200, which replaced 44 C.F.R. Part 13, *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments*, as well as 2 C.F.R. Part 215, *Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Learning, Hospitals, and Other Non-Profit Organizations* for all grants awarded under emergency or major disaster declarations issued on or after December 26, 2014.⁶⁴⁰

Although grants and agreements for declarations made prior to December 26, 2014, will be subject to the old regulations in most cases, please consult with Office of Chief Counsel (OCC) with questions regarding the new regulations under 2 C.F.R Part 200. These regulations set forth the policies establishing federal grant procurement requirements and allowable costs in the PA program.⁶⁴¹

B. Overview of Contracts

A contract is a promise or a set of promises, the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.⁶⁴² The term “contract” is generic and includes a number of different varieties or types. For example, one

⁶³⁹ See *Illinois Equal Employment Opportunity Regulations for Public Contracts*, B-167015, and 54 Comp. Gen. 6 (1974); See also *King v. Smith*, 392 U.S. 309, 333 n. 34 (1968).

⁶⁴⁰ Non-federal entities may continue to comply with the procurement standards provided in previous guidance for one additional fiscal year after 2 C.F.R. Part 200 goes into effect.

⁶⁴¹ Stafford Act § 406(e), 42 U.S.C. § 5172(e); 44 C.F.R. §§ 206.228, 206.202(d) and 13.22. Several OMB circulars, which are available at 2 C.F.R. Part 225, define allowable costs for different governmental and non-profit entities: Circular A-87 for state, tribal and local governments, https://www.whitehouse.gov/omb/circulars_default; Circular A-122 for PNPs other than institutions of higher education, hospitals and any other organization specifically exempted, http://www.whitehouse.gov/omb/circulars_a122_2004/; Circular A-21 for educational institutions <https://www.whitehouse.gov/omb/circulars/>.

⁶⁴² Restatement (Second) of Contract, § 1(1981).

could categorize a contract type by subject matter (construction, research, supply, service) or by the manner in which it can be formed and accepted (such as bilateral or unilateral).

Recipients and subrecipients may select the type of contract they award consistent with federal law and regulations, and applicable state and local law and regulations, and within the bounds of good commercial business practice.⁶⁴³

In the case of the PA grant program, FEMA is generally concerned with three aspects of contract types: (1) the recipient's/subrecipient's payment obligation; (2) the contractor's performance obligations; and (3) the method by which recipients and subrecipients solicit, evaluate, and select contractors for award.

Note: The many details and complexities of federal contracting procurement under PA grants are far too voluminous to cover in this chapter. For further information on issues arising with procurement under PA grants, please consult FEMA OCC Procurement and Fiscal Law Division (PFLD) PA Grantee and Subgrantee Procurement Field Manual, supplemental guidance and checklists (PFLD Field Manual and Checklists), found at <http://www.fema.gov/media-library/assets/documents/96773>.

1. Types of Contracts by Payment Obligations

a. Firm, Fixed-Price Contract

Fixed-price contracts provide for a firm price or, in appropriate cases, an adjustable price.⁶⁴⁴ The risk of performing the required work at the fixed price is borne by the contractor.⁶⁴⁵ Firm, fixed-price contracts are generally appropriate where the requirement is well-defined and of a commercial nature.⁶⁴⁶ Construction contracts, for example, are often

⁶⁴³ 2 C.F.R. Part 200 44 C.F.R. § 13.36 (2014); 2 C.F.R. Part 215 (2013).

⁶⁴⁴ Compare 48 C.F.R. subpart 16.2 (Fixed-Price Contracts).

⁶⁴⁵ *Bowsher v. Merck & Co.*, 460 U.S. 824, 826 at n. 1 (U.S. 1983).

⁶⁴⁶ Compare 48 C.F.R. § 16.202-2.

firm, fixed-price contracts. Time and materials contracts and labor-hour contracts are not fixed-price contracts.⁶⁴⁷

b. Cost-Reimbursement Contract

Cost-reimbursement types of contracts provide for payment of allowable incurred costs to the extent provided in the contract.⁶⁴⁸ They normally provide for the reimbursement of the contractor for its reasonable, allocable, actual, and allowable costs, with an agreed-upon fee/profit. There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the recipient's or subrecipient's approval or at the contractor's own risk.

In a cost-reimbursement contract, the recipient/subrecipient bears more risk than in a firm, fixed-price contract.⁶⁴⁹ A cost-reimbursement contract is appropriate when the details of the required scope of work are not well defined.⁶⁵⁰

There are many varieties of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.⁶⁵¹ One form of a cost-reimbursement contract is prohibited, which is the cost-plus-percentage-of-cost contract.⁶⁵²

2. Types of Contract by Performance

The most frequently encountered contract is one in which the contractor satisfies the agreed upon statement of work in the contract and the subrecipient pays the contractor either a fixed price or the contractor's

⁶⁴⁷ Compare 48 C.F.R. § 16.201(b).

⁶⁴⁸ Compare 48 C.F.R. subpart 16.3 (Cost-Reimbursement Contracts).

⁶⁴⁹ *Kellogg Brown & Root Servs. v. United States*, 742 F.3d 967, 971 (Fed. Cir. 2014).

⁶⁵⁰ Compare 48 C.F.R. § 16.301-2(a).

⁶⁵¹ Compare 48 C.F.R. subpart 16.3

⁶⁵² See 2 C.F.R. § 200.323(d); 44 C.F.R. § 13.36(f)(4) (2014); 2 C.F.R. § 215.44(c) (2013); See also *DHS OIG Report No. OIG-14-44-D, FEMA Should Recover \$5.3 Million of the \$52.1 Million of PA Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*, pp. 4 (Feb. 25, 2014) at [2014/OIG 14-44-D_Feb14.pdf](#). Compare 48 C.F.R. § 16.301-3(b).

https://www.oig.dhs.gov/reports/audits-inspections-and-evaluations?field_dhs_agency_target_id=2&field_oversight_area=All&field_fy_value=4

costs and fee. There are, however, additional types of contracts that FEMA will likely encounter in the PA context.

a. Indefinite Delivery and Indefinite Quantity Contracts

This is a type of contract that provides for an indefinite quantity of supplies or services during a fixed period of time.⁶⁵³ The recipient or subrecipient can determine the amount of services or supplies as needed, and the payment type can be fixed price or cost-reimbursement. In federal acquisitions, the contract must require the contractor and the federal government to furnish at least a stated minimum quantity of supplies or services.⁶⁵⁴

b. Time and Materials Contracts

This type of contract typically provides for the acquisition of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual costs for materials.⁶⁵⁵

A time and materials contract is generally used when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. Although FEMA policies generally discourage the use of time and materials contracts, they may be allowed for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed; it has been determined that no other contract is suitable; and the contract includes a ceiling price that the contractor exceeds at its own risk.⁶⁵⁶ For example, time and materials contracts are often permissible for time-sensitive work such as utility repairs, where costs and duration of work may be difficult to estimate. *See Part One,*

⁶⁵³Compare 48 C.F.R. § 16.504(a).

⁶⁵⁴ 48 C.F.R. § 16.504(a)(1).

⁶⁵⁵ Compare 48 C.F.R. § 16.601(b).

⁶⁵⁶ 2 C.F.R. § 200.318(j); *See also* 44 C.F.R. §13.36(b)(10) (2014); however, there is no analogous section in 2 C.F.R. Part 215 (2013) for colleges, hospitals, or non-profits for pre-Uniform Guidance procurements.

Section III(B)(4), *Utilities*, for more information on assistance for utility repairs.

3. Types of Contract Based on Procurement Method

The third type of contract concerns the method of procurement, which is the process followed by a recipient or subrecipient to solicit contractors, evaluate offers, and select a contractor using evaluation criteria. The federal procurement standards recognize five procurement methods. State, local, and tribal governments' procurement methods, and those of PNPs, will most likely align to these four primary methods (although there may be various permutations).

The five methods are small purchase procedures, sealed bidding, procurement through competitive proposals or “negotiated procurement,” micropurchase, noncompetitive procurement or “sole source.”

C. Procurement by a State

The federal procurement standards at 44 C.F.R. § 13.36(a) (2014) and 2 C.F.R. § 200.317(a) require a state⁶⁵⁷ to follow the same policies and procedures it uses for procurements from its non-federal funds when it procures property and services under a PA grant award.⁶⁵⁸ For example, if a state's policies and procedures include adhering to a statutorily imposed geographic preference, then the

⁶⁵⁷ A “state” means “any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.” 44 C.F.R. § 13.3 (2014), 2 C.F.R. § 200.90.

⁶⁵⁸ See DHS OIG Report No. 14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) at https://www.oig.dhs.gov/assets/GrantReports/2014/OIG_14-46-D_Feb14.pdf.

state may apply that geographic preference when evaluating bids.⁶⁵⁹ In addition, the state must ensure that every purchase order or other contract includes any clauses required by federal statutes and executive orders and their implementing regulations.

D. Procurements by Local and Tribal Governments

Local and tribal governments must use their own procurement procedures that reflect state and local law and regulations, provided that the procurements conform to applicable federal law and standards identified at 44 C.F.R. § 13.36(b)-(i) (2014) or 2 C.F.R. 318-326.⁶⁶⁰ The following provides a summary of the eight subsections to 44 C.F.R. § 13.36 and 2 C.F.R. 200.318-326.

Notably, a tribal government can be, in certain circumstances, a PA recipient—notwithstanding, the tribal government must still meet the requirements of 44 C.F.R. § 13.36(b)-(i), 2 C.F.R. § 200.318-326, whether serving as a recipient or subrecipient.⁶⁶¹ The term “subrecipient” as used in the following subsections, therefore, includes a local government (which will never serve as a PA grantee) and a tribal government acting as either a subrecipient or recipient.⁶⁶²

1. General Procurement Standards

The regulation at 44 C.F.R. § 13.36(b) (2014) and 2 C.F.R. § 200.318 set forth a number of general procurement standards, 9 of which are mandatory. The first standard requires a subrecipient to use its own procurement procedures, which must reflect applicable state and local laws and regulations.⁶⁶³

⁶⁵⁹ States are not subject to 44 C.F.R. § 13.36(c)(2) (2014) and 2 C.F.R. § 200.319(b), which provide that “grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals,” except in those cases where “applicable federal statutes expressly mandate or encourage geographic preference.”

⁶⁶⁰ 44 C.F.R. § 13.36(b)(1), 2 C.F.R. § 200.317.

⁶⁶¹ See Part One, Section II(A)(1)(b) *Tribal Governments* of this chapter.

⁶⁶² For further information on procurement by states and tribal governments serving as an applicant or recipient, consult the PFLD Field Manual and Checklists.

⁶⁶³ 44 C.F.R. § 13.36(b)(1)), 2 C.F.R. § 200.318(a).

Furthermore, the procurements must conform to applicable federal law and the standards under 44 C.F.R. § 13.36(b)-(i) and 2 C.F.R.

§ 200.318.⁶⁶⁴ The following section provides a summary of the remaining standards at 44 C.F.R. § 13.36(b)(2)-(12) and 2 C.F.R. § 200.318 and 2 C.F.R. § 200.324 (*Federal awarding agency or pass-through entity review*).

a. Contract Administration

Subrecipients must maintain a contract administration system that ensures that contractors perform in accordance with terms, conditions, and specifications of their contracts or purchase orders.⁶⁶⁵ The content of any such administration system is left to the discretion of the subrecipient.

Notwithstanding, if reviewing a subrecipient's contract administration system, FEMA will look for certain basic elements that should reasonably be part of any such system:

- Contract Monitoring and Performance Surveillance
- Voucher Processing
- Contract Closeout

b. Written Code of Procurement Standards of Conduct

Subrecipients are required to have a written code of standards of conduct for their employees who are engaged in the award and administration of contracts.⁶⁶⁶ FEMA expects an applicant, when contracting with PA grant funding, to ensure that procurement transactions are conducted in a

⁶⁶⁴ *Id.*

⁶⁶⁵ 44 C.F.R. § 13.36(b)(2) (2014); 2 C.F.R. § 200.318(i), 200.324. A subrecipient, in establishing its administrative system, should also review the guidance provided by OMB under the FY 2013 Compliance Supplement to OMB Circular A-133 to auditors seeking audits of subrecipients under the Single Audit Act 31 U.S.C. § 5207 *et seq.*, Pub. L. 101-301 (1984).

⁶⁶⁶ 44 C.F.R. § 13.36(b)(3) (2014), 2 C.F.R. § 200.318(c)(1).

manner beyond reproach, at arm's length, with impartiality, and without preferential treatment.

The regulations require the subrecipient's written standards to provide for, at a minimum, the following items:

c. No Personal Conflicts of Interest

Simply stated, subrecipients are required to use federal funds in the best interest of their PA projects, and these decisions must be free of undisclosed personal or organizational conflicts of interest—both in appearance and fact.⁶⁶⁷

d. Prohibition against Gratuities

The subrecipient's officers, employees, and agents can neither solicit nor accept gratuities, gifts, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements.⁶⁶⁸

e. Review of Proposed Procurements

Subrecipient procurement procedures must provide for a review of proposed procurements to avoid the purchase of unnecessary or duplicative items.⁶⁶⁹ Under these procedures, the subrecipient should consider consolidating or breaking out procurements to obtain a more economical purchase.⁶⁷⁰

f. Awards to Responsible Contractors

A subrecipient must make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.⁶⁷¹

⁶⁶⁷ *Id.*

⁶⁶⁸ 44 C.F.R. § 13.36(b)(3)(iv) (2014), 2 C.F.R. § 200.318(c)(1).

⁶⁶⁹ 44 C.F.R. § 13.36(b)(4) (2014), 2 C.F.R. § 200.318(d).

⁶⁷⁰ *Id.*

⁶⁷¹ 44 C.F.R. § 13.36(b)(8) (2014), 2 C.F.R. § 200.318(h).

g. Procurement Records

A subrecipient must maintain records in sufficient to detail the significant history of procurement.⁶⁷² These records must include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.⁶⁷³ These records should also include the contract document and any contract modifications with the signatures of all parties.

h. Time and Material Contracts

Federal grant regulations provide that a subrecipient may use a time and materials contract only after the subrecipient determines that no other contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.⁶⁷⁴

The ceiling price must not be so high as to render it meaningless as a cost control measure. A time and materials contract typically provides for the acquisition of supplies or services based on (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual costs for materials.⁶⁷⁵

A time and materials contract is generally used when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.⁶⁷⁶

FEMA, as a matter of policy, has advised against the use of time and materials contracts and recommends that applicants only use them when no other contract type is suitable;⁶⁷⁷ that such contracts should be limited to work necessary immediately after an incident and limited to a reasonable time based on the circumstances; that the applicant must

⁶⁷² 44 C.F.R. § 13.36(b)(9) (2014), 2 C.F.R. § 200.318(i).

⁶⁷³ *Id.*

⁶⁷⁴ 44 C.F.R. § 13.36(b)(10) (2014); 2 C.F.R. § 200.318(j)(1).

⁶⁷⁵ *Compare* 48 C.F.R. § 16.601(b).

⁶⁷⁶ *Compare Id.* § 16.601(c).

⁶⁷⁷ PAPPG, p. 33.

carefully monitor and document contractor expenses; and that when time and materials contracting is employed, the applicant should notify the state to ensure proper guidelines are followed.⁶⁷⁸

i. Settlement of Contractual and Administrative Issues

Subrecipients alone will be responsible, in accordance with good administrative practice and sound business judgment, for the administration and settlement of all issues arising out of procurements.⁶⁷⁹ These issues include but are not limited to source evaluation, protests, disputes, and claims. Violations of law will be referred to the local, state, or federal authority having proper jurisdiction.

j. Protest and Dispute Procedures

Under FEMA's procurement regulations at 44 C.F.R. Part 13, a subrecipient must have "protest procedures" to handle and resolve "disputes" relating to their procurements and shall, in all instances, disclose information regarding the protest to the state.⁶⁸⁰ A protestor must exhaust all administrative remedies with the subrecipient and state before pursuing a protest with FEMA.

Reviews of disputes or protests by FEMA will be limited to violations of federal law or regulations; a subrecipient's noncompliance with FEMA's regulation for subrecipient procurement at 44 C.F.R. § 13.36 (2014) and violations of the subrecipient's protest procedures for failure to review a complaint or protest.⁶⁸¹

Please note that the rules regarding bid and protest procedures not appear in the new grant rules at 2 C.F.R. Part 200.

⁶⁷⁸ *Id.*

⁶⁷⁹ 44 C.F.R. § 13.36(b)(11) (2014); 2 C.F.R. § 200.318(k).

⁶⁸⁰ 44 C.F.R. § 13.36(b)(12) (2014).

⁶⁸¹ *Id.*

k. Encouraging Intergovernmental Agreements

To foster “greater economy and efficiency,” FEMA regulations encourage recipients and subrecipients to enter into “State and local intergovernmental agreements for procurement or use of common goods and services.”⁶⁸²

l. Purchasing Off the General Services Administration (GSA)

i) Schedules

Section 833 of the John Warner National Defense Authorization Act (NDAA) for Fiscal Year 2007⁶⁸³ authorizes the General Services Administration (GSA) Administrator to provide for the use by “state and local governments” of GSA supply schedules for goods and services to be used to facilitate recovery from a major disaster under the Stafford Act, subject to certain requirements.⁶⁸⁴

ii) Encouraging the Use of Federal Excess and Surplus Property

FEMA and federal grant regulations encourage subrecipients to use federal excess and surplus property in lieu of purchasing new equipment and property whenever this is feasible and reduces project costs.⁶⁸⁵ A subrecipient would acquire such equipment and property through the Federal Surplus Personal Property Donation Program, which is administered by the Administrator of GSA.⁶⁸⁶

⁶⁸² 44 C.F.R. § 13.36(b)(5) (2014); 2 C.F.R. § 200.318(e).

⁶⁸³ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, (2006), codified as amended at 40 U.S.C. § 502.

⁶⁸⁴ *Id.* See also the FEMA Procurement Guidance for Recipients and Subrecipients under 2 C.F.R. Part 200, Supplement to the Procurement Disaster Assistance Team Field Manual (June 2016), FEMA Procurement Under Grants Field Manual Supplement, Section VI(1), *Federal Supply Schedules*, pp. VI-1-4, at <https://www.fema.gov/media-library/assets/documents/96773>., PDAT Web page at: www.fema.gov/procurement-disaster-assistance-team

⁶⁸⁵ 44 C.F.R. § 13.36(b)(6) (2014); 2 C.F.R. § 200.318(f).

⁶⁸⁶ <http://www.gsa.gov/portal/content/104591>

2. Competition

FEMA regulations requires a subrecipient to conduct all procurement transactions in a manner providing “full and open competition” consistent with the standards of 44 C.F.R. § 13.36 (2014) and 2 C.F.R §§ 200.317-326.⁶⁸⁷ Although not defined in the regulation, “full and open competition” generally means that a complete requirement is publicly solicited, and all responsible sources are permitted to compete.⁶⁸⁸

The full and open competition requirement has proven to be one of the most common problems with subrecipient procurements in recent years and comprises a majority of audit findings by the OIG.

a. Situations Restrictive of Competition

FEMA regulations identify seven situations that are considered to be restrictive of competition. This is an illustrative and non-exhaustive list.⁶⁸⁹

i) Placing Unreasonable Requirements on Firms in Order for Them to Qualify to Do Business

The subgrantee must not place unreasonable requirements on firms in order for them to do business.⁶⁹⁰ This means that the subgrantee should include only those requirements that are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements.

ii) Requiring Unnecessary Experience and Excessive Bonding

A subgrantee must not require unnecessary experience and excessive bonding.⁶⁹¹ As it relates to experience, this could include requiring unnecessary levels or years of experience for contractors as organizations, the contractors’ workforce, or the contractors’ key personnel on a project.

⁶⁸⁷ 44 C.F.R. § 13.36(c) (2014); 2 C.F.R. § 200.319.

⁶⁸⁸ *Cf.* 48 C.F.R. § 2.101.

⁶⁸⁹ 44 C.F.R. § 13.36(c)(1) (2014); 2 C.F.R. § 200.319(a)(1-7).

⁶⁹⁰ 44 C.F.R. § 13.36(c)(1)(i) (2014); 2 C.F.R. § 200.319(a)(1).

⁶⁹¹ 44 C.F.R. § 13.36(c)(1)(ii) (2014); 2 C.F.R. § 200.319(a)(2).

iii) Noncompetitive Pricing Practices between Firms or Between Affiliated Companies

Noncompetitive pricing practices between firms or between affiliated companies are restrictive of competition.⁶⁹² The most prominent form of noncompetitive pricing is referred to as “bid rigging,” which is the practice where conspiring competitors effectively raise prices where a purchaser acquires goods or services by soliciting competing bids.⁶⁹³ Essentially, competitors agree in advance who will submit the winning bid on a contract being awarded through the competitive bidding process.

iv) Noncompetitive Awards to Consultants on Retainer Contracts

Noncompetitive awards to consultants on retainer contracts are restrictive of competition.⁶⁹⁴ The term “retainer contract” is not defined in the regulations but is a form of agreement for general, unspecified services entered into in advance of work to be done.

v) Organizational Conflicts of Interest

Organizational conflicts of interest, which are different than personal conflicts of interest, are restrictive of competition. FEMA’s regulation, however, does not define nor provide additional guidance as to the scope and meaning of “organizational conflict of interest;”⁶⁹⁵ thus, it is helpful to understand the meaning and scope of organizational conflicts of interest within the federal procurement contracting rules and processes.⁶⁹⁶

vi) Specifying Only a Brand Name Product

It would be restrictive of competition for a subrecipient to specify only a “brand name” product instead of allowing “an equal” product to be

⁶⁹² 44 C.F.R. § 13.36(c)(1)(iii) (2014); 2 C.F.R. § 200.319(a)(3).

⁶⁹³ United States Department of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are And What To Look For, An Antitrust Primer* at <https://www.justice.gov/sites/default/files/atr/legacy/2007/10/24/211578.pdf>.

⁶⁹⁴ 44 C.F.R. § 13.36(c)(1)(iv) (2014); 2 C.F.R. § 200.319(a)(4).

⁶⁹⁵ 44 C.F.R. § 13.36(c)(1)(v) (2014); 2 C.F.R. § 200.319(a)(5).

⁶⁹⁶ "The Uniform Rules also address organizational conflicts of interest as they relate to non-governmental parent, subsidiary, or affiliate organizations. 2 C.F.R. § 200.318(c)(2)."

offered.⁶⁹⁷ This would generally include specifying only a “brand name” product without allowing offers of “an equal” product, or allowing “an equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.

vii) Any Arbitrary Action in the Procurement Process

Any “arbitrary action” in the procurement process is also restrictive of competition.⁶⁹⁸ The term “arbitrary” means that an action or decision was “founded on prejudice or preference rather than on reason or fact” and/or “depended on individual discretion.”⁶⁹⁹ It often means something that is unreasonable or unsupported.⁷⁰⁰

b. Local Preferences in Contractor Selection

Subrecipients must conduct their procurements in a manner that prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals.⁷⁰¹

Such geographic preferences may come in a variety of forms: price matching policies, where local vendors have the opportunity to match the lowest bid; reducing bids during sealed bidding evaluation, where bids submitted by local vendors may be reduced by a certain percentage during the evaluation process; adding weight to an evaluation factor score during competitive proposals to bids submitted by local vendors; and set asides, where a local jurisdiction simply sets aside certain contracts for local vendors.

There are, however, several exceptions to geographic preferences in the regulation concerning licensing, architectural and engineering services, and federal statutes. For further information on the general rule against

⁶⁹⁷ 44 C.F.R. § 13.36(c)(1)(vi) (2014); 2 C.F.R. § 200.319(a)(6).

⁶⁹⁸ 44 C.F.R. § 13.36(c)(1)(vii) (2014); 2 C.F.R. § 200.319(a)(7).

⁶⁹⁹ *Blacks’ Law Dictionary*, p. 119 (9th ed. 2009).

⁷⁰⁰ See DHS OIG Report No. 14-11 (Dec. 2013), *FEMA Should Recover \$6.1 Million of Public Assistance Grant Funds to Orlando Utilities Commission under Hurricane Frances*,

⁷⁰¹ 44 C.F.R. § 13.36(c)(2) (2014); 2 C.F.R. § 200.319(b).

local geographic preferences, as well as exceptions to the rule, please consult the PFLD Field Manual and Checklists.

i) Section 307 of the Stafford Act

Section 307 of the Stafford Act requires that, in the “expenditure of funds for debris clearance, distribution of supplies, reconstruction, or other major disaster or emergency assistance activities,” which may be carried out by contract or agreement with private organizations, firms, and individuals, “preference shall be given” to the extent “practicable and feasible” to those organizations, firms, and individuals “residing or doing business primarily in the area affected by such major disaster or emergency.”⁷⁰²

Section 307 does not expressly indicate whether or not the requirement to impose a local preference in the course of carrying out emergency or major disaster activities extends beyond the federal government to PA grantees and subrecipients. FEMA has not adopted regulations or other “requirements to facilitate compliance” with Section 307 with respect to PA recipients and subrecipients. As such, FEMA does not allow subrecipients to rely on Section 307 as a statutory exception to the limitations of 44 C.F.R. § 13.36(c)(2) (2014).

ii) Indian Self-Determination and Education Assistance Act

Tribal preferences may be permissible if certain requirements are met under the Indian Self-Determination and Education Assistance Act.⁷⁰³ A tribal government acting as either a recipient or subrecipient may give a preference in the award of contracts funded in whole or in part with PA funding to businesses falling within the meaning of “Indian organizations” or “Indian-owned economic enterprises” under the Act.⁷⁰⁴

⁷⁰² Stafford Act § 307, 42 U.S.C. § 5150; 44 C.F.R. § 206.10.

⁷⁰³ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, (1975) 25 U.S.C. § 450, *et seq.*

⁷⁰⁴ *Id* § 7(b).

c. Contract Award Selection Procedures

FEMA's regulations require recipients to have written selection procedures for procurement transactions.⁷⁰⁵ . The requirements under the regulation are aimed at not only ensuring competition, but also avoiding dishonest and unfair practices. These written selection procedures must include the features discussed here.

i) Clear and Accurate Description of Requirements

Solicitations must have clear and accurate descriptions of the technical requirements for the materials, products, or services to be procured.⁷⁰⁶ The purpose of this requirement is to enable vendors to understand the requirements and prepare sound proposals to satisfy those requirements. The description of requirements may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must set forth the minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

ii) Identification of Requirements and Evaluation Factors

The solicitation must identify all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.⁷⁰⁷ Evaluation factors could include, for example, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. FEMA does not mandate or dictate any specific evaluation factors, except that the evaluation factors must support the purposes and scope of work of the PA project award.

iii) Use of Prequalified Lists

A subrecipient may use a prequalified list among which to compete procurement for services or goods.⁷⁰⁸ Several conditions precedent must be met in using such a list. First, the subrecipient will ensure that all prequalified lists of persons, firms, or products used in acquiring goods

⁷⁰⁵ 44 C.F.R. § 13.36(c)(3) (2014); 2 CFR 200.319(c).

⁷⁰⁶ 44 C.F.R. § 13.36(c)(3)(i) (2014); 2 C.F.R. § 200.319(c)(1).

⁷⁰⁷ 44 C.F.R. § 13.36(b)(3)(ii) (2014); 2 C.F.R. § 200.319(c)(2).

⁷⁰⁸ 44 C.F.R. § 13.36(c)(4) (2014); 2 C.F.R. § 200.319(d).

and services are current and include enough qualified sources to ensure maximum full and open competition.⁷⁰⁹ Second, subrecipients must not preclude potential bidders from qualifying during the solicitation period.⁷¹⁰

FEMA encourages applicants to pre-qualify debris removal contractors before an event and then conduct full and open competition among that list, while still allowing other vendors to qualify for that list during the solicitation period. The solicitation for pre-qualifying contractors must adequately define, in the proposed scope of work, all potential debris types, anticipated haul distances, and size of events.

3. Methods of Procurement

The regulation at 44 C.F.R. § 13.36(d) (2014) and 2 C.F.R. § 200.320 set forth five methods of procurement to be followed by a subrecipient. A subrecipient should use competitive procedures appropriate for the acquisition undertaken, and the procurement method must comply with state and local laws, regulations, and procedures, so long as it complies with the minimum requirements of 44 C.F.R. § 13.36(d) (2014) or 2 C.F.R. § 200.320.

a. Procurement by Small Purchase and Micro-Purchase Procedures

“Small purchase procedures” are those relatively simple and informal procurement methods for securing services, supplies, or other property; and the regulation at 44 C.F.R. § 13.36(d)(1) (2014) and 2 C.F.R. § 200.320(B) authorize such procedures to acquire services, supplies, or other property valued at less than the federal simplified acquisition threshold fixed at 41 U.S.C. § 134, which is currently set at \$150,000. A subrecipient may set lower thresholds for small purchase procedures in compliance with state or local law.

2 C.F.R. Part 200 includes a new method of procurement option, micro-purchases. Procurement by micro-purchase is the acquisition of supplies

⁷⁰⁹ *Id.*

⁷¹⁰ *Id.*

or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act)⁷¹¹. To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micropurchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

b. Procurement by Sealed Bids (Formal Advertising)

The regulations recognize sealed bidding as a generally accepted method of procurement by a subrecipient.⁷¹² Under this method, bids are publicly solicited and a firm, fixed-price contract (lump sum or unit price)⁷¹³ is awarded to the responsible offeror whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.

c. Procurement by Competitive Proposals

FEMA recognizes the use of competitive proposals to be a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the subrecipient expects that more than one source will be willing and able to submit an offer or proposal.⁷¹⁴

Under this method, a fixed-price, cost-reimbursement, is awarded to the responsible firm whose proposal is most advantageous to the subrecipient, with price and other factors considered. This is the method of procurement most often used for professional services in connection with construction (but not for actual construction), such as program management; construction management; feasibility studies; preliminary engineering; and design, architectural, engineering, surveying, mapping, and related services.

One of the more common types of services that a subrecipient will procure through the competitive proposal method is architectural and

⁷¹¹ 2 C.F.R. 200.320(a)

⁷¹² 44 C.F.R. § 13.36(d)(2) (2014); 2 C.F.R. § 320(c).

⁷¹³ A “lump sum” is the entire contract price, and a “unit price” is the cost of one unit.

⁷¹⁴ 44 C.F.R. § 13.36(d)(3) (2014); 2 C.F.R. § 320(d).

engineering services. The regulations provides that subrecipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering professional services.⁷¹⁵

This method, where price is not used as a selection factor, can only be used in procurement of architectural/engineering services and cannot be used to purchase other types of services (even if an architectural/engineering firm is the one providing those other types of services).⁷¹⁶

d. Procurement by Noncompetitive Proposals and Contracting When a Public Exigency or Emergency Exists

Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source or, after a solicitation of a number of sources, competition is determined inadequate.⁷¹⁷ FEMA regulations set forth various requirements that must be met for a subrecipient to use this procurement method.⁷¹⁸

FEMA or the state/recipient may require the subrecipient to submit a proposed procurement for pre-award review.⁷¹⁹ While a subrecipient's noncompetitive procurement may meet the requirements of state and local procurement laws and regulations, if it does not meet the federal procurement standards set forth at 44 C.F.R. § 13.36(d)(4) or 2 C.F.R. § 200.320(f), the procurement is noncompliant with 44 C.F.R. Part 13 and 2 C.F.R. Part 200.

Importantly, a subrecipient must conduct a cost analysis, under which the subrecipient verifies the proposed cost data, verifies the projections of the

⁷¹⁵ 44 C.F.R. § 13.36(d)(3)(v) (2014); 2 C.F.R. § 200.320(d)(5).

⁷¹⁶ *Id.*; see, e.g. DHS OIG Report No. DA-12-22, *FEMA PA Grant Funds Awarded to the Long Beach Port Commission, Long Beach, Mississippi*, pp. 3-4 (Jul. 18, 2012), https://www.oig.dhs.gov/assets/GrantReports/OIG_DA-12-22_Jul12.pdf.

⁷¹⁷ 44 C.F.R. § 13.36(d)(4) (2014); 2 C.F.R. § 320(f).

⁷¹⁸ 44 C.F.R. § 13.36(d)(4) (2014); 2 C.F.R. § 320(f).

⁷¹⁹ 44 C.F.R. § 13.36(d)(4)(iii) (2014); 2 C.F.R. § 320(f)(3).

data, and evaluates the specific elements of costs and profits.⁷²⁰ The subrecipient must also negotiate profit as a separate element of price.⁷²¹

In addition, a subrecipient may use procurement by noncompetitive proposals only under two conditions. The first condition is that the award of a contract must be “*infeasible*” under small purchase procedures, sealed bids, or competitive proposals.⁷²² Whether or not a form of competitive procurement is feasible includes an analysis of the facts and circumstances of a particular incident intertwined with the analysis of the second condition. The subrecipient must, as with all other significant items in the history, document the basis and justification for procurement by noncompetitive proposals.⁷²³

The second condition is that one of the following four circumstances applies.

i) The Item Is Only Available from a Single Source

A subrecipient may use the procurement through noncompetitive proposal method when it requires services or supplies that are available from only one responsible source, and no other supplies or services will satisfy its requirements.⁷²⁴ When a subrecipient issues a change order to a contract that is beyond the scope of the contract, it has made a sole source award that must meet these requirements.

ii) The Public Exigency or Emergency

A subrecipient may use the procurement through the noncompetitive proposal method when the public exigency or emergency for the requirement will not permit delay resulting from competitive solicitation.⁷²⁵ The following provides several key considerations in

⁷²⁰ 44 C.F.R. § 13.36(f)(1) (2014); 2 C.F.R. § 200.320(f)(1).

⁷²¹ 44 C.F.R. § 13.36(f)(2) (2014); 2 C.F.R. § 200.320(f)(2).

⁷²² 44 C.F.R. § 13.36(d)(4)(i) (2014); 2 C.F.R. § 200.320(f)(4).

⁷²³ See, e.g., DHS OIG Report No. DS-11-12, *FEMA PA Grant Awarded to City of Paso Robles, California*, p. 3 (Sep. 13, 2011), https://www.oig.dhs.gov/assets/audit/OIG_DS-11-12_Sep11.pdf.

⁷²⁴ 44 C.F.R. § 13.36(d)(4)(i)(A) (2014); 2 C.F.R. § 200.320(f)(1).

⁷²⁵ 44 C.F.R. § 13.36(d)(4)(i)(B) (2014); 2 C.F.R. § 200.320(f)(2).

reviewing a subrecipient's procurement to determine whether it meets the "emergency" or "exigency" circumstance.⁷²⁶

Exigency vs. Emergency. The term "exigency" is not necessarily the same as the term "emergency," although the terms are often used interchangeably. An "exigency" is generally defined as something that is necessary in a particular situation that requires or demands immediate aid or action.⁷²⁷ By comparison, the term "emergency" means an unexpected and usually dangerous situation that calls for immediate action.⁷²⁸ One of the key distinctions between the terms, accordingly, is that an emergency will typically involve a threat to the public, private property, or some other dangerous situation, whereas an exigency is not necessarily limited.

Note that the duration of "infeasibility" is not necessarily the same as the period of emergency or exigency. While it may be infeasible in the short term to pursue a competitive procurement process in light of an emergency or exigency that does not permit delay, it may be possible for the subrecipient to proceed with a competitive procurement to transition the work into a contract that meets the full and open competition requirements of 44 C.F.R. § 13.36 and 2 C.F.R. § 200.318-326.

"Emergency" and "Emergency Work" Are Distinguishable. The term "emergency" for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B) and 2 C.F.R. § 320(f)⁷²⁹ is separate and distinct from "emergency work" as that term is used in the PA context. "Emergency work" in the PA context means either PA Category A (debris removal) or B (emergency protective measures). However, just because the subrecipient is performing "emergency work" does not relieve the subrecipient from the requirements of full and open competition, as not all emergency work is time sensitive to the extent that full and open competition is not possible

Long-term debris removal lasting weeks or months generally requires competitive bidding to conform to the requirements of 44 C.F.R. § 13.36

⁷²⁶ *Id.*

⁷²⁷ "Exigent," as defined by Merriam-Webster at <http://www.merriam-webster.com/dictionary/exigent>.

⁷²⁸ "Emergency," as defined by Merriam-Webster at <http://www.merriam-webster.com/dictionary/emergency>.

⁷²⁹ 44 C.F.R. § 13.36(d)(4)(i)(B). 2 C.F.R. § 200.320(f)(2)

(2014) and 2 C.F.R Part 200.320.⁷³⁰ An applicant may use a noncompetitive contract for short-term debris removal but should competitively bid the contract as soon as possible.⁷³¹

iii) Awarding Agency Authorizes Noncompetitive Proposals

A subrecipient may use the procurement through the noncompetitive proposal method when the “awarding agency” authorizes noncompetitive proposals.⁷³²

FEMA regulations define an “awarding agency” to mean “(1) with respect to a grant, the federal agency,⁷³³ and (2) with respect to a subgrant, the party that awarded the subgrant.”⁷³⁴ As applied to a non-state PA subgrantee, therefore, the “awarding agency” is the state.

iv) Competition Is Deemed Inadequate after the Solicitation of a Number of Sources

A subrecipient may use the procurement through noncompetitive proposal method when, after the solicitation of a number of sources, the subrecipient determines competition to be inadequate.⁷³⁵ This situation will arise when the subrecipient has solicited a number of sources but only a single source has submitted a bid or proposal.

In such a circumstance, the subrecipient should review the specifications in the solicitation for undue restrictiveness and determine whether changes can be made to encourage greater competition. In addition, the subrecipient might also survey potential sources that did not submit a bid or proposal.

⁷³⁰ *Id.* See also the following superseded FEMA Fact Sheets. 9580.4, *Emergency Work Contracting* (Oct. 23, 2008) and 9580.212, *Public Assistance Contracting Fact Sheet amnd FAQs*, (September 28, 2012) available at <https://www.fema.gov/public-assistance-archived-policies>.

⁷³¹ *Id.*

⁷³² 44 C.F.R. § 13.36(d)(4)(i)(C) (2014); 2 C.F.R. § 200.320(f)(3).

⁷³³ 2 C.F.R. § 200.37 (definition of “federal awarding agency”).

⁷³⁴ 44 C.F.R. § 13.3 (2014); 2 C.F.R. § 200.320(f)(4).

⁷³⁵ 44 C.F.R. § 13.36(d)(4)(i)(D) (2014); 2 C.F.R. § 200.320(f)(4).

4. Contracting with Small, Minority-Owned, Women's Business Enterprises, and Labor Surplus Area Firms

FEMA regulations require that a subrecipient must take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.⁷³⁶ Notably, this is not an authority to provide set-asides but rather a requirement aimed at ensuring maximum participation of these types of firms.

A subrecipient must, at a minimum, take the following six "affirmative steps" to assure that minority firms, women's business enterprises, and labor area surplus firms are used when possible.⁷³⁷ These include:⁷³⁸

(1) ***Solicitation Listing.*** The subrecipient must place qualified small and minority businesses and women's business enterprises on solicitation lists.⁷³⁹

(2) ***Soliciting.*** The subrecipient must assure that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources.⁷⁴⁰

(3) ***Breaking Up Requirements.*** The subrecipient must divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises.⁷⁴¹

(4) ***Accommodating Delivery Schedules.*** The subrecipient must establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises.⁷⁴²

⁷³⁶ 44 C.F.R. § 13.36(e)(2) (2014); 2 C.F.R. § 200.321(a).

⁷³³ 44 C.F.R. § 13.36(e)(2) (2014); 2 C.F.R. § 200.321(b).

⁷³⁸ *Id.*

⁷³⁹ 44 C.F.R. § 13.36(e)(2)(i) (2014); 2 C.F.R. § 200.321(1).

⁷⁴⁰ 44 C.F.R. § 13.36(e)(2)(ii) (2014); 2 C.F.R. § 200.321(2).

⁷⁴¹ 44 C.F.R. § 13.36(e)(2)(iii) (2014); 2 C.F.R. § 200.321(3).

⁷⁴² 44 C.F.R. § 13.36(e)(2)(iv) (2014); 2 C.F.R. § 200.321(4).

(5) ***Using Federal Agencies.*** The subrecipient should use, as appropriate, the services and assistance of the SBA and the Minority Business Development Agency of the Department of Commerce.⁷⁴³

(6) ***Affirmative Steps for Contractors.*** The subrecipient must require the prime contractor, if subcontracts are to be let, to take the five affirmative steps described.⁷⁴⁴

a. General Requirement

The regulations at 44 C.F.R. § 13.36(f)(1) (2014) and 2 C.F.R. § 200.323(a) state that a subrecipient must perform a cost or price analysis in connection with every federally assisted procurement action, including contract modifications. The method and degree of analysis depends on the facts surrounding the particular procurement situation.

b. Cost Analysis

FEMA requires a subrecipient to perform a cost analysis when the offeror is required to submit the elements of his estimated cost, such as under professional, consulting, and architectural engineering services contracts.⁷⁴⁵ A subrecipient is also required to perform a cost analysis for sole source procurements when adequate price competition is lacking, including for contract modifications or change orders.⁷⁴⁶

However, a subrecipient need not complete a cost analysis if it can establish price reasonableness based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.⁷⁴⁷

⁷⁴³ 44 C.F.R. § 13.36(e)(2)(v) (2014); 2 C.F.R. § 200.321(5).

⁷⁴⁴ 44 C.F.R. § 13.36(e)(2)(vi) (2014); 2 C.F.R. § 200.321(6).

⁷⁴⁵ 44 C.F.R. § 13.36(f)(1), 2 C.F.R. § 200.323(a).

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.*

c. Price Analysis

When a cost analysis is not necessary, the subrecipient must perform a price analysis in all other instances to determine the reasonableness of the proposed contract price.⁷⁴⁸ Price analysis is where offeror's prices are compared to each other and/or compared to established market or catalogue prices. Using this technique, a subrecipient compares the actual prices offered by various offerors to determine the reasonableness of the proposed price.

Under the old rules at 44 C.F.R. § 13.36(f)(3), Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles.⁷⁴⁹ Under the new rules at 2 C.F.R. Part 200, Costs or prices based on estimated costs for contracts under a federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under 2 C.F.R. Part 200, Subpart E—Cost Principles. The non-Federal entity may reference its own cost principles that comply with the federal cost principles.⁷⁵⁰

FEMA prohibits subrecipients from using a percentage of cost and percentage of construction costs method of contracting.⁷⁵¹ A cost plus percentage of cost contract is a cost reimbursement contract containing some element that obligates the subrecipient to pay the contractor an amount (in the form of either profit or cost), undetermined at the time the contract is made and to be incurred in the future, based on a percentage of future costs.⁷⁵²

⁷⁴⁸ *Id.*

⁷⁴⁹ 44 C.F.R. § 13.36(f)(3) (2014).

⁷⁵⁰ 2 C.F.R. § 200.323(c).

⁷⁵¹ 44 C.F.R. § 13.36(f)(4) (2014); 2 C.F.R. § 200.323(d). A cost-plus-percentage-of-cost system of contracting is prohibited under federal acquisition by 10 U.S.C. § 2306(a) and 41 U.S.C. § 3905(a). *Compare* 48 C.F.R. § 16.102(c).

⁷⁵² *See Muschany v. United States*, 324 U.S. 49, 61-62 (1944).

5. Pre-award Review of Subrecipient Procurements

a. Review of Technical Specifications on Proposed Procurements

A subrecipient must make available, upon request of the awarding agency or pass-through entity, technical specifications on proposed procurements when the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase.⁷⁵³ *See Section I of this Part above* for definitions of “awarding agency” and “pass-through entity”

b. Review of Other Procurement Documents

Subrecipients must, on request, make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc.⁷⁵⁴

6. Contractor Bonding Requirements

FEMA sets forth various bonding requirements for a subrecipient’s contractor for construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold (\$150,000).⁷⁵⁵ As a preliminary matter, the awarding agency or pass-through entity⁷⁵⁶ may accept the bonding policy and requirements of a subrecipient provided the awarding agency has made a determination that the awarding agency’s interest is adequately protected. If the awarding agency has not made such a determination, then the subrecipient shall follow the following minimum requirements for a bid guarantee, performance bond, and payment bond.⁷⁵⁷

⁷⁵³ 44 C.F.R. § 13.36(g)(1) (2014); 2 C.F.R. § 200.324(a).

⁷⁵⁴ 44 C.F.R. § 13.36(g)(2) (2014); 2 C.F.R. § 200.333.

⁷⁵⁵ 44 C.F.R. § 13.36(h) (2014); 2 C.F.R. § 200.325.

⁷⁵⁶ The “awarding agency” for a local government is a state. The same is true for a tribal government when the state is serving as the grantee—however, when the tribal government is serving as grantee, then it is the awarding agency for all subgrantees and FEMA is the awarding agency for the tribal government. 2 CFR Part 200.”

⁷⁵⁷ 44 C.F.R. § 13.36(h) (2014); 2 C.F.R. § 200.325.

a. Bid Guarantee

Each bidder must provide a bid guarantee equivalent to 5% of the bid price.⁷⁵⁸ The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.⁷⁵⁹

b. Performance and Payment Bonds

The contractor must provide both a performance bond and a payment bond, each for 100% of the contract price.⁷⁶⁰ A bond means a written instrument executed by a contractor (the “principal”) and a second party (“the surety” or “sureties”) to assure fulfillment of the principal’s obligations to a third party (the “obligee” which, in this case, is the subrecipient) identified in the bond. If the principal’s obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee.⁷⁶¹

A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

⁷⁵⁸ 44 C.F.R. § 13.36(h)(1) (2014); 2 C.F.R. § 200.325(a).

⁷⁵⁹ *Id.*, compare 48 C.F.R. § 28.001: “Bid guarantee means a form of security assuring that the bidder (1) will not withdraw a bid within the period specified for acceptance and (2) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.”

⁷⁶⁰ 44 C.F.R. § 13.36(h)(2) (2014); (3), 2 C.F.R. § 200.325(b).

⁷⁶¹ See 48 C.F.R. § 28.001. The term “bond” is not defined in 44 C.F.R. Part 13 (2014).

7. Contract Provisions

A subrecipient's contracts must contain the provisions set forth in 44 C.F.R. § 13.36(i) and 2 C.F.R. Part 200, Appendix II, *Contract Provisions for non-Federal Entity Contracts under Federal Awards*.⁷⁶²

Required contract provisions include provisions related to:

- Contractual Remedies
- Termination for Cause and Convenience
- Compliance with Executive Order 11,246
- Compliance with Copeland Anti-Kickback Act
- Compliance with the Davis-Bacon Act
- Compliance with the Contract Work Hours and Safety Standards Act
- Notice of Awarding Agency Requirements and Regulations Pertaining to Reporting
- Notice of Awarding Agency Requirements and Regulations Pertaining to Patent Rights, Copyrights, and Rights in Data
- Access to Records
- Retention of Records
- Compliance with the Clean Air Act and Clean Water Act
- Energy Efficiency

⁷⁶² 44 C.F.R. § 13.36(i) (2014); 2 C.F.R. § 200.326, 2 C.F.R. Part 200, Appendix II, *Contract Provisions for non-Federal Entity Contracts under Federal Awards* .

8. Suspension and Debarment

The policy of the federal government is to do business with, or award assistance to, persons that are “presently responsible.”⁷⁶³ To further this policy, the federal government may exclude, disqualify, or declare ineligible non-federal persons (including organizations and specific individuals) from federal assistance agreements and procurement contracts. Exclusion can be based on a person’s poor integrity, poor financial capability, violations of law and regulations, or poor performance.

In general, an “excluded” party cannot receive a federal grant award or a contract within the meaning of a “covered transaction,” to include subawards and subcontracts. This includes parties that receive federal funding indirectly, such as contractors to recipients and subrecipients.⁷⁶⁴

The key to the exclusion is whether there is a “covered transaction,” which is any non-procurement transaction (unless excepted) ⁷⁶⁵ at either a “primary” or “secondary” tier. Although “covered transactions” do not include contracts awarded by the federal government for the purposes of the non-procurement common rule and DHS’s implementing regulations, they do include some contracts awarded by recipients and subrecipients.⁷⁶⁶

The two forms of exclusion are suspension and debarment. Suspensions and debarments can be extended to include subsidiaries, parent companies, and other individuals.⁷⁶⁷

⁷⁶³ See 2 C.F.R. §§ 180.800(a)(4), (d), and 200.205.

⁷⁶⁴ 44 C.F.R. § 13.35(2014); 2 C.F.R. § 200.213.

⁷⁶⁵ 2 C.F.R. § 3000.137: “Within the Department of Homeland Security, the Secretary of Homeland Security has delegated the authority to grant an exception to let an excluded person participate in a covered transaction to the Head of the Contracting Activity for each DHS component as provided in the OMB guidance at 2 C.F.R. 180.135.”)

⁷⁶⁶ See 2 C.F.R. § 180.220.

⁷⁶⁷ 2 C.F.R. § 180.220; 2 C.F.R. § 3000.220.

a. Suspension

Suspension is an action taken by a suspending official that excludes a person from participating in a covered transaction for a temporary period pending completion of an investigation or of a legal, debarment, or other proceeding.⁷⁶⁸

Suspension, for a set period of time determined on a case-by-case basis, may be based on indictments, information, or adequate evidence involving environmental crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements.⁷⁶⁹ They are temporary actions that may last up to 18 months and are effective immediately.⁷⁷⁰

b. Debarment

Debarment, however, is an action taken by a debarring official to exclude a person from participating in a covered transaction for a specified period.⁷⁷¹ Debarment may be based on convictions, civil judgments, or fact-based cases involving crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements, as well as other causes.⁷⁷²

Statutory debarments occur by operation of law following criminal convictions under certain laws, i.e., the Clean Water Act⁷⁷³ and Clean Air Act.⁷⁷⁴ These last until the debarring official certifies that the condition giving rise to the conviction has been corrected.

⁷⁶⁸ 2 C.F.R. § 180.625.

⁷⁶⁹ 2 C.F.R. § 180.1015.

⁷⁷⁰ 2 C.F.R. §§ 180.700 and 180.800.

⁷⁷¹ 2 C.F.R. § 180.760.

⁷⁷² 2 C.F.R. § 180.925.

⁷⁷³ P.L. 92-500 (1972), codified as amended at 33 U.S.C. §§ 1251-1387.

⁷⁷⁴ P.L. 90-148 (1967), codified as amended at 42 U.S.C. §§ 7401-7671q.

E. Procurement by Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations⁷⁷⁵

Non-profit organizations, Institutions of Higher Education (as defined at 20 U.S.C. § 1001), and hospitals that were previously subject to the procurement standards set forth at 2 C.F.R. Part 215 are now subject to the procurement standards set forth at 2 C.F.R. §§ 200.318-200.326. These requirements differ from previous requirements, and the impacted non-federal entity should familiarize itself with these new standards for all grants under emergency or major disaster declarations issued on or after December 26, 2014.

For the procurement standards in §§ 200.317-200.326, non-federal entities may continue to comply with the procurement standards in previous OMB guidance (superseded by 2 C.F.R. Part 200) for three additional fiscal years after 2 C.F.R. Part 200 went into effect on December 26, 2014.

If a non-federal entity chooses to use the previous procurement standards for an additional fiscal year before adopting the procurement standards in this part, the non-federal entity must document this decision. For example, the third full fiscal year for a non-federal entity with a fiscal year ending June 30 fiscal year end would be June 30, 2018. For future fiscal years, all non-federal entities will be required to comply fully with 2 C.F.R. Part 200.

VII. Stafford Act § 705, Statute of Limitations on Deobligation of Funds after Closeout

Section 705 of the Stafford Act⁷⁷⁶ consists of three provisions governing the circumstances for FEMA's recovery of payments, except in cases of fraud, made to a state, tribal, or local government⁷⁷⁷ for

⁷⁷⁵ See PFLD Field Manual and checklists for a detailed discussion of this topic.

⁷⁷⁶ Stafford Act § 705, 42 U.S.C. § 5205. See also FEMA Recovery Policy, Stafford Act Section 705, *Disaster Grant Closeout Procedures* (March 31, 2016), FP 205-081-2 (not superseded by the PAPPG), <https://www.fema.gov/media-library/assets/documents/115804>.

⁷⁷⁷ PNP organizations are not covered by this section.

PA; FMAGs, HMGP assistance; and IA to governmental entities, but not to individuals.

Section 705(a) imposes a three-year statute of limitations in which FEMA must initiate administrative action to recover payments from a state, tribal, or local recipient or subrecipient. This limitation period begins to run upon the state or tribal government's submission of the expenditure report representing the relevant state, tribal, or local government's final expenditures for that declared disaster or emergency.⁷⁷⁸

Section 705(b) creates a presumption of records retention by the state, tribal, or local government for time and materials arising after that three-year statute of limitations period.⁷⁷⁹

Section 705(c) sets forth circumstances when a state, tribal, or local government is not liable to repay the funds FEMA otherwise seeks to recover. Those circumstances are when: "1) the payment was authorized by an approved agreement specifying the costs; 2) the costs were reasonable; and 3) the purpose of the grant was accomplished."⁷⁸⁰

⁷⁷⁸ *Id.* § 705(a), 42 U.S.C. § 5205(a).

⁷⁷⁹ *Id.* § 705(b), 42 U.S.C. § 5205(b).

⁷⁸⁰ *Id.* § 705(c), 42 U.S.C. § 5205(c).

Case Example

S. Fla. Water Mgmt. Dist. v. Fed. Emergency Mgmt. Agency, 2014 U.S. Dist. LEXIS 133153 (S.D. Fla. 2014)

A series of hurricanes crossed south Florida in 2005 and 2006, causing significant damage to levees maintained by the South Florida Water Management District (SFWMD) throughout south Florida. Both the USACE and the NRCS of the U.S. Department of Agriculture had programs in place to fund repair of damage to qualifying flood control works, including those at issue. For different reasons, both agencies declined to fund (most of) the levee repairs.

For two years, FEMA funded levee repair work not covered by the USACE or NRCS, despite the fact that the projects were inconsistent with FEMA policy.⁷⁸¹ That policy declares that flood control works eligible for NRCS or USACE funding are ineligible for FEMA assistance for permanent repairs (regardless of whether they are actually funded by NRCS or USACE).

After an OIG audit revealed that about \$21 million was obligated contrary to established FEMA policy, the funds were deobligated. SFWMD sought judicial review of FEMA's decision to deobligate through the Administrative Procedures Act.

Upon its review of the administrative record and the arguments of the parties, the court held that Section 705 (c) of the Stafford Act barred FEMA's deobligation of funds provided to the SFWMD for the reconstruction of levees because 1) the repairs were approved by an authorized agreement, 2) the work was completed, and 3) the costs were reasonable.

In so holding, the court found that where the criteria under 705(c) are met, FEMA's failure to comply with its own policy was irrelevant. The court also found that the Stafford Act's discretionary function exception⁷⁸² was inapplicable because FEMA lacked the discretion to recover funds once the 705(c) criteria were met.

⁷⁸¹ See RP 9524.3, *Levees*.

⁷⁸² Stafford Act § 305, 22 U.S.C. § 5148.

Part Three: Public Assistance Appeals and Dispute Resolution

I. Introduction

Frequently, disputes will arise between PA applicants, grantees, and FEMA regarding determinations made by FEMA on topics such as applicant, work, and project eligibility; scope of work; reasonableness and allowability of costs; and duplication of benefits with insurance proceeds or assistance from other federal agencies.⁷⁸³ Applicants have a number of options at their disposal for adjudicating Public Assistance disputes, including facilitated discussions using FEMA's Office of Alternative Dispute Resolution, administrative appeals to FEMA,⁷⁸⁴ arbitration before the Civilian Board of Contract Appeals (CBCA) for large (\$500,000+) projects under Hurricanes Katrina or Rita,⁷⁸⁵ and litigation before federal courts. This part discusses each of these potential avenues.

II. Public Assistance and Facilitated Discussions

FEMA promotes facilitated discussions between PA program staff and applicants to resolve eligibility issues. As set forth in the Public Assistance Appeals Program Manual,⁷⁸⁶ a facilitated discussion is

⁷⁸³ Recipients and subrecipients have the right to appeal adverse PA determinations. In most cases, the appellant in PA appeals is the subrecipient. For clarity in Part 3, we will use "applicant" as a general term for appellant with the understanding that appellants can be either a recipient or a subrecipient.

⁷⁸⁴ Stafford Act § 423, 42 U.S.C. § 5189a; 44 C.F.R. § 206.206.

⁷⁸⁵ American Recovery and Reinvestment Act of 2009 [hereinafter ARRA], Pub. L. No. 111-5, § 601, (2009); 44 C.F.R. § 206.209. SRIA (2013) authorized a Dispute Resolution Pilot Program [hereinafter DRPP] that had a sunset date of December 31, 2015, for arbitration requests to be filed. SRIA § 1105; *See* 44 C.F.R. § 206.210 for the implementing regulations for this pilot program. No arbitration requests were filed under this authority.

⁷⁸⁶ *See Recovery Directorate Manual, Public Assistance Program Appeal Procedures, Version 4 (Mar. 29, 2016) [hereinafter Appeals Manual]*. [hereinafter Appeal Manual], at

<https://intranet.fema.net/org/orr/recovery/pad/Pages/AppealsBranch.aspx?RootFolder=%2Forg%2Fforr%2Frecovery%2Fpad%2FDocuments%2FAppeals%20Manual%20Version%204&FolderCTID=0x0120008B9C5256BA5C6B43A3F8D0C7E846E6C1&View={E5F8030F-9D20-4E0C-A024-7E801CDEA2B9}> PAPP, pp. 146-147.

encouraged when interested parties might benefit from an opportunity to identify, clarify, and attempt to resolve outstanding eligibility issues before the agency makes an eligibility determination. Facilitated discussions are designed to enhance communication that might enable resolution of the dispute.

III. Appeals

The PA appeals process provides applicants the opportunity to challenge FEMA determinations regarding their eligibility for disaster assistance.⁷⁸⁷ FEMA provides two levels of administrative appeals to PA applicants who seek to challenge FEMA's determinations with regard to eligibility or funding. Applicants make their first appeal to the applicable FEMA RA and their second appeal to the Assistant Administrator for the Recovery Directorate at FEMA HQ in Washington, DC.⁷⁸⁸ This section discusses the appeals process, the administrative record FEMA considers in reviewing appeals, the standards of review FEMA applies in its review, and how FEMA catalogues and publicizes its appeals decisions.

A. First Appeals

The Stafford Act provides PA applicants a 60-day right to appeal any decision regarding eligibility for disaster assistance or the amount of assistance provided.⁷⁸⁹ FEMA's regulations afford a PA applicant the right to appeal any determination related to its application for assistance or the provision of assistance.⁷⁹⁰

⁷⁸⁷ 44 C.F.R. § 206.206.

⁷⁹⁸ *Id.*

⁷⁸⁹ See Stafford Act § 423((a), 42 U.S.C. § 5189a(a).

⁷⁹⁰ 44 C.F.R. § 206.206

Under this process, appellants are able to challenge the full range of bases upon which FEMA determines that assistance is not available, such as an applicant's lack of eligibility as a governmental entity or PNP organization;⁷⁹¹ insufficient documentation supporting claimed costs;⁷⁹² the existence of a duplication of benefits;⁷⁹³ a lack of legal responsibility for a facility;⁷⁹⁴ the actions taken in response to a DHS OIG;⁷⁹⁵ the applicability of another federal agency's authority for a

⁷⁹¹ See, e.g., FEMA Second Appeal Analysis, *State Accident Insurance Fund*, FEMA-4055-DR-OR (Dec. 19, 2013), finding that applicant, a public corporation providing workers' compensation insurance and reinsurance for state, was not eligible for assistance because it was not a state or local government or an "instrumentality of a local government"; FEMA Second Appeal Analysis, *Mount Nebo Bible Baptist Church*, FEMA-1603-DR-LA (Mar. 13, 2014), finding that applicant, a private nonprofit faith-based organization, was not eligible for assistance because it failed to provide documentation demonstrating that its facility was primarily used for eligible PNP services; FEMA Second Appeal Analysis, *Duxbury Beach Reservation, Inc.*, FEMA-4110-DR-MA (May 15, 2017), finding a PNP was not an eligible applicant because it did not own and operate an eligible facility.

⁷⁹² FEMA Second Appeal Analysis, *Loxahatchee Groves Water Control District*, FEMA-4084-DR-FL (July 8, 2016) denying costs because the Applicant had not provided adequate documentation to sufficiently distinguish between road repairs, which may be eligible for PA funding, and canal bank repairs, which were eligible for funding from another Federal agency. and FEMA Second Appeal Analysis, *FL Dept. of Transportation*, FEMA-4068-DR-FL (Aug. 5, 2016) finding that the burden to fully substantiate appeals with "documented justification" falls exclusively with the Applicant and hinges upon the Applicant's ability to produce not only its own records but to clearly explain how those records should be interpreted.

⁷⁹³ FEMA Second Appeal Analysis, *City of Orlando*, FEMA-1539/1561-DR-FL, (Mar. 22, 2017) finding that a portion of the claimed costs, if awarded, would constitute a duplication of benefits pursuant to Stafford Act § 312. and FEMA Second Appeal Analysis, *Roman Catholic Diocese of Brooklyn*, FEMA-4020-DR-NY (Mar. 31, 2015) finding that Stafford Act § 312 prohibits financial assistance from "any other source" as it would be a duplication of benefits.

⁷⁹⁴ FEMA Second Appeal Analysis, *Kansas Dept. of Wildlife, Parks and Tourism*, FEMA-4010-DR-KS (July 23, 2015) finding that the Applicant was legally responsible for the damaged facilities per a lease agreement.

⁷⁹⁵ FEMA Second Appeal Analysis, *City of Ft. Lauderdale*, FEMA-1609-DR-FL (Nov. 25, 2015) fully awarding costs previously deobligated as the result of an OIG audit; FEMA Second Appeal Analysis, *City of Vero Beach*, FEMA-1545/1561-DR-FL (Nov. 21, 2016) finding that the Applicant had partially substantiated costs deobligated as the result of an OIG audit were eligible under the PA program.

project;⁷⁹⁶ or a failure to adhere to applicable procurement standards.⁷⁹⁷

Applicants must file first appeals within 60 days of receiving “notice of the action being appealed” (i.e., an eligibility determination).⁷⁹⁸ The appeal must be in writing and contain documented justification supporting the applicant’s position and specifying the amount in dispute, as well as the provisions in federal law, regulation, or policy with which the appellant believes the determination was inconsistent.⁷⁹⁹

The applicant submits the appeal to the applicable recipient, who then has 60 days to review and evaluate the appeal, draft a written recommendation, and forward the appeal and recommendation to the applicable RA.⁸⁰⁰ The RA has 90 days following receipt of a first

⁷⁹⁶ FEMA Second Appeal Analysis, *LA Office of Coastal Protection and Restoration*, FEMA-4080-DR-LA (Dec. 23, 2016) denying costs because they fell under the USACE’s more specific authority found in the Coastal Wetlands Planning, Protection and Restoration Act of 1990; FEMA Second Appeal Analysis, *Town of Fairfield*, FEMA-4087-DR-CT (Mar. 29, 2017) finding that debris removal work performed on a channel was ineligible for PA funding because the channel was a federally maintained navigable channel and the work fell under the specific authority of the USACE and FEMA Second Appeal Analysis, *City of Clarksville*, FEMA-1909-DR-TN (Dec 18, 2015) finding that the Applicant did not forfeit eligibility for Stafford Act assistance by entering into a lease agreement with the USACE, and the lease agreement established that the Applicant was legally responsible for work necessitated by natural flooding.

⁷⁹⁷ FEMA Second Appeal Analysis, *City of Nome*, FEMA-4050-DR-AK (Sep. 28, 2016) denying the second appeal because the Applicant failed to comply with Federal procurement requirements under 44 C.F.R. § 13.36.

⁷⁹⁸ *Id.* § 206.206(d); See also FEMA Second Appeal Analysis, *Plaquemines Parish*, FEMA-1603-DR-LA (Dec. 28, 2016) finding that notice may come from FEMA or the Grantee, and that the regulatory timeframe begins when the Applicant receives notice. FEMA Second Appeal Analysis, *Los Angeles County*, FEMA-DR-CA (June 9, 2014) determining that a letter of intent to appeal does not meet the requirements of an appeal pursuant to 44 C.F.R. § 206.206.

⁷⁹⁹ *Id.* § 206.206(a).

⁸⁰⁰ *Id.* §§ 206.206(a) and 206.206(c)(2). The regulations recognize that grantees may submit grantee-related appeals. See *id.* § 206.206(a). In such cases, grantees submit appeals directly to the appropriate RA.

appeal to notify the applicant in writing of the decision or of the need for additional information.⁸⁰¹ If the RA issues a request for information, the request must include a date by which the requested information must be provided.⁸⁰²

Within 90 days following receipt of the requested information or expiration of the period for providing the information, the RA issues a written first appeal decision.⁸⁰³ In appeals involving highly technical issues, the agency may, in its discretion, submit the appeal to an independent scientific or technical subject matter expert for advice or recommendation.⁸⁰⁴ The period for this technical review may be in addition to other allotted time periods. Once FEMA receives a report from the technical expert, the RA has 90 days to issue the written first appeal decision.⁸⁰⁵

B. Second Appeals

If an applicant disagrees with the RA's first appeal decision, it can file a second appeal, which is decided by the Assistant Administrator for the Recovery Directorate (Assistant Administrator) at FEMA HQ.⁸⁰⁶

⁸⁰¹ See 44 C.F.R. § 206.206(c)(3).

⁸⁰² See *id.*

⁸⁰³ See *id.*

⁸⁰⁴ *Id.* § 206.206(d).

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.* § 206.206(b). The position of “Assistant Administrator for the Disaster Assistance Directorate” referred to in the regulation no longer exists; the appropriate replacement is the position of Assistant Administrator for the Recovery Directorate. For both first and second appeals, the RA/AAR have the ability to delegate authority in writing.

The timelines and process for submitting second appeals are identical to those for first appeals. The applicant must file the appeal, in writing, within 60 days of receiving notice of the first appeal decision,⁸⁰⁷ and the appeal must contain documented justification, specify the amount in dispute, and identify allegedly misapplied provisions of federal law, regulation, or policy.⁸⁰⁸

The applicant submits the appeal to the applicable recipient, which again has 60 days to review and evaluate it, draft a written recommendation, and forward the materials to the applicable RA.⁸⁰⁹ The RA forwards the second appeal materials to FEMA HQ.

The Assistant Administrator has 90 days following the agency's receipt of the appeal (by the RA) to issue a written decision to the applicant or issue a request for information (RFI).⁸¹⁰ Within 90 days following receipt of any requested information or expiration of the period for providing the information, the Assistant Administrator issues the second appeal decision.⁸¹¹ As with first appeals, when highly technical issues are involved, the agency may also obtain advice or recommendation from an independent scientific or technical subject

⁸⁰⁷ See 44 C.F.R. § 206.206(c)(1).

⁸⁰⁸ *Id.* § 206.206(a).

⁸⁰⁹ *Id.* §§ 206.206(a) and 206.206(c)(2). The regulations recognize that grantees themselves may submit grantee-related appeals. See *id.* § 206.206(a). In such cases, grantees submit appeals directly to the appropriate RA.

⁸¹⁰ See 44 C.F.R. § 206.206(c)(3). In all cases (both first appeals and second appeals), FEMA has interpreted “receipt” to mean receipt by the agency. Thus, the 90-day time period to respond to a second appeal begins when the RA receives the second appeal—not when the Assistant Administrator at FEMA HQ receives the second appeal.

⁸¹¹ See *Id.*

matter expert, with a decision due 90 days after receipt of the expert's report.⁸¹²

In 2013, the FEMA Recovery Directorate, through the PA Appeals Branch (PAAB)⁸¹³—a joint PA Program/OCC branch charged with administering, refining, and improving the PA appeals system—issued an Appeals Directive⁸¹⁴ and Manual.⁸¹⁵ Those guidance documents introduced additional procedures into the PA appeal process that correlate with the first and second appeal statutory and regulatory framework; they are designed to advance the consistency and timeliness of appeal responses, align the PA appeals process with other PA dispute resolution processes, provide a policy feedback mechanism, and reduce the overall number of appeals.

One significant change established through these documents is the closure of the administrative record following a first appeal decision and preclusion of appellants from submitting new information on second appeal.⁸¹⁶ This change ensures that both the RA and Assistant Administrator for Recovery are considering the issue in dispute based on the same set of facts. As such, the second appeal is better positioned to focus primarily on questions of law and policy.” In recognition of that, the new procedures prescribe a mechanism by which appellants are provided pre-decisional insight into the basis for a likely partial or complete denial on first appeal as well as an additional, final opportunity to supplement the record before the record is closed and the first appeal decision is issued.

⁶¹² *Id.*

⁶¹³ **Note:** As of April 2018, Public Assistance Appeals was transferred to FEMA OCC's Disaster Litigation Branch.). check with OCC for details.

⁸¹⁴ See Appeal Directive Version 4 (Mar . 29,7, 2016) (“Appeal Directive”),

⁸¹⁵ See Appeals Manual; PAPPG, pp. 146-147.

⁸¹⁶ *Id.*

Through a mandated “final RFI” procedure, when the RA anticipates that he or she will deny or only partially approve the first appeal, the RA must issue, after review by Regional Counsel, an RFI explaining the basis for a likely adverse decision; requesting any additional information the appellant wants to offer; and providing a complete index of documents in the administrative record compiled to that point. Typically, the applicant then has 30 days to provide additional information.

C. Administrative Record

The administrative record is a key component of FEMA’s various dispute resolution processes. The Appeals Directive and Appeals Manual define the administrative record: “[a]ll documents and materials directly or indirectly considered by FEMA in making a Public Assistance eligibility determination and subsequent *first appeal* decision. This record may include, but is not limited to, Project Worksheets (all versions) and their corresponding *Public Assistance Determination Memoranda*, supporting backup documentation, correspondence, photographs, technical reports, and other relevant information.”⁸¹⁷

PAAB has provided applicants with a template an appendix detailing the types of documents the administrative record should include, such as all versions of relevant PWs with backup documentation; internal agency communications upon which the agency’s eligibility determination relied; information stored on FEMA’s disaster grant management systems related to the agency’s eligibility determination; photographs or drawings of damaged sites; and relevant email correspondence.⁸¹⁸

Under the new appeal procedures, the compilation of documents that comprise the administrative record begins during PW development by PA specialists in the field.⁸¹⁹ PA field staff are instructed to develop

⁸¹⁷ See Appeals Directive § VI(A); Appeals Manual § 1-5(A); PAPPG, pp. 146-147.

⁸¹⁸ See Appeals Directive § VI (A); See Public Assistance Program, Regional Standard Operating Procedures for Appeals, at Appendix E (March 29, 2016). PAPPG, pp. 146-147.

⁸¹⁹ See Appeals Directive § VII (B) (C); Appeals Manual § 2-2; PAPPG, pp. 146-147.

PWs in accordance with administrative record requirements to ensure that project information is robust and complete, which promotes effective project administration and, therefore, is beneficial regardless of whether a dispute arises that later necessitates the creation of a formal administrative record package. When a dispute leads to the submission of a first appeal, PA staff in the relevant region compile the administrative record, with guidance from Regional Counsel.⁸²⁰

The administrative record in the appeals context is similar to the administrative record in the litigation context. First, administrative records in both situations include documents that decision makers considered in coming to a certain determination. Including all documents gives the applicants in the appeals process and litigants in federal courts the breadth of the information considered in a dispute.

Second, the administrative records in both contexts should not include privileged information, such as correspondence between attorneys and clients and documents created during the work process (i.e., work product privileged or deliberative process documents), including document drafts. Third, the administrative record in both contexts should be organized and understandable to judges or decision makers that do not regularly encounter cases with this particular subject matter. Individuals who compile the administrative record should use plain language where possible and avoid the use of agency-specific acronyms.

The administrative records in the two contexts also have key differences. First, the administrative record in the appeals context does not have to be certified by an agency official where the same record in litigation context must be certified. Second, non-attorneys will usually be responsible for compiling the administrative record for an appeal

⁸²⁰ See *id.*, § 3-2. A robust administrative record is useful for all forms of dispute resolution (e.g., administrative appeals, arbitration, and litigation). A comprehensive administrative record—including such materials as notes from meetings and phone conferences, website addresses of sites relied upon in making a determination, and email messages of personnel involved in making a determination—can greatly bolster FEMA’s ability to defend its determination when challenged.

matter. An attorney must be assigned to compile the record in the litigation context.

Third, if documents are being withheld from the litigation administrative record for privilege reasons, the attorney compiling the record may have to create a privilege log noting all documents pulled for privilege reasons. This is not a requirement for the appeals administrative record.

As a general matter, the administrative record created during the appeals process will essentially become the administrative record for litigation. Any staff member who compiles the administrative record in the appeals context should organize the documents in such a way that individuals inside and outside of FEMA will be able to follow the agency's decision-making process.

D. Standards of Review and Finality of Decision

Neither the Stafford Act appeals provision nor FEMA's PA appeals implementing regulations set forth a standard of review on appeal, as to both first appeals and second appeals.⁸²¹ However, the Administrative Procedures Act (APA) allows for *de novo* agency review of appeals, thus the appeals standard of review is also *de novo* review.⁸²²

A second appeal decision constitutes FEMA's final administrative decision.⁸²³ No further administrative review is available to an applicant after a second appeal decision.

⁸²¹ In contrast, the regulations implementing the DRPP set forth specific standards of review in arbitration proceedings following first appeal decisions. *See* 44 C.F.R. § 206.210(n): "The panel will only set aside the agency determination if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In the case of a FEMA finding of material fact adverse to the applicant on the first appeal, the panel will only set aside or reverse such a finding if the finding was clearly erroneous."

⁸²² *See* 5 U.S.C. § 557(b), which states that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision"; *See also Vercillo v. Commodity Futures Trading Comm'n*, 147 F.3d 548, 553 (7th Cir. 1998), indicating that the language in § 557(b) allows agencies to apply *de novo* review in an appeals proceeding).

⁸²³ *See* 44 C.F.R. § 206.206(e)(3).

Applicants may seek to further challenge these final determinations in federal court. Applicants have, at times, pursued litigation while simultaneously pursuing an appeal.⁸²⁴

E. Cataloging and Publicizing Appeals

Second appeal decisions are publicly available on FEMA's internet site for review and download.⁸²⁵ The online database allows searching by category, key word, major disaster or emergency number, applicant name, and other parameters.

Second appeal decisions also are posted on the PAAB intranet site, organized by region of origin.⁸²⁶ The decisions posted to the PAAB intranet site include case digests, which are one-page synopses of second appeal decisions that provide a short description of the appeal and key issues involved; a listing of applicable citations; and headnotes summarizing key principles and conclusions drawn.

Case digests from significant appeals are included in the PAAB *Appellate Review* newsletter, a quarterly publication that provides updates on appeal procedural and substantive trends, process improvements, updates, and other information to regional personnel involved in PA appeal processing. Case digests and the newsletter are available on the PAAB intranet site, along with resources on appeals-related doctrine, templates, training materials, organizational information, and metrics and trends information.⁸²⁷

⁸²⁴ See, e.g., FEMA Second Appeal Analysis, *South Florida Water Management District*, FEMA-1539, 1545, 1561, 1609-DR-FL (Feb. 18, 2014), deciding second appeal, while applicant litigation in federal district court was pending, addressing assistance for repairs to canals and related flood control works, vacated, *South Florida Water Mgmt. Dist. v. Federal Emergency Mgmt. Agency*, 2014 U.S. Dist. LEXIS 133153 (So. D. Fla. Sept. 18, 2014); FEMA Second Appeal Analysis, *Henderson County*, FEMA-1771-DR-IL (Sept. 20, 2013), deciding second appeal, applicant litigation in federal district court was pending, addressing reasonable costs in light of deobligation based on OIG audit of emergency dewatering services procurement.

⁸²⁵ <http://www.fema.gov/appeals>.

⁸²⁶ <https://intranet.fema.net/org/orr/recovery/pad/Pages/AppealsBranch.aspx>

⁸²⁷ *Id.*

IV. Arbitration under 44 C.F.R § 206.209 (Hurricanes Katrina and Rita)

A. Introduction

On February 17, 2009, the President signed into law the American Recovery and Reinvestment Act of 2009 (ARRA); in it, Congress provides an arbitration provision whereby an arbitration panel, established under the FEMA PA program, would review awards or denials of public assistance applications to expedite recovery efforts from Hurricanes Katrina and Rita.⁸²⁸

On August 5, 2009, the DHS entered into a Memorandum of Agreement with the CBCA under which the CBCA provides “arbitration services for all disputes raised by state and local governments, or private non-profit organizations (as those terms are defined in the Stafford Act) that are eligible for arbitration pursuant to Section 601 of the American Recovery and Reinvestment Act and applicable FEMA regulations and policies.”⁸²⁹ On August 31, 2009, FEMA issued regulations implementing the arbitration provisions of the ARRA.⁸³⁰

B. The Civilian Board of Contract Appeals (CBCA)

The CBCA was established by section 847 of the NDAA for Fiscal Year 2006⁸³¹ to hear and decide contract disputes between government contractors and executive agencies under the provisions of the Contract Disputes Act of 1978, and regulations and rules issued under that statute.⁸³²

⁸²⁸ ARRA, Pub. L. No. 111-5, § 601, (2009).

⁸²⁹ See FEMA Memorandum of Agreement with the Civilian Board of Contract Appeals [hereinafter CBCA] (August 5, 2009).

⁸³⁰ 74 Fed. Reg. 44,761 (Aug. 31, 2009) (*codified at* 44 C.F.R. § 206.209).

⁸³¹ National Defense Authorization Act. Pub. L. 109-163 (2006); *codified at* 41 U.S.C. § 438.

⁸³² Contracts Disputes Act. Pub. L. 95-563 (1978); *codified as amended at* 41 U.S.C. § 7101-7109 (1978).

The formation of the CBCA consolidated into one organization the functions of eight boards of contract appeals—those of the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs, and the GSA.

The Board uses a variety of techniques to shorten and simplify, when appropriate, the formal proceedings normally used to resolve disputes. In the case of FEMA arbitrations, the panel has allowed disputes to be decided using full hearings and appellate style arguments without formal appearances by the parties and submissions of briefs only.

C. Arbitration Process

Any applicant who is eligible for federal PA funding for large projects, who disputes a FEMA project eligibility determination and/or amount of the project award, and who is eligible to avail themselves of the FEMA appeals process provided for in 44 C.F.R. § 206.206, may request resolution of the matter through arbitration if the requirements are satisfied.⁸³³

The arbitration panel, consisting of three CBCA judges, will review and decide only those disputes involving PA projects in excess of \$500,000 arising from Hurricanes Katrina and Rita in the Gulf Coast states of Alabama, Louisiana, Mississippi and Texas.⁸³⁴ The panel is chosen by the arbitration administrator and consists of a random selection of three judges, with one judge appointed chair for the duration of the matter.

The applicant may choose the arbitration process in lieu of filing or continuing an administrative appeal under 44 C.F.R. §206.206.⁸³⁵

⁸³³ 44 C.F.R. § 206.209.

⁸³⁴ While the value of the project in dispute must exceed the \$500,000 threshold, the amount in dispute may be much less. In CBCA 1771, *Forrest County Board of Supervisors*, a project worksheet was written to repair the Forrest County Courthouse for an estimated amount exceeding \$500,000, but actual repair costs on the project totaled only \$202,443. The CBCA determined that the estimated cost met the jurisdictional requirement of \$500,000, even though actual costs were well below the jurisdictional threshold.

⁸³⁵ 44 C.F.R. § 206.209 (d)(1).

Therefore, if an applicant requests arbitration, the applicant agrees to forgo seeking a formal appeal.⁸³⁶

Arbitration is not available for any matter that obtained final agency action by FEMA prior to February 17, 2009, or for determinations for which the applicant failed to file a timely appeal prior to August 31, 2009, or for determinations that received a decision on a second appeal from FEMA prior to February 17, 2009.⁸³⁷

When seeking arbitration, the applicant must, within 30 calendar days after receipt of notice of the final adverse determination by FEMA, file a simultaneous written request for arbitration with the CBCA, FEMA, and the state.⁸³⁸ The recipient (usually, a state or tribal government) may choose to file a recommendation in support of, or in opposition to, the applicant's request for arbitration. This recommendation must be filed within 15 calendar days of receipt of the request for arbitration and filed simultaneously with the CBCA, FEMA, and the applicant.⁸³⁹

FEMA is required to file its written response to the applicant's request for arbitration—simultaneously with the CBCA, the applicant, and the state—within 30 calendar days of receipt of the applicant filing of a request for arbitration.⁸⁴⁰ The parties must submit filings by electronic mail, courier, or overnight delivery service.⁸⁴¹

Within 10 business days of the panel's receipt of FEMA's response to the request for arbitration, a preliminary conference is held (usually by telephone) with the panel and all parties.⁸⁴² This conference may address such issues as the future conduct of the case, including clarification of the issues and claims, possible arbitrator disqualification, scheduling of hearings and the hearing location, additional motions or briefing, etc. If the applicant or FEMA would

⁸³⁶ *Id.*

⁸³⁷ 44 C.F.R. § 206.209 (d)(2).

⁸³⁸ 44 C.F.R. § 206.209(e)(2).

⁸³⁹ 44 C.F.R. § 206.209(e)(3).

⁸⁴⁰ 44 C.F.R. § 206.209(e)(4).

⁸⁴¹ 44 C.F.R. § 206.209(e)(5).

⁸⁴² 44 C.F.R. § 206.209 (g).

like to request a hearing, it must be requested no later than the preliminary conference.⁸⁴³

The panel will attempt to schedule the hearing within 60 calendar days of the preliminary conference, unless the panel postpones the hearing upon agreement of the parties or at the request of a party for good cause shown.⁸⁴⁴ If a hearing is postponed, the panel will set a new date within 10 business days of the postponement.⁸⁴⁵

The panel is required to review all relevant written submissions provided by the parties to the arbitration.⁸⁴⁶ The panel may request additional information or materials from any party or seek the advice or expertise of independent scientific or technical subject matter experts.⁸⁴⁷

Based on the complexity of issues related to a case, the panel's goal is to issue a written decision within 60 calendar days after a hearing is closed or—if no hearing was requested—within 60 calendar days following the receipt of FEMA's response to a request for arbitration.⁸⁴⁸ A decision of the majority of the panel will constitute a final decision, binding on all parties. Final decisions are not subject to further administrative review and not subject to judicial review, except as permitted by 9 U.S.C. 10.⁸⁴⁹

⁸⁴³ 44 C.F.R § 206.209 (h)(1).

⁸⁴⁴ 44 C.F.R § 206.209 (h)(5)

⁸⁴⁵ *Id.* at (h)(6).

⁸⁴⁶ *See* 44 C.F.R § 206.209 (i)(2).

⁸⁴⁷ *Id.*

⁸⁴⁸ *See* 44 C.F.R § 206.209 (k)(1).

⁸⁴⁹ 9 U.S.C. § 10 states that an arbitration award may be vacated (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. All requests to vacate arbitration awards under 9 U.S.C. § 10 must be filed by a party to the arbitration in the United States District Court where the award was made.

V. Disaster Litigation

A. Introduction

With respect to most litigation brought against FEMA related to its PA program, the courts have concluded it is not judicially reviewable. However, some PA activity does become the subject of litigation in federal courts. As with appeals and arbitration cases, disputes are litigated by applicants on matters related to eligibility determinations, such as scope of work, reasonableness, and/or allowability of costs.⁸⁵⁰

Occasionally, an adversely affected third party will challenge a decision to award public assistance, possibly for environmental reasons.⁸⁵¹ Recently, the most frequent subject of litigation in federal courts has been deobligation determinations.⁸⁵² This section will provide a brief outline of the scope of judicial review, as well as the major procedural aspects of PA litigation in federal courts.

B. Jurisdiction

Unlike arbitration cases, there is no minimum dollar amount of controversy required to file a civil action against the United States.⁸⁵³ However, the doctrine of “sovereign immunity” provides that the United States and its respective agencies are immune from liability from any claim, in the absence of a waiver of its immunity by Congress.⁸⁵⁴ The APA is an example of such a Congressional waiver of

⁸⁵⁰ See *Columbus Regional Hospital v. FEMA*, 708 F. 3d 893 (7th Cir. 2007).

⁸⁵¹ See *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461 (3d Cir. V.I. 1997); plaintiffs sought an injunction of a housing project under the Endangered Species Act because of possible adverse effects on endangered sea turtles.

⁸⁵² See *City of Chicago v. Fed. Emergency Mgmt. Agency*, 2013 U.S. Dist. LEXIS 41633 (N.D. Ill. Mar. 21, 2013); *Public Util. Dist. No. 1 v. Fed. Emergency Mgmt. Agency*, 371 F.3d 701, 707-08 (9th Cir. 2004); deobligation is a post-award adjustment to a grant occurring after it is determined by audit or otherwise that a grantee has received funds in excess of that which they are finally determined to be entitled.

⁸⁵³ 28 U.S.C. 1331.

⁸⁵⁴ *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); absent an express waiver of sovereign immunity, a district court lacks subject matter jurisdiction over claims against the United States.

immunity and is usually cited by plaintiffs as authority to prosecute litigation against the United States.

1. The Administrative Procedures Act (APA)

The APA represents a broad waiver of immunity. It states that, unless otherwise precluded by law, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁸⁵⁵ The term “person” is broadly defined to include an “individual, partnership, corporation, association, or public or private organization...”⁸⁵⁶

While the APA waiver is broad, it only allows a court to review agency activity that has become a “final agency action.” Further, as discussed here, the court’s review of agency action is also limited because of the deference owed to the agency’s reasonable construction of applicable statutes and regulations.⁸⁵⁷

2. Final Agency Action

Under the APA, agency action is presumed to be valid in the absence of a substantial showing to the contrary. A court will only set aside final agency action if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸⁵⁸

In determining whether the agency decision is arbitrary and capricious, a “reviewing court must determine whether the decision was based on the relevant factors and whether there has been a clear error in judgment.”⁸⁵⁹

The Supreme Court has stated that under the APA, while the court’s “inquiry into the facts is to be searching and careful, the ultimate standard

⁸⁵⁵ 5 U.S.C. § 702.

⁸⁵⁶ 5 U.S.C. § 551

⁸⁵⁷ See also *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

⁸⁵⁸ 5 U.S.C. § 701(a)(1), (2).

⁸⁵⁹ *Sierra Club v. Davies*, 955 F.2d 1188, 1192 (8th Cir. 1992).

of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”⁸⁶⁰

Importantly, as discussed in greater detail here, judicial review of agency decisions are to be based on the “full record that was before the agency at the time its decision was made.”⁸⁶¹ It is critical that all FEMA employees working in the PA program understand this rule and its consequences. Because there is typically no testimony or other opportunity to explain an agency decision after the fact, any consideration, explanation, or analysis made that was not reduced to writing will not be a part of the record and not be considered by a reviewing court.

3. Non-Liability of Federal Government, Stafford Act § 305

The APA does not allow review of agency action where “statutes preclude judicial review” or “agency action is committed to agency discretion by law.”⁸⁶² In turn, Section 305 of the Stafford Act provides that “[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a *discretionary function or duty* on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of [the Stafford] Act.”⁸⁶³

This provision serves to raise a statutory barrier to judicial review in certain circumstances. Courts considering this provision have observed that “inability should not be imposed on the federal government for discretionary acts or omissions of its agencies or employees in distributing benefits under such gratuitous programs.”⁸⁶⁴

⁸⁶⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (U.S. 1971).

⁸⁶¹ American Jurisprudence 3d, 6-52 Administrative Law § 52.03.

⁸⁶² 5 U.S.C. § 701(a)(1).

⁸⁶³ Stafford Act § 305, 42 U.S.C. §5148.

⁸⁶⁴ *Ornellas v. United States*, 2 Cl. Ct. 378, 379-80 (1983). See, e.g., *Columbus Regional Hospital v. FEMA*, 708 F. 3d 893 (7th Cir. 2007); *St. Tammany Parish v. FEMA*, 556 F.3d 307, 318 (5th Cir. 2009); *City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1015 (N.D. Cal. 2001); *Sunrise Village Mobile Home Park, L.C. v. United States*, 42 Fed. Cl. 392 (19905).

FEMA interprets the discretionary function exception broadly, suggesting that any activity undertaken to carry out the provisions of the Stafford Act will necessarily require the application of the discretionary function statute.

While the exact parameters of the Stafford Act's discretionary function exception remain undefined, the provision has limited or eliminated judicial reviewability for a significant majority of cases brought under the Stafford Act.⁸⁶⁵ Courts interpreting the Stafford Act's discretionary function exemption have used a two-pronged test to determine its applicability.⁸⁶⁶ That test, known as the "*Berkovitz* test, asks two questions. 1) Is the action a matter of judgment or choice (i.e., is it discretionary or mandatory)? 2) If so, does the challenged action involve some sort of social, economic, or political policy judgment?⁸⁶⁷

The decision whether to provide disaster-related assistance under the Stafford Act and the level to which it is provided is highly discretionary. FEMA employees implementing the PA program should make sure to apply evenly any applicable criteria set forth in regulation or policy to all similarly situated applicants.

Even though previous agency decisions to award or deny assistance do not bind FEMA to act a certain way in the future, "when an agency departs from what it has previously done, it must acknowledge the difference and explain its departure."⁸⁶⁸ The failure to act in this manner may result in a finding by a reviewing court that FEMA has acted in an "arbitrary and capricious" manner in violation of the APA.

Throughout the Stafford Act, provisions related to disaster assistance use permissive terms that either explicitly or implicitly leave discretion to FEMA, as delegated from the President. For example, the President "may"

⁸⁶⁵ See, e.g., *St. Tammany Parish v. FEMA*, 556 F.3d 307, 318 (5th Cir. 2009); *City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1015 (N.D. Cal. 2001).

⁸⁶⁶ *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

⁸⁶⁷ *Id.*

⁸⁶⁸ *Texas v. United States*, 866 F.2d 1546, 1557 (5th Cir. 1989); *Frozen Food Express, Inc. v. U.S.*, 535 F.2d 877, 880 (5th Cir. 1976), "law does not permit an agency to grant one person the right to do that which it denies to another similarly situated."

provide assistance under Sections 406 and 502 of the Act,⁸⁶⁹ and he or she is “authorized” to provide assistance under Section 407 of the Act.⁸⁷⁰

Courts considering claims brought under the APA frequently find that FEMA’s determinations regarding whether to provide disaster assistance, and to what level, are committed to agency discretion and therefore not judicially reviewable.⁸⁷¹ Despite this deferential standard, program staff should take care to make sure that any applicable criteria as set forth in regulation or policy is applied evenly to all similarly situated applicants.

C. Administrative Record

Most cases involving FEMA PA decisions are brought through the APA, which states that the court’s review of an agency decision to determine whether it is arbitrary and capricious shall be made by reviewing the “whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”⁸⁷²

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court clarified that the administrative record submitted to the court shall consist of “all documents and materials directly or indirectly considered by the agency decision-makers and includes evidence contrary to the agency’s position.”⁸⁷³ “A reviewing court should have before it nothing more than the materials that were before the agency when it made its decision, and should not substitute its opinion for that of the agency.”⁸⁷⁴

⁸⁶⁹ Stafford Act § 406, 502, 42 U.S.C. § 5172, 5192.

⁸⁷⁰ Stafford Act § 407, 42 U.S.C. 5173, “The President, whenever he determines to be in the public interest, is authorized . . . to make grants to any State or local government or owner or operator of a private non-profit facility for the purpose of removing debris or wreckage resulting from a major disaster...”

⁸⁷¹ *Sunrise Village Mobile Home Park, L.C. v. United States*, 42 Fed. Cl. 392 (Fed. Cl. 1998).

⁸⁷² *Id.*

⁸⁷³ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (U.S. 1971); *Thompson v. Dep’t of Labor*, 885 F.2d 551 (9th Cir. 1989).

⁸⁷⁴ *SEC v. Chenery Corp.*, 332 U.S. 194, 196, (1996).

1. Administrative Record Content

The administrative record must contain all non-privileged documents and materials directly or indirectly relied upon by the decision maker. For more recent cases, the administrative record started in the agency appeals process will serve as the foundation for the administrative record content in the litigation context.

There is no definitive guide as to what constitutes an administrative record. However, the Executive Office for United States Attorneys issued a bulletin that outlined guidance on preparing an administrative record to be utilized in litigation.⁸⁷⁵ The guidance sets forth general principles for the compilation of the administrative record, including the following.

Optimally, an agency will compile the administrative record as documents and generation or receipt of materials occurs during the agency decision making process. This is the process currently used for administrative record compilation in the appeals process. The record may be a contemporaneous record of the action. However, the agency may compile the administrative record after litigation has been initiated.

An agency employee should compile the administrative record. That individual will be responsible for certifying the administrative record to the court and should document where she or he searched for the documents and materials, and whom they consulted while compiling the administrative record.⁸⁷⁶

Compiling the administrative record in civil litigation is usually orchestrated by OCC. However, the arduous task of compiling a complete administrative record to be filed with the court requires cooperation from every element of FEMA. The appropriate program office should designate an individual who will have the access to all records and will be the primary point of contact for OCC.

⁸⁷⁵ Compiling the Administrative Record, United States Attorneys' Bulletin, 7 (Feb. 2000) , Published by the United States Department of Justice Executive Office for United States Attorneys, Volume 48 Number 1, at http://www.justice.gov/usao/eousa/foia_reading_room/usab4801.pdf.

⁸⁷⁶ *Id.*

In litigation involving challenges of FEMA PA determinations, the administrative record should be the same record used in second appeals to the Agency. *See* Part Three, Section III (C), *Appeals, Administrative Record*.

Compilation of the record is a critical phase of the defense of a case; the failure to compile a complete record may prevent FEMA from being able to explain its decision. Moreover, an incomplete record erodes the confidence of both the court and the public in FEMA's decision-making process.

2. Certification

After the Agency compiles an Administrative Record, it must be "certified" by an agency official indicating that it is, to the declarant's knowledge, complete and correct. There are no firm rules as to who the certifying official should be; however, it ideally should be someone with significant involvement with the decision being challenged and the record gathering process. The certification requirement underscores the need for substantial involvement of PA program staff in compiling the Administrative Record.

3. Judicial Review

In traditional civil litigation, filing a complaint ultimately leads to a trial in which the parties present evidence to the fact finder (either a judge or a jury) for a determination of the case. Under the APA, the factual basis of the entire case is set forth in the administrative record, so there is no need to present a case to a fact finder. Consequently, APA cases are typically decided by a Motion to Dismiss or a Motion for Summary Judgment.⁸⁷⁷

These are known as 'dispositive motions' as they dispose of all issues raised in the litigation.

⁸⁷⁷ Where FEMA is asserting that the plaintiff's claims are precluded by the deliberative process exception, a Motion to Dismiss is filed on the basis that the plaintiff has not plead a claim under which they may be entitled to relief. In other cases, FEMA will file a Motion for Summary Judgment on the basis that there are no disputed material facts and FEMA is entitled to judgment as a matter of law

The dispositive motions are prepared by OCC attorneys and/or Department of Justice (DOJ) attorneys, often collaboratively. These responsibilities are established on a case-by-case basis, based on workload and particular experience implicated in the specific case. Generally, in litigation, the DOJ becomes the lead agency, meaning it has the final determination as to what arguments are made in court.⁸⁷⁸ Each motion has a detailed statement of facts, as well as a detailed analysis of the relevant statutes, regulations, and policy implicated by the matter.

Involvement of agency personnel is a critical aspect of this process so that the facts of the case are accurately portrayed and all relevant policy considerations are weighed. After one or both parties' dispositive motion, each party has an opportunity to file a brief in opposition to any such motion, as well as an opportunity to file a reply to the opposition brief. After a case is fully briefed, a court may or may not hold a hearing to assist the court in its understanding of the case.

Hearings are typically in the form of an oral argument, where the parties' legal counsel explains arguments relating to points of law. Occasionally, a court will allow or require testimony of agency officials or experts to assist in its understanding of the case. Because the plaintiff had an opportunity to submit any information that it thought was relevant to the Agency's decision maker, such 'evidentiary hearings' are relatively rare and are strongly opposed.

Once the court has the administrative record and all of the parties' arguments on the merits of the case, it is ready for a decision by the court. If a reviewing court determines that the Agency considered the relevant factors in reaching its decision (or if it finds that the agency's decision is not subject to judicial review), the court affirms the agency's decision and issues a judgment in favor of the Agency. If, however, the court determines that, based upon its review of the administrative record, the Agency's decision does not meet the standards of the APA, a court may permit or require the agency to supplement the record for its review.

⁸⁷⁸ *U.S. Department of Justice Organization, Mission and Functions Manual*, <https://www.justice.gov/jmd/organization-mission-and-functions-manual>

A court might also remand the decision to the agency and/or vacate the rule or decision. The remedies imposed against the agency in an adverse decision depend largely on the quality of the agency's certified administrative record.

CHAPTER 6
Individual Assistance
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CHAPTER 6

Individual Assistance

I. Introduction

The Stafford Act authorizes a wide variety of assistance to individuals and households affected by a major disaster or emergency.¹ FEMA has implemented this authority through its Individual Assistance (IA) programs, which include the Individuals and Households Program (IHP), as well as a variety of other programs.² This program is a complement to FEMA's Public Assistance (PA) program, in particular its emergency shelter programs, which assist state, tribal, and local governments in their responsibilities to save lives and protect property. *See* Chapter 4, *Response* and Chapter 5, *Public Assistance*, and Section I(A)(1) of this chapter, *Public Assistance (PA) Provision of Mass Care Services and Transition to Individual Assistance (IA)*.

A. Continuum from Response to Recovery

The IA programs are part of the continuum from response to recovery, assisting individuals and households back to self-sufficiency. After a major disaster or emergency, FEMA's assistance under its IA programs is not likely to make the individual or household completely whole, in part because federal disaster assistance is supplemental and is not the same as insurance, which can be much more extensive in its coverage for replacing damaged and destroyed property. Thus, disaster survivors may have higher expectations than the federal

¹ Stafford Act §§ 408–416, 423, 425, and 426; 42 U.S.C. §§ 5174–5183, 5189a, 5189c, and 5189d. Post Katrina Emergency Management Reform Act of 2006 (PKEMRA), Pub. L. No. 109-295, amended the Stafford Act, among other things, to add Sections 425 and 426.

² Stafford Act § 408, *Federal Assistance to Individuals and Households*, 42 U.S.C. § 5174. The IHP is referred to as “section 408 assistance” because it is authorized by section 408 of the Stafford Act.

government, states, or voluntary organizations can meet regarding financial assistance.

However, IA for a major disaster is more holistic in its approach by providing not only financial assistance for temporary housing and repair and replacement of real and personal property for essential needs, but also crisis counseling, free legal services, emergency food stamps, disaster unemployment, and case management services. This is in addition to the broad array of services and assistance that may be provided by other federal agencies (OFAs), state, tribal, and local governments, and by voluntary organizations active in disasters.

Managing the expectations of disaster survivors early in the disaster with respect to what federal, state, local, and tribal governments and nonprofit organizations can deliver will assist disaster survivors in understanding that their own role in the recovery process is crucial. Disaster survivors can then make informed decisions regarding their individual and/or household recoveries.

FEMA provides information to disaster survivors several ways: online (fema.gov and [Disaster Assistance.gov](http://DisasterAssistance.gov))³; via smart phone application (m.fema.gov); on toll free lines (1-800-621-3362 and 1-800-462-7585 TTY); in person at Disaster Recovery Centers (DRCs), at community town hall meetings, and through Community Relations staff; and through press releases and applicant guides.

³ DisasterAssistance.gov provides disaster survivors with a single source for potential assistance programs, easy access to the application process, application updates, and disaster-related information. It is a primary component of the Disaster Assistance Improvement Program (DAIP) created pursuant to Executive Order No. 13411 of August 29, 2006, *Improving Assistance for Disaster Victims*, 71 Fed. Reg. 52729 (Sept. 6, 2006). The mission of the DAIP is to ease the burden on disaster survivors by providing them with a mechanism to access and apply for disaster assistance through the collaborative efforts of federal, state, tribal, local, and nonprofit partners.

1. Public Assistance (PA) Provision of Mass Care Services and Transition to Individual Assistance (IA)

As discussed in Chapter 4, *Response* and in Chapter 5, *Public Assistance*, the Stafford Act authorizes emergency sheltering and other emergency assistance to meet life-threatening needs.⁴ FEMA provides or funds prolonged emergency sheltering and other emergency assistance as part of its PA program in extreme situations when such assistance is requested by the state and the affected local communities. Individuals and households are not required to submit a formal application to FEMA for such assistance.

However, in certain situations, assistance (such as transitional sheltering) is generally restricted to applicants that have registered and are found eligible for IHP. These programs help form a bridge from immediate, short-term mass care and sheltering assistance provided by affected communities and voluntary agencies to IHP's longer term housing assistance for IHP eligible applicants.

a. Emergency Sheltering Programs

FEMA has several PA Emergency Assistance Programs that may provide prolonged sheltering assistance to evacuees, and/or immediate temporary repairs to residences to allow occupants to shelter in place:

- Transitional Sheltering Assistance: for extended sheltering through hotel lodging for IHP eligible applicants who are unable to return to their communities because they are inaccessible or uninhabitable.
- Blue Roof Program: temporary repairs to damaged roofs to allow sheltering in place pending permanent repairs.
- Sheltering and Temporary Essential Power (STEP) Program: to provide essential, temporary repairs and power

⁴ Stafford Act § 403(a)(3), 42 U.S.C. §5170b(a)(3).

restoration for residences to allow sheltering in place pending permanent repairs.⁵

In general, these programs, which provide direct assistance instead of financial assistance for emergency sheltering and public safety, are not considered a duplication of benefits for IHP assistance.

b. Transitional Sheltering Assistance (TSA)

Transitional sheltering assistance or (TSA) is intended to provide short-term lodging assistance to survivors who have been evacuated from an identified area and cannot return to their homes for an extended period of time because their community is either uninhabitable or inaccessible due to disaster-related damage.⁶ TSA is authorized under Section 403 of the Stafford Act and is subject to a cost share.⁷

Before TSA can be implemented, this form of assistance must be requested by the state and the applicable Presidential declaration must include a Section 403/502 – Category B (Emergency Protection Measures) and a Section 408 (IHP) designation.⁸

TSA can be implemented for major disasters or emergencies.⁹ It should be noted that TSA is provided through direct federal assistance, which means that FEMA directly implements the sheltering assistance for the state.¹⁰ Generally, states may not request reimbursement under Section 403 for transitional sheltering implemented by the state.¹¹

⁵ STEP was a pilot program for the 2012 Hurricane Sandy declarations for New York, New Jersey, and Connecticut, and was also implemented following flooding in Louisiana in 2016 (DR-4277).

⁶ See the *Individuals and Households Program Unified Guidance* [hereinafter IHPUG], FP 104-009-3, Sept 30, 2016, Appendix A: *Transitional Sheltering Assistance*, pp. 123-125, available at <https://www.fema.gov/media-library/assets/documents/124228>. See also the *Public Assistance Program and Policy Guide* (PAPPG), FP 104-009-2, Chapter 2, Section VI(B)(10) *Evacuations and Sheltering*, (b) *Sheltering*, pp. 65-66, available at <https://www.fema.gov/public-assistance-policy-and-guidance>.

⁷ 42 U.S.C. §5170b(a)(3)(B).

⁸ See the IHPUG, p. 123 and the PAPPG, p. 66.

⁹ If both IA and PA Category B, emergency protective measures, are designated.

¹⁰ See the IHPUG, p. 123 and the PAPPG, p. 66.

¹¹ PAPPG, pp. 65-66.

The initial period of TSA assistance is 5 to 14 days (which can be adjusted to 30 days if needed) from the date TSA is authorized by the Assistant Administrator for Disaster Assistance.¹² The period of assistance can be extended, in 14-day intervals, up to six months from the date of declaration.¹³

TSA is intended to reduce the number of survivors housed in congregate shelters and provide more privacy than congregate shelters. Typically, under TSA, survivors are temporarily housed in hotels or motels.

Individuals and households are considered eligible for TSA assistance if:

- The individual or household registers with FEMA for assistance;
- The individual or household passes identity verification;
- The individual or household's pre-disaster primary residence is located in a geographic area designated for TSA;
- As a result of the disaster, the individual or household is displaced from the pre-disaster primary residence
- The individual or household is unable to obtain lodging through another source.¹⁴

Transitional sheltering will end once the period of assistance interval expires unless there has been an extension.¹⁵ Individuals and households found to be ineligible for Section 408 assistance under IHP will be referred to voluntary agencies and state or local agencies for additional assistance to meet unmet housing needs.

¹² IHPUG, p. 123.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Transitional sheltering assistance does not count against the IHP assistance cap for individuals or households.¹⁶

2. Hurricanes Katrina and Rita (2005) Emergency Shelter and Temporary Housing Assistance Litigation

In 2005, hundreds of thousands of Gulf Coast residents fled Hurricanes Katrina and Rita, and many had nowhere to go. FEMA funded shelter to more than 100,000 evacuees in hotels and motels. This type of assistance can be very costly and can be financially and mentally stressful on survivors because of the lack of adequate cooking and laundry facilities and cramped living conditions.

As the post-disaster circumstances stabilized and emergency conditions ended, FEMA began winding down the emergency sheltering program to transition eligible applicants to IHP.¹⁷

Not all individuals in the sheltering program met the eligibility criteria for IHP assistance such as temporary housing assistance, and FEMA so notified them. Several groups sued FEMA, challenging various aspects of the transition from emergency sheltering to IHP.

a. Litigation on Transitioning to Temporary Housing Assistance

In *McWaters v. FEMA*,¹⁸ disaster assistance applicants alleged that FEMA violated statutory and constitutional requirements in administering temporary housing assistance under IHP.

On June 16, 2006, the district court dismissed most of the plaintiffs' claims in its final order, but the court ruled that applicants for disaster

¹⁶ It is provided under §§ 403/502 as direct federal assistance to the state for sheltering and is not considered financial assistance provided to IHP applicants under § 408.

¹⁷ Alternative Dispute Resolution may be useful when terminating emergency shelter assistance for individuals. It has been successfully used to help survivors develop transition plans to more permanent living arrangements.

¹⁸ 408 F. Supp. 2d 221 (E.D. La. 2006), *modified*, *McWaters v. FEMA*, 408 F. Supp. 2d 221; *dismissed in part, injunction granted*, *McWaters v. FEMA*, 436 F. Supp. 2d 802 (E.D. La. 2006).

assistance who met the statutory eligibility criteria¹⁹ had a constitutionally protected property interest in the receipt of housing assistance under the Due Process Clause of the Fifth Amendment of the U.S. Constitution.²⁰

Nonetheless, the court ruled that the plaintiffs failed to prove that FEMA unconstitutionally deprived them of that interest. Instead, the court found that the significant delays in processing Katrina-related applications for housing assistance were inevitable due to the magnitude of the disaster and the multitude of applications for temporary housing assistance. Therefore, the court found no constitutional violation on which the plaintiffs could sue FEMA.

The court required FEMA to provide evacuees with two weeks' notice prior to terminating their temporary housing assistance. In addition, the court permanently enjoined FEMA from requiring that applicants for temporary housing assistance apply for a loan from the Small Business Administration (SBA) as a prerequisite of applying for or receiving temporary housing assistance, and from improperly communicating to applicants about SBA loan requirements.²¹

b. Litigation on Denial of Temporary Housing Assistance

In *Ass'n of Cmty Orgs. for Reform Now (ACORN) v. FEMA*, ACORN²², acting for FEMA disaster applicants from Hurricanes Katrina and Rita, filed a class action complaint against FEMA. Specifically, the lawsuit targeted FEMA's transition of disaster applicants from the Stafford Act's emergency

¹⁹ "...[I]ndividuals and households who are displaced from their primary pre-disaster residences or whose primary pre-disaster residences are rendered uninhabitable ..."
Stafford Act § 408(a)(2), 42 U.S.C. § 5174(a)(2).

²⁰ *McWaters v. FEMA*, 436 F. Supp. 2d 802, 816-818 (E.D. La. 2006).

²¹ Note that this district court's finding of a constitutionally protected property right in the receipt of disaster housing assistance conflicts with a subsequent Fifth Circuit Court of Appeals decision in *Ridgely v. FEMA* [hereinafter *Ridgely*]. The Fifth Circuit Court of Appeals in *Ridgely* held that the Stafford Act and FEMA's implementing regulations alone do not create a constitutionally protected property right. See *Ridgely*, 2007 U.S. Dist. LEXIS 38461 (E.D. La. May, 2007); *injunction granted in part, Ridgely*, 2007 U.S. Dist. LEXIS 43009 (E.D. La. June 2007); *vacated in part, remanded, Ridgely*, 512 F.3d 727 (Fifth Cir. La. 2008); *later proceeding, Ridgely*, 2010 U.S. Dist. LEXIS 136368 (E.D. La. Dec. 2010).

²² *Ass'n of Cmty Orgs. for Reform Now (ACORN) v. FEMA*, 2007 U.S. App. LEXIS 929 (D.C. Cir. 2007).

assistance program for shelter housing to the Stafford Act's temporary housing assistance program. ACORN sought injunctive relief.

On November 29, 2006, the district court issued an order granting ACORN's motion for a preliminary injunction. The court determined that FEMA's temporary housing assistance ineligibility notices contained cryptic, often conflicting, numeric codes that were meaningless without the explanation provided in a separate application guide. The guide's language was vague and non-individualized; thus, the notices did not provide sufficient notice under the Fifth Amendment of the Constitution.

B. Scalability of Individual Assistance (IA)

Not every disaster event rises to the level of a Northridge earthquake,²³ a 9/11 terrorist attack,²⁴ or a Hurricane Katrina²⁵ in its widespread impact and nationwide attention, but the same IA programs are generally available and authorized for major disaster declarations²⁶.

There have been circumstances, described in Chapter 3, *Declarations*, however, where more limited IA assistance has been designated for major disasters presenting economic loss as the primary effect. Scaling up IA is a bit more difficult. There is a monetary cap on the financial assistance available under the IHP. Any scalability of IA to meet disaster survivors' needs will generally be found in the direct assistance elements of IHP and in use of its broad emergency work authorities under the PA program for emergency work.

²³ FEMA-1008-DR-CA (1994).

²⁴ FEMA-1391-DR-NY (2001); FEMA-1392-DR-VA (2001).

²⁵ FEMA 1603-DR-LA (2005), Hurricane Katrina (also declared a major disaster in Alabama, Florida, and Mississippi).

²⁶ However, much more limited IA is available under emergency declarations as illustrated in Table 6-1.

Table 6.1: IA Programs Available under a Major Disaster or an Emergency Declaration

IA Program	Maj. Disaster	Emergency	Assistance²⁷
Individuals and Households Program	Yes, 42 U.S.C. § 5174(a)(1)	Yes, 42 U.S.C. § 5192(a)(6)	Housing: Direct and Financial ONA: Financial
Disaster Unemployment Assistance	Yes, 42 U.S.C. § 5177(a)	No	Financial
Benefits and Distribution (D-SNAP)	Yes, 42 U.S.C. § 5179(a)	No	Financial
Food Commodities	Yes, 42 U.S.C. § 5180(a)	Yes, 42 U.S.C. § 5180(a)	Direct
Relocation Assistance	Yes, 42 U.S.C. § 5181	No	Financial
Disaster Legal Services	Yes, 42 U.S.C. § 5182	No	Direct
Crisis Counseling	Yes, 42 U.S.C. § 5183	No	Direct
Transportation Assistance	Yes, 42 U.S.C. § 5189c	Yes, 42 U.S.C. § 5189c	Direct and Financial
Disaster Case Management	Yes, 42 U.S.C. § 5189d	No	Direct
Cora Brown	Yes, 44 C.F.R. § 206.181(c)	Yes, 44 C.F.R. § 206.181(c)	Financial

²⁷ Financial: grant assistance; Direct: in kind (commodity, services).

II. The Individuals and Households Program (IHP)

A. In General

FEMA²⁸ is authorized under Section 408²⁹ of the Robert T. Stafford Disaster Relief and Emergency Assistance Act³⁰ (Stafford Act) to provide financial assistance and direct services³¹ to individuals and households who, as a result of a major disaster, have necessary expenses and serious needs that they are unable to meet through other means.³² IHP assistance is also available under an emergency declaration,³³ although it is rare; overall IA is limited as indicated in Table 6-1.

Declaration information is available on FEMA.gov at <https://www.fema.gov/disasters>. FEMA is authorized to establish the rules and regulations for IHP, including criteria, standards, and procedures for determining eligibility for assistance.³⁴

²⁸ The Stafford Act vests this authority in the President. The President has delegated most of the functions vested in him under the Stafford Act, 42 U.S.C. §§ 5121-5207, to the Secretary of Homeland Security. See Executive Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003); Executive Order No. 12,673, 54 Fed. Reg. 12,571 (Mar. 23, 1989); and Executive Order No. 12,148, 44 Fed. Reg. 43,239 (July 20, 1979). The Secretary of Homeland Security has delegated this authority to the Administrator of FEMA. See Delegation to the Administrator of the Federal Emergency Management Agency, DHS Delegation No. 9001.1 (Dec. 10, 2010).

²⁹ Stafford Act § 408, 42 U.S.C. § 5174. See also 44 C.F.R. §§ 206.110-120; 206.181, and 206.191; 44 C.F.R. 206.141-44 C.F.R. 206.171..

³⁰ Pub. L. 93-288, as amended, 42 U.S.C. § 5121, *et seq.*

³¹ For purposes of housing assistance, the term “direct assistance” is used instead of direct services. See generally Stafford Act §408(c), 42 U.S.C. § 5174(c); 44 C.F.R. §206.110(a).

³² Stafford Act §408(a)(1), 42 U.S.C. § 5174 (a)(1).

³³ Stafford Act §502(a) (6), 42 U.S.C. § 5192(a)(6). See FEMA-3363-EM-TX as an example at <https://www.fema.gov/disaster/3363>.

³⁴ Stafford Act §408(j), 42 U.S.C. § 5174 (j). FEMA’s implementing regulations for IHP and its other IA programs are found in 44 C.F.R. Part 206, Subparts D and F, 206.110191. Note that 206.101 (Subpart D) and 206.131 (Subpart E) are obsolete as they relate to the Stafford Act Temporary Housing Assistance and Individuals and Family Grant Programs in place prior to the Disaster Mitigation Act of 2000 (Pub. L. 106-390), which established the IHP.

This is the Individuals and Households Program (IHP), which provides housing assistance (financial and direct) and other needs assistance (financial) for individuals and households.

New Unified IHP Guidance Issued

FEMA issued the First Edition of the FEMA *Individuals and Households Program Unified Guidance* (IHPUG), effective for declarations declared on or after September 30, 2016.³⁵ The IHPUG compiles FEMA policy for each type of assistance under the IHP into one comprehensive document and is intended to serve as a singular policy resource for state, local, territorial, and tribal governments, and other entities who assist disaster survivors with post-disaster recovery. The IHPUG replaces all stand-alone IHP policies and policy statements currently located in FEMA documents and standard operating procedures (SOPs) as of September 30, 2016 (See IHPUG Appendix C).

³⁵ *IHPUG*, FP 104-009-3, Sept. 30, 2016, available at <https://www.fema.gov/media-library/assets/documents/124228>.

1. Scope and Amount of IHP Assistance

IHP provides:

- Housing assistance (HA),³⁶ including rental assistance (financial assistance);³⁷ direct assistance for temporary housing;³⁸ repair (financial assistance);³⁹ replacement (financial assistance);⁴⁰ permanent and semi-permanent construction (financial or direct assistance);⁴¹ and
- Other needs assistance (ONA), including financial assistance for medical, dental, child care, funeral, personal property, and transportation needs.⁴²

Eligible applicants can receive more than one type of housing assistance, including a mix of financial and direct assistance.⁴³ FEMA will determine the appropriate types of assistance based on considerations of cost effectiveness, convenience to disaster survivors, and suitability and availability of the types of assistance to meet survivor needs in the particular disaster situation.⁴⁴

FEMA utilizes temporary housing and repair assistance to the fullest extent possible before other types of housing assistance.⁴⁵ An applicant is expected to accept the first offer of housing assistance; unwarranted refusal of assistance may result in the forfeiture of future housing assistance.⁴⁶

³⁶ FEMA determines the appropriate types of housing assistance based on considerations of cost effectiveness, convenience to the individuals and households, and such other factors it determines appropriate. Stafford Act § 408(b)(2)(A); 42 U.S.C. § 5174(b)(2)(A).

³⁷ Stafford Act § 408(c)(1)(A); 42 U.S.C. § 5174(c)(1)(A).

³⁸ Stafford Act § 408(c)(1)(B); 42 U.S.C. § 5174(c)(1)(B) for the provision of temporary housing units or for the lease and repair of multi-family rental properties.

³⁹ Stafford Act § 408(c)(2), 42 U.S.C. § 5174(c)(2).

⁴⁰ Stafford Act § 408(c)(3), 42 U.S.C. § 5174(c)(3).

⁴¹ Stafford Act § 408(c)(4), 42 U.S.C. § 5174(c)(4).

⁴² Stafford Act § 408(e), 42 U.S.C. § 5174(e); 44 C.F.R. § 206.119.

⁴³ *Id.* § 408(b)(2)(B), 42 U.S.C. § 5174(b)(2)(B).

⁴⁴ *Id.* § 408(b)(2), 42 U.S.C. § 5174(b)(2); 44 C.F.R. § 206.110(c).

⁴⁵ 44 C.F.R. § 206.110(c).

⁴⁶ *Id.*

a. Minimum Amount of IHP Financial Assistance

The amount of financial assistance available to an individual or household under IHP for temporary housing, repair or replacement, permanent/semi-permanent construction and for other needs assistance is subject to a minimum amount of \$50.00 per single disaster (or emergency) declaration.⁴⁷

This minimum may be met under any combination of HA or ONA category. If an applicant is initially ineligible due to not meeting the minimum IHP threshold but upon appeal or a request for a different category of assistance the applicant meets the \$50.00 minimum amount, all eligible assistance should be processed.⁴⁸ Once this minimum is met, any additional eligible assistance can be awarded regardless of amount.

b. Maximum Amount of IHP Financial Assistance

The amount of financial assistance available to an individual or household under IHP for temporary housing, repair or replacement, permanent/semi-permanent construction and for other needs assistance is subject to a maximum amount per single disaster (or emergency) declaration⁴⁹, adjusted annually⁵⁰ to reflect changes in the Consumer Price Index for All Urban Consumers (CPI-U).⁵¹

⁴⁷ IHPUG, Chapter 1, Section II(B) p. 5. *See also* Processing Procedures Manual [hereinafter PPM], SOPs and Job Aids, ONA Guidance, Cross Topics, IV.M.1.ja, p. 2-3. *Maximum and Minimum IHP Awards Job Aid* at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npscs/applicant_processing/Guidance/Maximum%20and%20Minimum%20IHP%20Awards%20Job%20Aid.docx.

⁴⁸ *Id.*, Part A.2.e.

⁴⁹ 42 U.S.C. § 5174(h)(1); 44 C.F.R. § 206.110(b).

⁵⁰ FEMA makes its annual IHP maximum grant adjustment every fiscal year (October 1-September 30) based on changes in the Consumer Price Index for All Urban Consumers (CPI-U) for a preceding 12-month period, which is published by Bureau of Labor Statistics for the Department of Labor. 44 C.F.R. § 206.110(b). The maximum amount does not always increase. It actually decreased from \$30,300 to \$29,900 for FY 2010 due to a decrease in the CPI-U. *See* 74 FR 51303 (October 6, 2009).

⁵¹ 42 U.S.C. § 5174(h)(2).

For declarations issued during fiscal year 2017, the maximum amount is \$34,000⁵² For the purposes of this chapter, this dollar amount is called the “max IA grant.”⁵³ The value of direct assistance authorized under IHP, or for financial or direct assistance provided under any other IA program, is not subject to this cap.

2. Assistance not Considered Income

a. Effect on Means-tested Programs

Federal major disaster and emergency assistance provided to individuals and households under the Stafford Act is not considered income or a resource determining eligibility for federally funded means-tested programs such as welfare.⁵⁴ Comparable disaster assistance provided by states, tribes, and local governments and by disaster assistance organizations is also not considered income or a resource for these purposes.⁵⁵

b. Federal Income Tax Implications

Qualified disaster relief payments such as IHP assistance are generally excluded from gross income for federal income tax purposes.⁵⁶ Qualified disaster relief payments include amounts paid to, or for the benefit of, an individual for personal, family, living, or funeral expenses and repair or replacement of personal residence and contents if those expenses are

⁵² See 81 FR 70431 (October 12, 2016) at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-12/pdf/2016-24626.pdf>. This is for emergency and major disasters declared on or after October 1, 2016.

⁵³ Note that direct assistance under 408 and financial assistance provided under non-408 authorities are not subject to this maximum cap.

⁵⁴ Stafford Act § 312(d), 42 U.S.C. § 5155(d); 44 C.F.R. §§ 206.110(f) and 206.191(b)(2).

⁵⁵ Stafford Act § 312(d), 42 U.S.C. § 5155(d).

⁵⁶ 26 U.S.C. § 139(a) Disaster Relief Payments provides that “qualified disaster relief payments” are not included in gross income. See also *FAQs for Disaster Victims – Mitigation Payments* (also discusses IHP payments) at <https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/FAQs-for-Disaster-Victims-Mitigation-Payments>.

attributable to a qualified disaster⁵⁷ and are not compensated for by insurance or otherwise.⁵⁸

Please note that disaster unemployment compensation is subject to applicable income taxation.⁵⁹ Deductions or credits are not allowed for casualty losses or for medical expenses specifically reimbursed under qualified disaster relief payments.⁶⁰

The recipient of a FEMA IHP repair or replacement assistance payment must reduce his or her tax basis in the damaged or destroyed residence by the amount of the FEMA IHP payment.⁶¹ If the FEMA IHP repair assistance or replacement assistance payment and/or insurance proceeds (and any other form of compensation for the damaged or destroyed residence) exceed the recipient's adjusted tax basis in the damaged or destroyed residence (considered an involuntary conversion), the recipient has realized gain for federal income tax purposes, which may be eligible for deferred reporting.⁶²

Applicants should confer with tax specialists regarding their specific circumstances. Please note that state income tax treatment of disaster assistance varies from state to state.

Please also refer to the Internal Revenue Service (IRS) regarding federal income tax relief for declared events that may include extended filing and

⁵⁷ 26 U.S.C. § 139(c)(2), which includes federally declared disasters as defined by 26 U.S.C. § 165(h)(3)(C)(i), which is any disaster determined to warrant assistance by the federal government under the Stafford Act.

⁵⁸ 26 U.S.C. § 139(b). See IRS Publication 547, Casualties, Disasters, and Thefts at <http://www.irs.gov/pub/irs-pdf/p547.pdf> for a detailed explanation of tax relief for declaring losses and treatment of "qualified disaster relief payments."

⁵⁹ *Id.*

⁶⁰ 26 U.S.C. § 139(h). See also *FAQs for Disaster Victims – Mitigation Payments* at <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/FAQs-for-Disaster-Victims-Mitigation-Payments>.

⁶¹ See *FAQs for Disaster Victims – Mitigation Payments* at <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/FAQs-for-Disaster-Victims-Mitigation-Payments>.

⁶² *Id.*

payment deadlines, and the amendment of the prior year's return to capture disaster-related casualty losses.⁶³

c. Exemption from Garnishment or Seizure

IHP assistance is also exempt from garnishment, seizure, encumbrance, levy, execution, pledge, attachment, release, or waiver and may not be reassigned or transferred.⁶⁴ However, these exemptions do not apply to FEMA recovery assistance fraudulently obtained or misapplied.⁶⁵

3. Nondiscrimination Provisions

Any person eligible to receive disaster aid or other services from FEMA is entitled to those benefits without discrimination. Title VI of the Civil Rights Act of 1964 protects individuals from discrimination on the basis of their race, color, or national origin in programs that receive federal financial assistance.⁶⁶ Section 504 of the Rehabilitation Act of 1973 ("Section 504") affords comparable guarantees to individuals with disabilities, and adds protections against bias in programs conducted by the government.⁶⁷

The Stafford Act prohibits discrimination in the provision of IA and other relief and assistance activities based on race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.⁶⁸ Governmental bodies and other organizations that participate in the distribution of assistance or supplies or of receiving assistance under the

⁶³ See <https://www.irs.gov/uac/Tax-Relief:-Presidentially-Declared-Disaster-Areas>. See also <https://www.irs.gov/uac/tax-relief-in-disaster-situations> which provides links to IRS new releases regarding Tax Relief in Disaster Situations. See also *Guidance for those Affected Disasters* at <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/FAQs-for-Disaster-Victims> for additional information.

⁶⁴ 44 C.F.R. §206.110(g).

⁶⁵ *Id.*

⁶⁶ Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) as amended, 42 U.S.C. § 2000d – 2000d-7.

⁶⁷ Section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112), as amended, 29 U.S.C. §794.

⁶⁸ Stafford Act § Section 308; 42 U.S.C. § 5151.

Stafford Act are required to comply with the nondiscrimination regulations promulgated by the President.⁶⁹

4. Access and Functional Needs

Accommodating applicants with functional and access needs is integral to FEMA's mission. Individuals with access and functional needs may include individuals with and without disabilities who may have physical, programmatic, and effective communication accessibility requirements.

FEMA and applicants for FEMA assistance (such as Public Assistance or Hazard Mitigation Grant Programs) must comply with several other federal laws, such as the Rehabilitation Act⁷⁰ and the Architectural Barriers Act of 1968⁷¹ in implementing FEMA's programs.

Class Action Lawsuit on Provision of Temporary Housing Assistance to Applicants with Disabilities

In a 2006 class action suit, *Brou v. Fed. Emergency Mgmt. Agency*, a class of applicants with disabilities displaced by the 2005 Hurricanes Katrina and Rita, sued FEMA on the subject of equal access to government services.⁷² The class alleged that FEMA denied them "equal and meaningful access" to temporary housing in violation of

⁶⁹ *Id.* See also § 309, 42 U.S.C. § 5152, which is specific to relief or disaster organizations. FEMA's nondiscrimination regulations are found at 44 C.F.R. Part 7, *Nondiscrimination in federally assisted programs*; Part 16, *Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the Federal Emergency Management Agency*; Part 19, *Nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance*; and § 206.11, *Nondiscrimination in disaster assistance*.

⁷⁰ Rehabilitation Act, 29 U.S.C. § 701, *et seq.*

⁷¹ Architectural Barriers Act, as amended, 42 U.S.C. § 4151, *et seq.*

⁷² Settlement Agreement at 1, *Brou v. Fed. Emergency Mgmt. Agency*, No. 06-0838 (E.D. La., Aug. 15, 2006) [hereinafter *Brou Settlement Agreement*] available at <http://nclej.org/news/nclej-and-colleagues-win-settlement-requiring-accessible-trailers-for-katrina-evacuees-with-disabilities>.

Section 504,⁷³ the Fair Housing Act,⁷⁴ and the Stafford Act. The parties agreed to a settlement.⁷⁵

In the settlement agreement, FEMA agreed to require at least 10% of temporary housing units for survivors of Hurricane Katrina (Louisiana and Mississippi) or Rita (Louisiana), and all common areas of group sites,⁷⁶ comply with the Uniform Federal Accessibility Standards⁷⁷ and that at least 5% of group site units for these survivors are accessible.⁷⁸ FEMA's current policy is that at least 15% of individual lots within any FEMA temporary housing unit group site are designed to accommodate accessible units.⁷⁹

a. Definition of Disability

Section 504 prohibits discrimination against individuals with disabilities in the programs, services, and activities of federal agencies, and in programs receiving federal financial assistance.⁸⁰ "Disability" is a legal term that should be construed in favor of coverage. An individual with a disability has a physical or mental impairment that limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment.⁸¹

⁷³ 29 U.S.C. § 794(a).

⁷⁴ 42 U.S.C. § 3604.

⁷⁵ *Brou Settlement Agreement* at 2, 18. Although FEMA agreed to settle, it maintained that it operated its temporary housing program in compliance with all laws and expressly denied liability. *Id.*

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 14 (subject to any amendment, modification, or waiver the Department of Housing and Urban Development may approve). To view the Uniform Federal Accessibility Standards, see <http://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-aba-standards/ufas>.

⁷⁸ *Id.* at 4. The Accessibility Notice defined a "disabled person" as one who has trouble with the following activities: walking, seeing, hearing, speaking, breathing, learning, working, or doing another major activity. *Id.* Attachment A. Depending on disability type, the notice lists the following available trailer modifications: installation of a ramp, enough turning space for a wheelchair, accessible shower/tub, and grab bars. *Id.*

⁷⁹ *IHPUG*, Chapter 5, Section V, *Group Sites*, pp. 78-79.

⁸⁰ 29 U.S.C. § 794.

⁸¹ 44 C.F.R. § 16.103.

Examples of “major life activities” are functions such as caring for oneself, walking, seeing, hearing, talking, breathing, and learning.⁸² Individuals with disabilities may have access and functional needs that must be met to provide an equal opportunity to participate in or benefit from agency programs, services, and activities in accordance with Section 504.

With respect to FEMA’s disaster assistance programs and activities, a “qualified individual with a disability” usually means an individual with a disability who meets the essential eligibility requirements for participation in or receipt of benefits from the program or activity.⁸³

If any of the agency programs or activities require the participants to achieve a certain level of accomplishment, then a “qualified individual with a disability” means an individual with a disability who meets the essential eligibility requirements and can achieve the purpose of the program or activity without modifications that would cause a fundamental alteration in the program or activity.⁸⁴ If modifications that do not cause a fundamental alteration in the program or activity are necessary for a qualified individual with a disability to participate in the program or activity, then the agency is required to provide those modifications.

Under Section 508 of the Rehabilitation Act, the agency may not provide qualified individuals with disabilities different or separate aids, benefits, or services unless it is necessary to provide aids, benefits, or services that are as effective as those provided to other individuals.⁸⁵ While the agency is allowed to provide separate or different programs or activities for individuals with disabilities, the agency may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different.⁸⁶ This means that FEMA may be required to make reasonable accommodations so that individuals with disabilities may participate in programs and activities that are not separate or different.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 44 C.F.R. § 16.103.

⁸⁵ 44 C.F.R. § 16.130 (b)(1)(iv).

⁸⁶ 44 C.F.R. § 16.130 (b)(2).

b. Program Accessibility⁸⁷

The notion of “program accessibility” is present throughout FEMA’s Section 504 implementing regulations. The regulations mandate that FEMA’s program or activities, when viewed in their entirety, are “accessible to and usable by individuals with handicaps.”⁸⁸ This includes ensuring that individuals with disabilities are not physically excluded from FEMA programs because the program is located at a facility with architectural barriers.

The regulations also prohibit the agency from selecting facilities that have the effect of excluding individuals with disabilities from programs or activities conducted by the agency.⁸⁹ This means that the agency must choose facilities that are architecturally physically accessible.

c. Effective Communication

Another aspect of “program accessibility” is “effective communication.” FEMA is required to engage in “effective communication” with individuals with disabilities.⁹⁰ Effective communication is communication that is comparable in content and detail to communication with members of the public who do not have disabilities. Auxiliary aids and services may be necessary to achieve effective communication.⁹¹

The agency is required to give primary consideration to the request of the individual with the disability to determine what type of auxiliary aid or service is necessary to achieve effective communication.⁹² Sign language interpreters, video remote interpreting services, computer assisted real-time translation, amplifying devices, magnifying devices, and alternate

⁸⁷ See FEMA Recovery Policy (Interim) 0452.1: Temporary Housing Units for Eligible Disaster Victims with a Disability (October 2006) at <https://www.fema.gov/media-library/assets/documents/24468>.

⁸⁸ 44 C.F.R. § 16.150(a).

⁸⁹ 44 C.F.R. § 16.149.

⁹⁰ 44 C.F.R. § 16.160.

⁹¹ 44 C.F.R. § 16.160 (a)(1).

⁹² 44 C.F.R. § 16.160 (a)(1)(i).

formats of printed materials such as Braille and large print are auxiliary aids that may be used to provide effective communication.

B. Assistance Registration Process

Applicants for disaster assistance may access the federal disaster assistance system several ways to complete the FEMA Application/Registration for Disaster Assistance, Form 009-0-1: online,⁹³ including via smart phone (fema.gov⁹⁴, ready.gov⁹⁵ and DisasterAssistance.gov⁹⁶); and on toll free lines (1-800-621-3362 and 1-800-462-7585 TTY).⁹⁷

Applications are processed by FEMA through its National Processing Service Centers (NPSCs),⁹⁸ which are designed to be a first contact point for disaster survivors seeking assistance. When an applicant initially seeks federal assistance through one of these methods, FEMA enters the pertinent personal and disaster-related information into its National Emergency Management Information System (NEMIS) computer system.⁹⁹ Thereafter, applicants can obtain application status online, via smartphone application, by contacting the NPSCs via the FEMA toll free lines, or by visiting a DRC.

⁹³ The form is available at

https://portalapps.fema.net/apps/employee_tools/forms/FEMA%20Forms/Forms/AllItems.aspx. The Spanish language form is Form 009-0-2 and is available at:

https://portalapps.fema.net/apps/employee_tools/forms/FEMA%20Forms/Forms/AllItems.aspx

⁹⁴

https://portalapps.fema.net/apps/employee_tools/forms/FEMA%20Forms/Forms/AllItems.aspx

⁹⁵ <http://www.ready.gov/>.

⁹⁶ <http://www.disasterassistance.gov/>.

⁹⁷ In unusual circumstances, applicants may be able to fill out an application for assistance in person by visiting a Disaster Recovery Center (DRC).

⁹⁸ FEMA has 3 National Processing Service Centers [hereinafter NPSCs], which are located in Maryland, Virginia and Texas.

⁹⁹ FEMA is required to maintain a system, including an electronic database, for purposes of verification, fraud prevention, prevention of duplicative payments, and the provision of instructions to applicants on use of assistance and for the review and appeal of denied applications. Stafford Act §408(i), 42 U.S.C. § 5174(i).

1. Registration Period

The IHP registration period is 60 days following the date of declaration for IA.¹⁰⁰ The Stafford Act is silent on the application period; however, the IHP regulations provide at 44 C.F.R. § 206.112(a) that “[t]he standard FEMA registration period is 60 days following the date that the President declares an incident a major disaster or an emergency.”¹⁰¹ FEMA interprets this as starting on the date when IA was designated for the declaration.¹⁰²

The Regional Administrator (RA)¹⁰³ or his or her designee may extend the registration period: 1) when the state requests more time to collect registrations from the affected population; or 2) when necessary to establish the same registration deadline for contiguous counties or states for the same declared event.¹⁰⁴

For example, if there is a lengthy incident period or prolonged evacuation, the registration period may be extended to ensure that affected individuals and households have an opportunity to register, or if additional counties are added at a later date, the registration period can be extended to have the same ending date for all add-on counties. In addition, FEMA

¹⁰⁰ If the ending date is on a Sunday or federal holiday, it is automatically extended to the next day.

¹⁰¹ See 44 C.F.R. § 206.112(a). Contrast this language with the PA regulations for applications for assistance found at 44 C.F.R. § 206.202(c), which provides that requests for PA be submitted “within 30 days after designation of the area where the damage occurred.”

¹⁰² For example, if the President declares a major disaster designating only PA and Hazard Mitigation Grant Program funds on April 1, but IA is added to the declaration on April 15, the IA application period begins on April 15.

¹⁰³ FEMA has 10 regional offices, each headed by a Regional Administrator (RA). See <http://www.fema.gov/about-agency> for Regional Office listings.

¹⁰⁴ 44 C.F.R. § 206.112(b). See also 44 C.F.R. § 206.110(k)(2), which provides that the governor’s authorized representative may request a time extension for FEMA (see § 206.112) to accept registrations and to process assistance applications from applicants with damaged property in a Special Flood Hazard Area (SFHA) located in a non-National Flood Insurance Program (NFIP) participating community if the community qualifies for and enters the NFIP during the six-month period following the declaration. Further discussion regarding the NFIP is found in the *National Flood Insurance Program (NFIP) Coverage Requirement* section later in this chapter.

regulations permit late registration for an additional 60 days for applicants who provide justification on a case-by-case basis for the delay.¹⁰⁵

2. Identification Verification and Housing Inspection Process

The Stafford Act requires FEMA to establish a system to verify the identity and address of applicants to ensure that assistance is only made to those eligible.¹⁰⁶ This system also needs to minimize the risk of duplicative payments and fraud.¹⁰⁷

All applicants must pass the basic identification requirements for IHP and must also sign the Declaration and Release, FEMA Form 009-0-3, which provides FEMA's Privacy Act Statement and includes the applicant's declaration regarding citizenship/immigration status eligibility and consent for release of information for eligibility verification,¹⁰⁸ before FEMA considers them eligible for IHP or ONA.

FEMA conducts an identification verification (applicant name, date of birth, and social security number) at registration intake.¹⁰⁹

As part of the application process, FEMA will conduct a housing inspection to confirm that the applicant's primary residence is uninhabitable or inaccessible as a result of the major disaster or emergency as applicable for disaster-related needs. Often the inspection is a basic step to establish applicant eligibility for temporary housing and

¹⁰⁵ 44 C.F.R. § 206.112(c). See, for example, FEMA memorandum, *Extension of Registration Periods for Late Applications*, (Sept. 26, 2008) (permitting late registration without written justification after Hurricanes Gustav and Ike). See also the PPM, I.L3: *Late Application SOP*, (3/04/2015) at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/Forms/AllItems.aspx

¹⁰⁶ Stafford Act § 408(i)(1), *Verification Measures*, 42 U.S.C. § 5174(i)(1).

¹⁰⁷ *Id.* § 408(i)(2), § 5174(i)(2).

¹⁰⁸ See https://portalapps.fema.net/apps/employee_tools/forms/Pages/forms.aspx FEMA Form 009-0-4 is the Spanish language version and is available at http://www.disasterassistance.gov/sites/default/files/pdf/Declaration%20and%20Release_ES.pdf.

¹⁰⁹ IHPUG, Chapter 2, Section I(B) *Identity Verification*, pp. 13-14.

disaster-related real property damage (housing assistance) and for personal property needs (ONA). The inspectors,¹¹⁰ while they are at the residence, generally have the applicant sign the Declaration and Release Form. This form meets required citizenship or qualified alien eligibility verification for federal public benefits, which is separate from identification verification.¹¹¹

3. Period of Assistance

FEMA may provide IHP assistance for a “period of assistance” not to exceed 18 months from the date of declaration.¹¹² This primarily affects continued assistance for temporary housing assistance.¹¹³ The Assistant Administrator for Recovery may extend this period if he/she determines that due to extraordinary circumstances, an extension would be in the public interest.¹¹⁴

Repair and replacement assistance is generally provided as a one-time payment. Rental assistance is generally provided for an initial period of one, two, or three months. To be considered for additional rental assistance, applicants must demonstrate that they have spent previous assistance from FEMA as instructed, and they must demonstrate efforts to

¹¹⁰ These are generally contract inspectors, not FEMA employees. FEMA does maintain a small number of in-house inspectors who may conduct quality control inspections.

¹¹¹ Refer to subsequent discussion in this chapter regarding citizenship and immigration status requirements.

¹¹² Although Stafford Act Section 408 only refers to an 18-month temporary housing assistance, FEMA’s implementing regulations apply this period of assistance to all of IHP. See Stafford Act § 408(c)(1)(B)(iii), 42 U.S.C. § 5174(c)(1)(B)(iii) and 44 C.F.R. § 206.110(e). The 18-month period commences from the initial date of declaration for the incident, irrespective of whether IA is designated at a later time. See the FEMA Memo, *Individuals and Households Program (IHP) Period of Assistance*, dated July 12, 2013 at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Policy%20Repository/Signed%20Final%20-%20Individuals%20and%20Households%20Program%20Period%20of%20Assistance%20Memo%20-%206%2012%202013_508.pdf.

¹¹³ See 44 C.F.R. §§ 206.114(b)(3) and (4), and 206.117(b)(1)(ii)(G)(I).

¹¹⁴ 44 C.F.R. § 206.110(e). Note that the regulations refer to the Assistant Administrator for the Disaster Assistance Directorate. However, the Disaster Assistance Directorate (DAD) has been replaced by the Office of Response and Recovery, which includes the Recovery Directorate.

reestablish permanent housing.¹¹⁵ Additional assistance is generally provided for one, two, or three months at a time.

C. Access to Records and Privacy Act Protections

When a Presidentially declared disaster or emergency forces mass evacuations, sheltering, and ongoing displacement of disaster survivors from their homes, FEMA's Individual Assistance (IA) data is often the most current, useful, and available information for the disaster community. FEMA maintains IA applicants' personally identifiable information (PII) in the NEMIS database.

The Privacy Act of 1974 (Privacy Act)¹¹⁶ protects IA applicant PII and, as such, FEMA generally cannot disclose it without the written consent of those applicants.¹¹⁷ The Privacy Act has exceptions to the "no disclosure without written consent rule."¹¹⁸ The most common exception is that of "routine use,"¹¹⁹ which allows sharing to an outside entity where its use of the information "is compatible with the purpose for which it was collected."¹²⁰

FEMA routinely sends IA applicant PII to other federal agencies; state, tribal, and local government agencies; and voluntary organizations serving disaster hit areas.¹²¹ It is crucial for FEMA to send IA applicant PII expediently to these entities so that survivors can receive assistance from all possible sources. FEMA must also prevent duplicating benefits and efforts.¹²²

¹¹⁵ 44 C.F.R. § 206.114(b)(1)-(4).

¹¹⁶ 5 U.S.C. § 552a, *et seq.*

¹¹⁷ *Id.* § 552a (b).

¹¹⁸ *Id.* § 552a(b)(1-12).

¹¹⁹ *Id.* § 552a(b)(3).

¹²⁰ *Id.* § 552a(a)(7).

¹²¹ See the DHS/FEMA-008-Disaster Recovery Assistance Files SORN, 78 Fed. Reg. 25,282 (Apr. 30, 2013) available at <http://www.dhs.gov/system-records-notice-sorns>.

¹²² FEMA Recovery Policy 9420.1, *Secure Data Sharing* (September 9, 2013), explains FEMA's IA information sharing processes and is located at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Pages/RoutineUsesPrivacyAct.aspx

FEMA publishes these routine uses (as well as others) in a Privacy Act System of Records Notice (SORN) published in the *Federal Register*.¹²³ The Stafford Act requires FEMA to share applicant PII with states if: (1) the purpose is to make available additional state and local assistance, and (2) the information pertains only to individuals located in the requesting state.¹²⁴ This is considered a “congressionally mandated” routine use under the Privacy Act and is also published in a SORN.¹²⁵

D. General Eligibility for IHP

The general eligibility criteria for an individual or household to receive IHP assistance are:

- U.S. citizenship, non-citizen national, or qualified alien status;
- Necessary expenses and serious needs directly related to a declared disaster;
- Insurance or other forms of disaster assistance cannot meet the disaster-related needs.

1. Citizenship and Immigration Status Requirements for Federal Public Benefits

In 1996, Congress passed the Welfare Reform Act,¹²⁶ which provides that aliens who are not qualified aliens are not eligible for federal public benefits.¹²⁷ A federal public benefit includes any retirement, welfare, health disability, public or assisted housing, post-secondary education, food assistance, unemployment benefits, or any similar benefit for which payments or assistance are provided to an individual, household, or family

¹²³ *Id.* and 5 U.S.C. § 552a (e)(4).

¹²⁴ Stafford Act § 408(f)(2), 42 U.S.C. § 5174(f)(2). *See also* 44 C.F.R. § 206.110(j)(2).

¹²⁵ *See* OMB Privacy Act Guidance, 40 Fed. Reg. 28,948, 28,956-58 (July 9, 1975).

¹²⁶ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [hereinafter Welfare Reform Act], Title IV, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996). *See* 8 U.S.C., Chapter 14 - *Restricting Welfare and Public Benefits for Aliens*, 8 U.S.C. §§ 1611- 1646.

¹²⁷ 8 U.S.C. § 1611(a).

eligibility unit by an agency of the United States or by appropriated funds of the United States.¹²⁸

Stafford Act and other disaster assistance programs to which this restriction applies include IHP, Disaster Unemployment Assistance (DUA),¹²⁹ SBA disaster loans,¹³⁰ and the Cora Brown Fund.¹³¹ As a result, applicants must certify that they are U.S. citizens, non-citizen nationals of the United States, or qualified aliens to receive assistance under IHP.

The citizen¹³² or qualified alien eligibility requirement does not apply to the following short-term, non-cash, in-kind federal emergency disaster relief programs:¹³³

- Emergency assistance;¹³⁴
- Disaster legal services;¹³⁵
- Crisis counseling;¹³⁶ and
- Disaster Supplemental Nutrition Assistance Program (D-SNAP).¹³⁷

While the citizen/qualified alien eligibility requirement does not apply to emergency shelter, which is considered short-term, non-cash, in-kind federal emergency disaster relief provided under Stafford Act Sections 403

¹²⁸ 8 U.S.C. § 1611(c).

¹²⁹ Stafford Act § 410, 42 U.S.C. § 5177.

¹³⁰ See the SBA discussion later in this chapter.

¹³¹ 44 C.F.R. § 206.181

¹³² Encompasses both U.S. citizen and non-citizen national of the United States status for purposes of this discussion.

¹³³ Welfare Reform Act, 8 U.S.C. § 1611(b)(1)(B).

¹³⁴ Stafford Act §§ 403 and 502, 42 U.S.C. §§ 5170b and 5192. Emergency assistance includes search and rescue, medical care, shelter, food, water, hazard clearance, and reducing threats to life, property, and public health or safety.

¹³⁵ *Id.* § 415, 42 U.S.C. § 5182.

¹³⁶ *Id.* § 416, 42 U.S.C. § 5183.

¹³⁷ *Id.* § 412, 42 U.S.C. § 5179. See Disaster SNAP Guidance, May 18, 2012, Figure 1. Comparison of Eligibility Standards for SNAP and D-SNAP, Restricted Eligibility Categories, p. 3, at http://www.fns.usda.gov/disasters/response/D-SNAP_Handbook/guide.htm. This is in contrast to the restrictions provided for the regular program, Supplemental Nutritional Assistance Program [hereinafter SNAP], 7 C.F.R. §273.4.

or 502,¹³⁸ FEMA considers IHP assistance (financial or direct) provided under Stafford Act Section 408 a “federal public benefit,” as it includes financial payments and longer term assistance. Consequently, some survivors who are eligible for congregate emergency sheltering may be ineligible when assistance transitions to temporary housing direct assistance under IHP.

After Hurricanes Katrina and Rita, for example, FEMA paid for tens of thousands of people to stay in hotels and motels under emergency assistance (discussed in Chapter 4, *Response*). Many of these people, however, could not transition to IHP because they were not U.S. citizens or qualified aliens, as required by the Welfare Reform Act. See the discussion in *Provision of Mass Care Services and Transition to Individual Assistance (IA)* earlier in this chapter.

Cerro Grande Losses

In 2000, in New Mexico, the federal government carried out a controlled burn that was part of the 10-year Bandelier National Monument plan for reducing fire hazard within the monument. Unfortunately, the government lost control of the burn due to high winds and drought conditions in the area, and the fire destroyed the homes of a number of scientists from other countries who were working at the Los Alamos National Laboratory. The scientists, who were lawful residents in the United States and often homeowners, were ineligible for Stafford Act IHP assistance because they were not “qualified aliens” due to the nature of their visas. However, the Cerro Grande Fire Assistance Act,¹³⁹ which was administered by FEMA, was enacted to provide an expedited claims process for ‘injured persons,’ including individuals—regardless of citizenship or immigration status¹⁴⁰—who suffered losses resulting from the Cerro Grande Fire.

¹³⁸ 42 U.S.C. §§ 5170b or 5192.

¹³⁹ Pub. L. 106-246, 114 Stat. 584.

¹⁴⁰ 44 C.F.R. § 295.50.

a. Status Definitions

A **U.S. citizen** is a person born in one of the 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands; a person born outside of the United States to at least one U.S. parent; or a naturalized citizen.¹⁴¹

A **non-citizen national of the United States** is a person born in an outlying possession of the United States (American Samoa or Swain's Island) on or after the date the United States acquired the possession or a person whose parents are U.S. non-citizen nationals.¹⁴² U.S. citizens are nationals of the United States; however, not every national of the United States is a U.S. citizen, although owing permanent allegiance to the United States.¹⁴³

Qualified alien is a complex definition under federal immigration law.¹⁴⁴ It includes aliens¹⁴⁵ under the following categories:

- Legal permanent resident ("green card" holder)¹⁴⁶
- An asylee,¹⁴⁷ a refugee,¹⁴⁸ or an alien whose deportation is being withheld¹⁴⁹
- Alien paroled into the United States for at least one year¹⁵⁰

¹⁴¹ See 8 U.S.C §§ 1401-1504.

¹⁴² See 8 U.S.C § 1408. The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. As a general matter, a U.S. non-citizen national is a person born in an outlying possession of the United States (American Samoa or Swain's Island) on or after the date the United States acquired the possession, or a person whose parents are U.S. non-citizen nationals (subject to certain residency requirements).

¹⁴³ 8 U.S.C. § 1101(a)(22).

¹⁴⁴ See 8 U.S.C. § 1641.

¹⁴⁵ Any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).

¹⁴⁶ 8 U.S.C. § 1641(b)(1).

¹⁴⁷ *Id* at § 1641(b)(2).

¹⁴⁸ *Id* at § 1641(b)(3).

¹⁴⁹ *Id* at § 1641(b)(5).

¹⁵⁰ *Id.* at § 1641(b)(4).

- Alien granted conditional entry (per law in effect prior to April 1, 1980)¹⁵¹
- Cuban/Haitian entrant¹⁵²
- Battered alien spouse, battered alien children, the alien parent of battered children, and alien children of battered parents who fit certain criteria¹⁵³
- Victim of a severe form of trafficking¹⁵⁴

Many categories of aliens lawfully present in the United States, however, are not considered qualified aliens, including but not limited to temporary tourist visa holders; foreign students; temporary work visa holders;¹⁵⁵ and habitual residents such as citizens of the Federated States of Micronesia and the Republic of the Marshall Islands under Compacts of Free Association with the United States.

b. Household Eligibility

FEMA requires applicants for federal disaster assistance to sign a Declaration and Release Form declaring whether they are a U.S. citizen, non-citizen national, or a qualified alien.¹⁵⁶

If the applicant does not meet these criteria, the household may still apply for and receive IHP assistance if:

¹⁵¹ *Id.* at § 1641(b)(6).

¹⁵² *Id.* at § 1641(b)(7).

¹⁵³ *Id.* at § 1641(c).

¹⁵⁴ *Id.* at § 1641(c)(4).

¹⁵⁵ This includes CW-1 visa holders for the Commonwealth of the Northern Mariana Islands.

¹⁵⁶ See https://portalapps.fema.net/apps/employee_tools/forms/Documents/009-0-3%20English.pdf. FEMA Form 009-0-4 is the Spanish language version and is available at [https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Documents/FEMA%20FORM_009-0-4%20\(Spanish\)%207-31-17.pdf](https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Documents/FEMA%20FORM_009-0-4%20(Spanish)%207-31-17.pdf). FEMA's process for compliance with the Welfare Reform Act has been designed to meet the statutory requirements while not unduly slowing down the application process and provision of disaster relief assistance in a timely and effective manner.

- Another adult household member meets the eligibility and signs the form; or
- The applicant is the parent/guardian of an eligible minor child residing in the household so that the applicant can sign the form on behalf of the minor.¹⁵⁷

One member of a household who meets the citizenship or qualified alien requirement qualifies the entire household for assistance.

Example of Household Eligibility

An eligible child born during the incident period for the declared event may qualify the household for IHP assistance.¹⁵⁸

c. Collection of Citizenship and Immigration Status Information

Applicants have repeatedly raised concerns regarding the release of immigration status information that FEMA collects in the application registration process. The information that FEMA collects as part of the registration process is protected under the Privacy Act;¹⁵⁹ however, as provided in the Declaration and Release Form, FEMA is a component of the U.S. Department of Homeland Security (DHS), and that information

¹⁵⁷ *Id.* The child is registered as the applicant in its National Emergency Management Information System, to include date of birth and social security number for identification verification, and the parent/guardian is registered as the co-applicant. See the FEMA Memo, *Recordation of Name for Dependent Child Applicants*, dated February 1, 2013 at [https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Policy%20Repository/Recordation%20of%20Dependent%20Child%20App%20\(020113\)%20FINAL_508.pdf](https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Policy%20Repository/Recordation%20of%20Dependent%20Child%20App%20(020113)%20FINAL_508.pdf).

¹⁵⁸ See generally Stafford Act § 424, 42 U.S.C. § 5189C; 44 C.F.R. § 206.110(d).

¹⁵⁹ As provided in the Privacy Act Statement for Declaration and Release Form 009-0-01, information may be disclosed as generally permitted under the Privacy Act of 1974, as amended, 5 U.S.C. § 552a(b). This includes using this information as necessary and authorized by routine uses published in DHS/FEMA-008 Disaster Recovery Assistance Files SORN, 78 Fed. Reg. 25,282 (Apr. 30, 2013) and upon written request, by agreement, or as required by law.

may be subject to sharing within the DHS, including but not limited to the U.S. Immigration and Customs Enforcement.¹⁶⁰

FEMA only collects that information necessary to qualify one member of the pre-disaster household. FEMA does not require applicants to declare their specific subcategory of qualified alien status¹⁶¹ and does not collect citizenship/immigration status information regarding other household members, including the parent or guardian who applies on behalf of a qualifying child.¹⁶²

2. Necessary Expenses and Serious Needs

As noted in the Introduction to this chapter, federal disaster assistance is not the same as insurance and does not compensate survivors for all disaster-related losses. IHP is intended to meet basic necessary expenses and serious needs¹⁶³ that are a direct result of a major disaster, including housing;¹⁶⁴ lost personal property (such as basic furniture); and medical, dental, child care, funeral, and transportation expenses.¹⁶⁵

A necessary expense is defined as a cost associated with acquiring an item or items, obtaining a service, or paying for any other activity that meets a serious need.¹⁶⁶ A serious need is defined as the requirement for an item or service that is essential to an applicant's ability to prevent, mitigate, or overcome a disaster-related hardship, injury, or adverse condition.¹⁶⁷

a. Disaster-Related

An applicant who has incurred a disaster-related necessary expense or serious need in a declared state may be eligible for assistance without regard to the applicant's residency in that state.¹⁶⁸ However, that disaster-

¹⁶⁰ Declaration and Release Form 009-0-3.

¹⁶¹ *Id.*

¹⁶² *See* Application/Registration for Disaster Assistance Form 009-0-01 and Declaration and Release Form 009-0-03.

¹⁶³ Stafford Act § 408(a)(1), 42 U.S.C. §5174(a)(1); 44 C.F.R. § 206.110(a).

¹⁶⁴ Stafford Act § 408(c), 42 U.S.C. §5174(c).

¹⁶⁵ Stafford Act § 408(e), 42 U.S.C. §5174(e).

¹⁶⁶ 44 C.F.R. § 206.111 *Definitions*.

¹⁶⁷ *Id.*

¹⁶⁸ 44 C.F.R. § 206.113(a)(1).

related expense or need must be attributable to an area of the declared state designated for federal disaster assistance.¹⁶⁹

For purposes of Housing Assistance, that means the applicant's pre-disaster primary residence must be located in a designated area. For purposes of ONA (personal property losses, medical, dental, child care, funeral, etc.), that means the loss occurred in a designated area irrespective of residence in the state or location of primary residence.

For example, someone visiting a designated area whose vehicle is damaged or destroyed, or who suffers an injury as a result of the disaster, may be eligible for ONA. An out of the state applicant who is "next of kin" may be eligible for ONA for funeral costs of someone whose death is attributed to the disaster.

b. Displacement or Uninhabitable Pre-Disaster Primary Residence for Housing Assistance Eligibility

Eligibility for Housing Assistance (temporary housing, repair or replacement,¹⁷⁰ and permanent or semi-permanent housing construction),¹⁷¹ but not ONA, is limited to applicants with disaster-related housing needs who are displaced from their pre-disaster primary residence or whose pre-disaster primary residence is uninhabitable or inaccessible as a result of damages caused by the declared event.¹⁷²

i) Pre-disaster Primary Residence

FEMA defines primary residence as 1) the dwelling where the applicant normally lives during the major portion of the calendar year, or 2) the dwelling that is required because of proximity to employment, including agricultural activities that provide 50% of the household's income.¹⁷³

¹⁶⁹ See 44 C.F.R. § 206.40 Designation of affected areas and eligible assistance (b) Areas eligible to receive assistance and 206.2 (a) (6). Designated area: any emergency or major disaster-affected portion of a state that has been determined eligible for federal assistance.

¹⁷⁰ Only owner-occupants and not renters are eligible for repair or replacement assistance. See Stafford Act § 408(c)(2)(A) and 3(A), 42 U.S.C. § 5174(c)(2)(A) and (3)(A).

¹⁷¹ Stafford Act § 408(c)(4), 42 U.S.C. § 5174(c)(4).

¹⁷² Stafford Act § 408(b)(1), 42 U.S.C. § 5174(b)(1). See also 44 C.F.R. § 206.113(b)(8).

¹⁷³ 44 C.F.R. § 206.111.

This includes any residence where the applicant “lived in the home more than six months of the year, or the applicant lists it as the address of his or her Federal Tax Return, or the applicant files a homestead exemption, or the applicant uses it as a voter registration address...”¹⁷⁴

Issues may arise regarding pre-disaster primary residence when an applicant is the process of moving from one residence to another and the move is interrupted by the disaster event. Questions of whether a damaged residence is a vacation or secondary home and not an eligible primary residence may also arise, especially in Sun Belt areas such as Arizona or Florida with sizable “snowbird” populations. There may also be issues regarding whether student housing is an applicant’s primary residence. See text box regarding IHP Eligibility for Students in Dorms at the end of this section.

ii) Displacement

A displaced applicant is one whose primary residence is uninhabitable, inaccessible, made unavailable by a landlord (to meet the landlord’s own disaster housing need) or not “functional”¹⁷⁵ as a direct result of the disaster and who has no other housing available in the area, such as a secondary home or vacation home within a “reasonable commuting distance”¹⁷⁶ to the disaster area.¹⁷⁷

An applicant with adequate rent-free housing accommodations will not be eligible for housing assistance.¹⁷⁸ An applicant who owns available rental property that meets the applicant’s temporary housing needs will also not be eligible for housing assistance.¹⁷⁹ An applicant who evacuated the residence in response to official warnings as a precautionary measure and

¹⁷⁴ See Application/Registration for Disaster Assistance, Form 009-0-1, p. 2: Application/Registration for Disaster Assistance
<https://intranet.fema.net/org/ms/ocao/IMD/orm/Pages/Forms.aspx>Instructions, note 16

¹⁷⁵ Meaning an item or home that is capable of being used for its intended purpose. 44 C.F.R. § 206.111. *Definitions*.

¹⁷⁶ See 44 C.F.R. § 206.111.

¹⁷⁷ See 44 C.F.R. §§ 206.111 and 206.113(a)(8)-(9) and (b)(3).

¹⁷⁸ *Id* at 206.113(b)(2).

¹⁷⁹ *Id* at 206.113(b)(3).

who is able to return to the residence immediately after the disaster incident will not be eligible for housing assistance.¹⁸⁰

iii) Uninhabitable

A residence (dwelling)¹⁸¹ is considered “uninhabitable” for purposes of housing assistance if it is not:

- safe, i.e., secure from disaster-related hazards or threats to occupants;¹⁸²
- sanitary, i.e., free of disaster-related health hazards;¹⁸³ or
- fit to occupy¹⁸⁴
- as a result of damage caused by a major disaster.¹⁸⁵

The habitability for an owner-occupied residence is assessed at the time of the incident, while it is assessed at the time of the inspection for a renter-occupied residence. It is presumed that an owner-occupant (eligible for all forms of housing assistance) whose residence is damaged will commence repairs immediately and will thus have incurred eligible out-of-pocket repair expenses by the time of the inspection, while a renter who is not eligible for repair or replacement assistance will not have such out-of-pocket expenses at the time of inspection.

A renter may, however, be able to establish out-of-pocket temporary housing expenses because of displacement while repairs were made by the landlord to the residence prior to the inspection.

¹⁸⁰ *Id* at 206.113(b)(4).

¹⁸¹ *Id* at 206.111.

¹⁸² *Id*.

¹⁸³ *Id*.

¹⁸⁴ *Id*.

¹⁸⁵ Stafford Act § 408(b)(1), 42 U.S.C. § 5174(b)(1). Note that although IHP is a major disaster program, it can be authorized for an emergency declaration. *See* 42 U.S.C. § 5192(a)(6).

“Deferred Maintenance” and the *Lupe* Case

There has been one significant case on the habitability of an applicant’s primary residence. In *La Union Del Pueblo Entero (LUPE) v. Fed. Emergency Mgmt. Agency*,¹⁸⁶ LUPE applicants sought disaster housing assistance after Hurricane Dolly.

FEMA denied some applicants’ housing assistance because FEMA determined the damage was not a result of the storm; thus, any damage present was pre-existing. Among other claims, the LUPE applicants challenged the sufficiency of FEMA’s regulations governing housing repair assistance and claimed that the regulations should state with particularity the criteria used to determine whether damage was disaster related.

Initially, the District Court for the Southern District of Texas enjoined FEMA to: (1) publish definite and ascertainable criteria, standards, and procedures for determining eligibility for relief assistance; and (2) reconsider LUPE applicants’ applications for housing assistance under the new criteria, standards, and procedures. On appeal, the Fifth Circuit determined that in creating FEMA’s program, *Federal Assistance to Individuals and Households*, Congress required FEMA to promulgate standards and criteria for housing assistance through regulations but did not require any level of specificity in the regulations. The court further found that FEMA had discretion to decide how specific its regulations would be and noted that responding to disasters requires a degree of flexibility that the regulations appropriately recognize. Accordingly, the Fifth Circuit concluded that the district court had abused its discretion in issuing the preliminary injunction, and remanded the case to the district court for further proceedings.

Upon remand, the District Court has recently ruled on summary judgment that FEMA relied upon an unpublished deferred maintenance (pre-existing damage) rule that should have been published prior to it going into effect due to the substantial and adverse effect on the public. The court invalidated FEMA’s use of this “rule” for the disaster. At present, the court is determining what its final judgment will be and what remedy to provide plaintiff applicants. The IA program no longer uses the term “deferred maintenance.”

¹⁸⁶*La Union Del Pueblo Entero (LUPE) v. Fed. Emergency Mgmt. Agency*, 2008 U.S. Dist. LEXIS 102978 (S.D. Tex. Dec. 17, 2008); motion denied by, injunction granted at *LUPE v. FEMA*, 2009 U.S. Dist. LEXIS 40368 (S.D. Tex. May 13, 2009); vacated by, remanded by *LUPE v. FEMA*, 608 F.3d 217, 2010 U.S. App. LEXIS 11242 (Fifth Cir. Tex. 2010).

On October 30, 2013, partially in response to the issues raised in LUPE, FEMA published a final rule that clarified the eligibility criteria for repair, replacement, and housing construction assistance.¹⁸⁷

¹⁸⁷ 44 C.F.R. § 206.117. *See also* Final Rule, *Housing Assistance due to Structural Damage*. 78 FR 66856, Nov. 7, 2013.

FEMA's Promulgation of IHP Regulations and the *Barbosa* case

A recent D.C. District Court upheld FEMA's promulgation of its IHP regulations as consistent with requirements found in the Administrative Procedure Act (APA).¹⁸⁸

Plaintiffs included 26 individuals whose homes were damaged during a disaster and applied to FEMA for home repair assistance under the IHP, but had their applications denied in whole or in part. Plaintiffs alleged FEMA violated APA requirements by not disclosing the legal standards it used to evaluate their applications or the reasons for denying them full relief. The suit compelled FEMA to articulate those standards, to shed light on the IHP process, and to reconsider their applications. Plaintiffs sought the court to order FEMA to promulgate regulations that define eligibility criteria for home repair assistance relief under the IHP, detail the process for appealing application denials, and ensure the equitable and impartial administration of the IHP.

Upon FEMA's filing of its Motion to Dismiss, the Court dismissed the case entirely holding that it lacked subject matter jurisdiction as FEMA has discretion pursuant to Section 305 of the Stafford Act (42 U.S.C. § 5148) to promulgate the three regulations at issue in the suit.¹⁸⁹ It held the Stafford Act vests discretion in FEMA to promulgate rules and regulations for the IHP and FEMA's promulgation of such rules and regulations is the type of discretionary agency action shielded from court review.

Further, the Court held that even if it did have jurisdiction to hear Plaintiffs' dispute, FEMA's IHP regulations constitute reasonable interpretations of the Stafford Act.

In response to the Plaintiffs' Motion for Reconsideration of the Court's ruling, the Court denied the motion and expanded its original ruling explicitly holding that FEMA has discretion under the Stafford Act to decide whether or not to publish a rule or policy via the APA notice and comment requirements. Notably, the Court specifically stated that it was not following the 5th Circuit's decision in the *LUPE v. FEMA* case, where the 5th Circuit held that the Stafford Act's discretionary function exception did not present a barrier to a failure-to-publish claim under the APA.

The Plaintiffs appealed the decision to the D.C. Circuit Court of Appeal that is pending review.

iv.) Inaccessible

The Stafford Act provides that housing assistance may be provided with respect to individuals with disabilities who are displaced or whose pre-disaster primary residences are rendered inaccessible *or* uninhabitable as a result of disaster caused damage.¹⁹⁰ FEMA's regulations apply the inaccessible basis for housing assistance to all applicants for housing whose primary residence is rendered inaccessible due to disaster caused damage.¹⁹¹

A residence is considered "inaccessible" if, as a result of the disaster, the applicant cannot reasonably be expected to gain entry to his or her pre-disaster residence due to the disruption or destruction of access routes or because of other impediments to access or restrictions placed on movement by a responsible official due to continued health, safety, or security problems.¹⁹²

IHP Eligibility for Students in Dorms

IHP assistance, housing, and ONA for students living in campus-affiliated housing or dormitories (on or off campus) during a disaster must be addressed in an appropriate manner to minimize or prevent duplication of benefits when processing student disaster-related unmet needs. Issues may be raised regarding insurance coverage (including coverage on a parent's homeowner's policy), continuing school obligation to provide housing,¹⁹³ and whether the housing can be considered the primary residence of the student.

1. Temporary Housing Assistance: IHP may provide Housing Assistance, such as Rental Assistance, when a student's primary residence is damaged or destroyed.

¹⁹⁰ 42 U.S.C. § 5174(b)(1).

¹⁹¹ 44 C.F.R. § 206.114(a) *Conditions of eligibility* (8): "With respect to housing assistance, if the primary residence has been destroyed, is uninhabitable, or is inaccessible..." See also § 206.111: "Displaced applicant means one whose primary residence is uninhabitable, inaccessible..."

¹⁹² 44 C.F.R. § 206.111. *Definitions*

¹⁹³ Note that temporary facilities and permanent repair/replacement of damaged student housing may be provided under the PA program, subject to the eligibility requirements of that program.

- a. In most cases, a dormitory or student housing is considered temporary and does not meet the definition of a primary residence; therefore, Rental Assistance is not initially provided unless the student can establish independent status.¹⁹⁴
 - b. Students living in off-campus/non-school-affiliated housing may be eligible for rental assistance if displaced from their pre-disaster primary residence.
2. ONA: all students who reside in dormitories or student housing at a college, university, or other institutions of higher learning may be eligible for ONA, irrespective of whether such housing is considered their primary residence.
 - a. Students, regardless of roommate status, may be eligible for uninsured damaged personal property even though their school living arrangement is not their primary residence. If found eligible, assistance is limited to those items an individual student brought with them to school and excludes items provided by the school.
 - b. Students may be eligible for medical, dental, funeral, transportation, and moving and storage expenses without regard to the type of pre-disaster housing.

¹⁹⁴ “Independent status” refers to financial independence from parent(s) and/or guardian(s), such as to indicate that the student does not have primary residence elsewhere and is responsible for his or her own living expenses; is at least age 24 by December 31 of the award year; was married prior to the disaster; is in a masters or doctorate program; has legal dependents; is an orphan or ward of the court; is on active military duty; is a military veteran; or has documented determination of independent status by a financial aid administrator. See the *IHPUG*, Chapter 2, Section II(F) *Students, Independent*, p. 23.

3. Unmet Needs - Insurance and Other Sources of Funding

IHP provides assistance to eligible individuals and households for their uninsured or under-insured disaster-related necessary expenses and serious needs that they are unable to meet through other means,¹⁹⁵ which includes monetary or in-kind contributions from voluntary or charitable organizations, insurance, other governmental programs, or any sources other than those of the applicant.¹⁹⁶ See discussion on *Duplication of Benefits (DOB) Prohibition and the Sequence of Delivery* later in this chapter regarding treatment of assistance from other means.

a. Applicants without Insurance

FEMA may provide financial assistance to applicants who do not have insurance for most of their verified housing losses up to the maximum allowable grant for the fiscal year without requiring the applicant to seek assistance from other sources, such as the SBA.¹⁹⁷ In addition, if an applicant's eligible disaster-related losses exceed the amount of IHP repair or replacement assistance, the applicant may apply for a loan from the SBA to help with additional needs, including additional repair or replacement costs.

b. Applicants with Insurance

Under certain conditions set forth in FEMA regulations, FEMA may provide assistance to applicants who have insurance.¹⁹⁸ For example, if an applicant's insurance settlement is delayed, FEMA may provide assistance if the applicant agrees to repay FEMA from insurance proceeds that the applicant receives later.¹⁹⁹ In addition, FEMA may provide assistance when insurance proceeds are less than the maximum amount of assistance

¹⁹⁵ Stafford Act § 408(a)(1), 42 U.S.C. § 5174(a)(1) and 44 C.F.R. § 206.110(a).

¹⁹⁶ 44 C.F.R. § 206.111. Definitions, Assistance from other means.

¹⁹⁷ See Stafford Act §§ 408(a)(2) and (c)(2)(B); 42 U.S.C. §§ 5174(a)(2) and (c)(2)(B).

¹⁹⁸ 44 C.F.R. § 206.113(a) (2)–(6).

¹⁹⁹ *Id.* at § 206.113(a) (3).

FEMA can authorize and the disaster survivor continues to have necessary expenses or serious needs.²⁰⁰

E. The Duplication of Benefits (DOB) Prohibition and the Sequence of Delivery

The Stafford Act includes a specific provision prohibiting the duplication of federal benefits.²⁰¹ Every agency in the federal government must assure that no one receives duplicate assistance for any part of a loss for which the individual or business has received financial assistance under any other program, from insurance, or from any other source.²⁰²

FEMA's implementing IHP regulations provide that FEMA will not provide IHP assistance when any other source has already provided such assistance or when such assistance is available from any other source. In the instance of insured applicants, FEMA will provide IHP assistance only when:

- Payment of the applicable benefits are significantly delayed;
- Applicable benefits are exhausted;
- Applicable benefits are insufficient to cover the housing or other needs; or
- Housing is not available on the private market.²⁰³

The duplication of benefits (DOB) prohibition essentially means that FEMA must coordinate the provision of assistance with other entities, as

²⁰⁰ So, if the applicant's insurance proceeds are \$30,000 but the verified loss is \$35,000, the applicant may be eligible for the \$5,000 shortfall in repair assistance because the insurance proceeds are less than the IA max grant of \$33,300 for FY17. However, if the insurance settlement is, for example, \$50,000, and the verified loss is \$55,000, FEMA's regulations do not allow it to provide the \$5,000 shortfall because the insurance proceeds exceed the max IA grant. *Id.* at 206.113(a) (4) and (a) (6).

²⁰¹ Stafford Act § 312, 42 U.S.C. § 5155.

²⁰² *Id.*

²⁰³ 44 C.F.R. § 206.110(h)(1)-(4).

well as take insurance coverage into consideration. The most important other entities are the SBA and nonprofit voluntary organizations. See Section IV, *IHP: Other Needs Assistance (ONA)*, including Table 6-1, earlier in this chapter, which depicts the internal IHP Sequence. FEMA's regulations provide a sequence of delivery scheme to allow each indicated agency or organization to deliver its assistance without regard to duplication later in the sequence.²⁰⁴

The usual order for delivery of services is:²⁰⁵

- Volunteer agencies' emergency assistance; homeowner and personal property insurance (including flood insurance); and FEMA emergency assistance;
- Housing assistance (temporary housing, repair, replacement, and permanent/semi-permanent housing assistance);
- Non-SBA dependent ONA (medical, dental, funeral, child care, other);²⁰⁶
- SBA disaster loans;

²⁰⁴ 44 C.F.R. § 206.191(d)(3)(i).

²⁰⁵ 44 C.F.R. § 206.191(d)(2). See also the Sequence of Delivery Chart at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Documents/IHP%20Sequence%20of%20Delivery.pdf. Note that the listing contained in the regulation fails to account for the fact that there are two categories of ONA: Non-SBA dependent and SBA dependent. A better illustration of the sequence is contained in the cited chart. Also note that the reference in regulations at § 206.191(d)(2)(iii) to the Farmers Home Administration (FmHA) disaster loans is outdated. The former FmHA was part of the U.S. Department of Agriculture (USDA). Its housing and community programs transferred to the USDA Rural Development when the FMHA was fully terminated in 2006. See <https://www.fedhomeloan.org/usda-home-loan-information-resources/>.

²⁰⁶ For ONA, eligibility for medical, dental, child care, and funeral expense is not dependent on an applicant going to SBA for a loan before seeking assistance from FEMA. All other ONA categories require that the disaster survivor go to SBA first for such items, such as clothing, household items, moving and storage, and essential tools.

- SBA dependent ONA (personal property, moving and storage, transportation, and group flood insurance) for applicants who do not qualify for an SBA loan;
- Voluntary agencies' "additional assistance" programs and unmet needs committees; and
- The Cora Brown Fund.

The sequence order thus determines what other resources the agency or organization must consider before it provides assistance.²⁰⁷ The Stafford Act prohibits disaster survivors from collecting reimbursement from two different sources for the same loss, or a "duplication of benefits."²⁰⁸

In very large disasters, FEMA may provide rental assistance to eligible disaster survivors within 72 hours because it appears from the level of devastation that the disaster survivors will receive their insurance assistance significantly later. However, FEMA does not immediately provide funds for insurable property losses, such as repair or replacement housing assistance, to applicants who indicate that they have insurance covering their home when they register for FEMA assistance.

If applicants indicate they do not have insurance and turn out to be mistaken, a duplication with insurance is more likely to arise. Moreover, housing assistance, including repair or replacement assistance, will ordinarily not be provided until a FEMA housing inspection takes place.

If an applicant receives both an insurance settlement and FEMA assistance, FEMA will review the two along with the applicant's FEMA verified loss or unmet need and the statutory cap in effect to determine whether the settlement covers the same loss or damage for which the survivor received assistance from FEMA. In that case, the applicant must return the FEMA assistance because it is considered duplicate benefits in violation of the Stafford Act prohibition.²⁰⁹

²⁰⁷ Stafford Act § 312, 42 U.S.C. § 5155.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

Military Personnel and Military Civilian Employees²¹⁰

There may be duplication of benefits issues regarding Department of Defense (DoD) assistance available to active duty military and military civilian employees for disaster-related losses and expenses, depending on whether the applicant resides in military housing and the nature of the expense.

Some common forms of DOD assistance include:

Military Personnel and Civilian Employees' Claims Act Assistance: for personnel residing in military housing, their disaster-related personal property losses may be considered a DOB for ONA personal property losses.

Basic Allowance Housing: an unrestricted housing allowance not considered a DOB for housing assistance.

Safe Haven Allowance: to assist with disaster-related housing assistance, may constitute a DOB for housing assistance.

F. National Flood Insurance Program (NFIP) Coverage Requirement

Disaster applicants seeking housing repair or replacement assistance or ONA for damaged real or personal property located in a designated Special Flood Hazard Area (SFHA)²¹¹ are subject to National Flood Insurance Reform Act of 1994 (NFIRA)²¹² flood insurance requirement to obtain *and* maintain flood insurance.²¹³

FEMA will not provide disaster assistance for flood-damaged insurable real and personal property located in an SFHA unless the community where the property is located is participating in the National Flood

²¹⁰ See the IHPUG, Chapter 2, Section II(E) *Military Personnel*, p. 22.

²¹¹ An "Area of special flood hazard" is the land in the floodplain within a community subject to a 1% or greater chance of flooding in any given year (also known as a 100-year floodplain). See 44 C.F.R. § 59.1 *Definitions: Area of special flood hazard* and *Special Flood Hazard Area*.

²¹² National Flood Insurance Reform Act of 1994 (NFIRA), as amended, Pub. L. No. 102-125; See 42 U.S.C. § 4001-4129.

²¹³ See 42 U.S.C. § 5154b and 44 C.F.R. § 206.110(k) and 206.113(b)(7).

Insurance Program (NFIP) at the time of the declaration.²¹⁴ However, the state may ask for an extension of time for FEMA to accept IHP applications and process applications if the community qualifies for and enters the NFIP during the six months following the declaration.²¹⁵

The NFIRA requirement applies only to real and personal property that is in a designated SFHA and that can be insured under the NFIP.²¹⁶ ONA recipients may be eligible for Group Flood Insurance Policy (GFIP) coverage to meet their initial obtain and maintain flood insurance requirements for their flood-damaged property. See discussion in *Group Flood Insurance Policy (GFIP)* under ONA later in this chapter for more information.

An applicant who had a prior NFIRA requirement for federal disaster assistance such as IHP or an SBA loan is ineligible for future federal assistance for flood-damaged real and personal property if he or she did not obtain and maintain flood insurance.²¹⁷ The applicant may only be eligible for medical, dental, child care, funeral, transportation, uninsurable real property, and rental assistance and any loss that was not flood related.²¹⁸

Duration of flood insurance coverage requirement:²¹⁹

- Homeowner applicant: must maintain flood insurance coverage at the address of the flood-damaged property for as long as the address exists and is in the SFHA. The requirement is reassigned to any subsequent owner of the flood-damaged address.²²⁰
- Renter applicant: must maintain coverage for personal property for as long as the renter resides at the flood-damaged

²¹⁴ See 44 C.F.R. §§ 206.110(k)(2) and 206.113(b)(7).

²¹⁵ *Id.*

²¹⁶ *Id.* Note that homeowners' insurance virtually never includes flood insurance.

²¹⁷ 42 U.S.C. § 4106(a). See also, 44 C.F.R. § 206.110(k) and 206.113(b)(8).

²¹⁸ 44 C.F.R. § 206.113(b)(7).

²¹⁹ Note SBA flood insurance coverage requirements are for the life of the loan.

²²⁰ 44 C.F.R. § 206.110(k)(3)(A).

rental unit. The restriction is lifted once the applicant moves from the unit.²²¹

- Replacement: an applicant who uses financial disaster assistance to purchase a dwelling in an SFHA must maintain coverage on the dwelling for as long as the dwelling exists and is in the SFHA. The requirement is reassigned to any subsequent owner of the dwelling.²²²

III. IHP Housing Assistance (HA) Program

One of FEMA's basic principles is to provide assistance to disaster applicants as soon as possible after a declared disaster. When an applicant registers for assistance with FEMA and has met the basic requirements for eligibility, FEMA, after a housing inspection, may provide funds to assist with housing repair or replacement and/or for rental assistance as temporary housing assistance.²²³ Multiple forms of assistance may be provided based on suitability and availability to meet the needs of the applicants.²²⁴

Temporary housing as well repair assistance is to be utilized to the fullest extent practicable before other types of housing assistance.²²⁵

A. Temporary Housing Assistance

FEMA may provide temporary housing assistance as either financial or direct assistance.²²⁶

When there is an insufficient supply of available housing resources for rent and applicants are unable to use financial assistance, FEMA may choose to implement a direct housing mission, which may require the provision of temporary housing units (THUs), including manufactured housing units (MHUs), or the use of the Multi-Family

²²¹ 44 C.F.R. § 206.110(k)(3)(B).

²²² 44 C.F.R. § 206.110(k)(3)(C).

²²³ Stafford Act § 408(c)(1)(A), 42 U.S.C. § 5174(c)(1)(A).

²²⁴ Stafford Act § 408(b)(2)(B), 42 U.S.C. § 5174(b)(2)(B).

²²⁵ 44 C.F.R. § 206.110(c).

²²⁶ Stafford Act § 408(c)(1)(A) and (B), 42 U.S.C. § 5174(c)(1)(A) and (B).

Lease and Repair (MLR) Program if more cost effective. These forms of assistance are contingent on an amendment to the FEMA-State/Tribe Agreement to clearly delineate respective roles and responsibilities.

In addition to its temporary housing programs, FEMA may utilize its authorities to implement the Disaster Housing Assistance Program (DHAP) through the U.S. Department of Housing and Urban Development (HUD) to assist applicants with their temporary housing needs.

1. Rental Assistance

a. Scope of Assistance

Applicants may use financial assistance to secure temporary housing such as a house, apartment, hotel, motel, manufactured home, recreational vehicle, or other readily fabricated dwelling available to be rented by the public and may include payments for utilities, excluding telephone service.²²⁷ Assistance may also include cost of any transportation, utility hookups, or unit installation for manufactured homes or recreational vehicles or for security deposits.²²⁸

In response to Hurricane Katrina and issues relating to utility costs and security deposits, the Post Katrina Emergency Management Reform Act (PKEMRA)²²⁹ amended the Stafford Act to allow for the payment of utility costs, excluding telephone service, and for the inclusion of security deposits.²³⁰

Financial assistance for temporary housing assistance may be used to pay for rent and basic utilities such as for heat, water, and electricity but not for telephone, cable television, or Internet service.²³¹ Please note that

²²⁷ Stafford Act § 408(c)(1)(A)(i), 42 U.S.C. § 5174(c)(1)(A)(i); *See also* 44 C.F.R. §206.117(b)(1)(i).

²²⁸ Stafford Act § 408(c)(1)(A)(ii), 42 U.S.C. § 5174(c)(1)(A)(ii).

²²⁹ Pub. L. 109–295, 120 STAT. 1452 (Oct.4, 2006).

²³⁰ Stafford Act § 408(c)(1)(A)(i) and (ii), 42 U.S.C. § 5174(c)(1)(A)(i) and (ii).

²³¹ *IHPUG*, Chapter 4, Section II, *Rental Assistance*, p. 45.

FEMA's regulations regarding utility costs and security deposits²³² (issued in 2002) have not been revised to reflect these PKEMRA statutory changes and do not reflect current statutory authority.²³³

b. Time Period and Amount of Assistance

FEMA applicants may receive financial assistance to reimburse lodging expenses and/or rental assistance for up to 18 months but subject to the max IA grant cap for IHP financial assistance.²³⁴ FEMA bases the amount of assistance on the HUD fair market rent (FMR) for the county within the declared disaster area where the primary residence is located.²³⁵ FEMA may authorize emergency exceptions to the published HUD FMR rate when such an action is necessary to counter elevated housing market rates that have adversely impacted the availability of FMR affordable rental resources for applicants.²³⁶

While FEMA determines rental assistance with reference to HUD's FMR, FEMA's rental assistance need not be identical to HUD's FMR. *Watson v. FEMA* upheld FEMA's broad discretion in calculating what FMR it will use in affected localities.²³⁷

c. Assistance for One Temporary Residence for the Household

All members of the pre-disaster household will be included in a single registration, and FEMA will provide assistance for one temporary housing

²³² 44 C.F.R. §206.117(b)(1)(i)(C) and (D).

²³³ For example, FEMA no longer requires the return of security deposits as provided for in 44 C.F.R. §206.117(b)(1)(i) (D). *See also* the FEMA Memo, *Processing Guidance for Allowing Security Deposits as Allowable Costs under Financial Temporary Housing Assistance*, dated Jan. 11, 2013 at https://intranet.fema.net/org/orr_programs/recovery_programs/ia_programs/Policy%20Repository/Forms/AllItems.aspx

²³⁴ Stafford Act § 408(h), 42 U.S.C. § 5174(h). 44 C.F.R. § 206.110(b).

²³⁵ *See* 44 C.F.R. § 206.117(b)(1)(i)(B).

²³⁶ *See IHPUG*, Chapter 4, Section IV, *Rental Assistance Rate Increase*, p 50.

²³⁷ *Watson v. FEMA*, C.A. No. H-06-1709, 2006 U.S. Dist. Lexis 34414 (S.D. Tex.); *injunction granted*, *Watson v. FEMA*, 438 F. Supp. 2d 638 (S.D. Tex.); *vacated, motion denied*, *Watson v. FEMA*, 2006 U.S. App. Lexis 29392 (Fifth Cir Sept 6, 2006).

residence.²³⁸ A household is defined as all persons, including children, who lived in the pre-disaster residence as well as any persons, such as infants, spouse, or part-time residents who were not present at the time of the disaster but who are expected to return during the assistance period.²³⁹

However, the Regional Administrator or the RA's designee may determine that the size or nature of a household requires that FEMA provide assistance for more than one residence.²⁴⁰ For example, if the assistance provided to the household is not shared, or if the new residence is too small or causes undue hardship, members of the household may request assistance separate from their pre-disaster household.²⁴¹

d. Continued Assistance

After the individual or household receives an initial amount of rental assistance, FEMA may provide additional assistance if the applicant continues to require housing assistance and when adequate, alternative housing²⁴² is not available or when the permanent housing plan²⁴³ has not been fulfilled through no fault of the applicant.²⁴⁴ Applicants are required to provide verifiable rental receipts; express an ongoing need for housing assistance, including lack of financial ability to pay housing costs;²⁴⁵ and demonstrate action towards achieving housing self-sufficiency to be certified for continued assistance.²⁴⁶

²³⁸ 44 C.F.R. § 206.117(b)(1)(i)(A).

²³⁹ 44 C.F.R. § 206.111. *Definitions: Household.*

²⁴⁰ 206.117(b)(1)(i)(A)

²⁴¹ See explanation of Household Composition under Conditions and Limitations of IHP Assistance at <https://www.fema.gov/media-library/assets/documents/124228>.

²⁴² Housing that accommodates the occupants' needs is within normal commuting patterns or reasonable commuting distance of work, school, or farming activities contributing at least 50% of household income and is within the occupant's financial ability. See 44 C.F.R. § 206.111, *Definitions*.

²⁴³ A realistic plan that within a reasonable time frame puts the applicant back into permanent housing that is similar to their pre-disaster housing situation. See 44 C.F.R. § 206.111, *Definitions*.

²⁴⁴ 44 C.F.R. § 206.114(a) and (b)(1) – (4).

²⁴⁵ See 44 C.F.R. § 206.111, *Definitions*.

²⁴⁶ 44 C.F.R. § 206.114(a) and (b)(1) – (4). See also *IHPUG*, Chapter 4, Section III, *Continued Rental Assistance*, p. 46.

2. Direct Housing Operations Program (DHOP)

FEMA may lease or purchase THUs to provide directly to eligible disaster survivors.²⁴⁷ THUs may include a house, apartment, cooperative, condominium, MHUs, or other dwelling acquired by purchase or lease and made available to eligible applicants for a limited period of time.²⁴⁸

Direct housing missions are expensive. Beyond the financial commitment, they require a significant commitment of time and personnel, often for much longer than the 18-month period of assistance. An in-depth examination of alternatives to the provision of THUs is appropriate before direct housing for survivors is undertaken.

The Stafford Act requires that FEMA work to use existing housing resources before providing any type of THU.²⁴⁹ If local housing resources are inadequate or if the community is unsafe for survivors, FEMA may, with the support of state and local partners, provide THUs to eligible individuals and households.²⁵⁰

FEMA's decisions, in concert with the state or tribe, concerning overall housing options (such as whether to implement a direct housing mission using THUs or to rely on financial assistance or other forms of temporary housing) are generally made for all of the households in a particular area. For example, in Hurricanes Ike and Gustav, FEMA and the State of Texas decided to use MHUs in the Beaumont and Port Arthur areas because there were insufficient rental resources available. Applicants in much of the rest of Texas received rental assistance because rental resources were available.

Although FEMA bears the entire cost of providing disaster housing, the most successful recoveries from disasters occur when state and local partners fully support a direct housing mission.

²⁴⁷ Stafford Act § 408(c)(1)(B)(i), 42 U.S.C. § 5174(c)(1)(B)(i).

²⁴⁸ The Stafford Act refers to temporary housing units under its temporary housing direct assistance, site placement, and disposal authorities.

²⁴⁹ *Id.*

²⁵⁰ See in general, *IHPUG*, Chapter 5 *Housing Assistance (Direct)*, p.59.

The Stafford Act provides four site options for placing THUs:²⁵¹

- Commercial sites. FEMA may lease vacant pads in existing commercial sites provided a site inspection determines the pads are suitable for THUs. These locations must meet floodplain management and other environmental compliance requirements, which are addressed in this section.
- Private sites provided by the disaster survivors. Placement on a private site is cost effective, reduces the risk of further damage, and facilitates applicant repair of the damaged dwelling. FEMA requires a private site feasibility inspection, separate from the previously discussed home inspection, to ensure that all necessary utilities are operational and that the unit will fit in the space available.
- Group site provided by the state or local government, which may include publicly owned park land with adequate utilities availability. Note that if cost effective and timely, FEMA may undertake activity to develop the group site, including installation or repairs to essential utilities.
- FEMA-developed group sites on property that FEMA leases and develops to accommodate THUs.

As noted earlier, FEMA may place the THU on the survivor's private property, on a pre-existing commercial pad, on a group site local officials approve and may provide and that FEMA constructs and maintains or, as a last resort, on a group site provided by FEMA.

In addition, it is important to consider the availability of necessary wrap-around services in planning for group sites.²⁵²

²⁵¹ Stafford Act § 408(d)(1)(A)(iii), 42 U.S.C. § 5174(d)(1)(A)(iii). *See also* 44 C.F.R. § 206.117(b)(ii)(E).

²⁵² Wrap-around services include basic social services, access to transportation, police/fire protection, emergency/health care services, communications, utilities, grocery stores, child care, and educational institutions. *See IHPUG*, Chapter 5, Section V(B), *Wrap-around Services*, p. 79.

a. Environmental and Historic Preservation Site Considerations

Prior to placing any THU on any private or commercial site, FEMA must comply with several federal, state, and local requirements.²⁵³

i) State and Local Codes and Ordinances

State laws and local codes may prohibit locating mobile homes or smaller park models on certain property or in certain areas. FEMA will work with city, tribal, county, and state officials to seek waivers of these provisions.

Example of Waiving Local Codes

After Hurricane Ike in 2008, FEMA worked with local officials from Texas Gulf Coast communities where waivers of local ordinances were necessary to permit placement of THUs near disaster-damaged residences so disaster survivors could more quickly rebuild their properties.

ii) National Environmental Policy Act (NEPA)

Executive Order 11991²⁵⁴ directs federal agencies to evaluate and inform the public about the environmental impacts of their activities pursuant to the National Environmental Policy Act (NEPA).²⁵⁵ FEMA is the only federal agency with a statutory exclusion from compliance with NEPA for some of its activities. See Chapter 8, *Environmental and Historic Preservation Laws*, for a more detailed discussion of NEPA. Pursuant to several sections of the Stafford Act, disaster assistance, “which has the effect of restoring a facility substantially to its condition prior to the

²⁵³ 44 C.F.R. § 206.117(b)(1)(ii)(C); see DOLR Chapter 8, *Environmental and Historic Preservation Laws*.

²⁵⁴ Exec. Order No. 11991, 42 FR 26967.

²⁵⁵ 42 U.S.C. § 4231, *et seq.*

disaster or emergency,” is exempt from compliance with NEPA requirements.²⁵⁶

Temporary housing at group sites is not exempt from compliance with NEPA.²⁵⁷ In practice, this lack of an exemption means that FEMA must prepare an Environmental Assessment²⁵⁸ prior to creating a group site for THUs. When FEMA places THUs on private residential sites, it does not normally do an Environmental Assessment.²⁵⁹

iii) Floodplain Management and Protection of Wetlands

Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands) require that FEMA avoid adverse impacts to floodplains and wetlands to the maximum extent possible in carrying out temporary housing activities.²⁶⁰ FEMA’s implementing regulations contain different requirements for placing MHUs on group sites compared to private or commercial sites.²⁶¹ FEMA must also meet any more restrictive state, tribal, or local floodplain management standards for group, individual, or

²⁵⁶ Stafford Act § 316, 42 U.S.C. § 5159. These are: § 402, 42 U.S.C. § 5170a (General Federal Assistance); § 403, 42 U.S.C. § 5170b (Essential Assistance); § 406, 42 U.S.C. § 5172 (Permanent Work); § 407, 42 U.S.C. § 5173 (Debris Removal); § 422, 42 U.S.C. § 5189 (Simplified Procedures); and § 502, 42 U.S.C. § 5192 (Federal Emergency Assistance).

²⁵⁷ See 44 C.F.R. §206.117(b)(1)(ii)(C), which requires compliance with 44 C.F.R. Part 10 (2015), *Environmental Considerations*. Part 10 was rescinded in 2016 and replaced with FEMA Directive (FD) 108-1, *Environmental Planning and Historic Preservation Responsibilities and Program Requirements*, issued 08/22/16, and available under Directives at

https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx.

²⁵⁸ An Environmental Assessment is a concise public document discussing the purpose and need for the proposed action; a description of the proposed action; alternatives considered; environmental impact of the proposed action and alternatives; listing of agencies and persons consulted; and a conclusion of whether to prepare a much more detailed and lengthy Environmental Impact Statement. 44 C.F.R. § 10.9.

²⁵⁹ 44 C.F.R. § 10.8(d)(xix)(D).

²⁶⁰ 44 C.F.R. §§ 9.1 to 9.3.

²⁶¹ See C.F.R. Part 9. The regulations provide that FEMA should analyze “group sites” using the 8-step process set forth in 44 C.F.R. §§ 9.6 to 9.12. Note that elevation to the base flood level is required. 44 C.F.R. § 9.11(d)(3). FEMA should analyze “private or commercial sites” using a modified process under 44 C.F.R. § 9.13(d); elevation up to the base flood level is required “to the fullest extent practicable” and in a manner consistent with the NFIP, 44 C.F.R. § 9.13(d)(4)(i) and (ii). See also *IHPUG*, Chapter 5, Section V(C), *Floodplain Management and EHP [Environmental and Historic Preservation] Considerations*, pp. 79-80.

commercial sites.²⁶² *See also* Chapter 8, *Environmental and Historic Preservation Laws*, which discusses floodplain requirements in detail.

iv) Coastal Barriers Resources Act (CBRA)

The Coastal Barriers Resources Act (CBRA)²⁶³ established the Coastal Barrier Resources System (CBRS) and Otherwise Protected Areas (OPAs), comprised of undeveloped coastal barriers along the Atlantic, Gulf, and Great Lakes coasts. The law encourages the conservation of hurricane-prone, biologically rich coastal barriers by restricting federal expenditures that encourage development, such as requiring federal flood insurance through the NFIP. CBRA is applicable to IHP repair/replacement assistance, and FEMA interprets CBRA as prohibiting it from locating a THU on an applicant's home site within the CBRS or OPA.²⁶⁴

No new expenditures or financial assistance may be made within the CBRS for construction, replacement, or repair.²⁶⁵ Financial assistance is defined as any form of federal loan, grant, grant guaranty, insurance, payment rebate, subsidy, or any other form of direct *or* indirect federal assistance.²⁶⁶ *See* Chapter 8, *Environmental and Historic Preservation Laws*, for a more detailed discussion of the CBRA.²⁶⁷

v) National Historic Preservation Act

FEMA activities must comply with its federal responsibilities set forth in the National Historic Preservation Act.²⁶⁸ While assistance under IHP will generally not affect historic properties and will therefore be exempt from historic review, ground disturbing activities and construction related to direct housing assistance, replacement housing, and permanent housing

²⁶² *See* 44 C.F.R. § 9.11(d)(6) and 44 C.F.R. § 9.13(d)(4)(ii).

²⁶³ Pub. Law 97-348 (1982), 16 U.S.C. §§ 3501, *et seq.* *See* FEMA's implementing regulations at 44 C.F.R. Part 206, Subpart J: 206.340-.349.

²⁶⁴ *See* the FEMA Coastal Barrier Resources Act Fact Sheet (Nov. 2011) at <https://www.fema.gov/media-library/assets/documents/17075>.

²⁶⁵ 44 C.F.R. § 206.344.

²⁶⁶ 44 C.F.R. § 206.342(f).

²⁶⁷ *See also* FEMA's implementing regulations for CBRA at 44 C.F.R. Part 206, Subpart J, 206.340-349.

²⁶⁸ National Historic Preservation Act §§ 106, 16 U.S.C. § 470f and 110, 16 U.S.C. § 470h-2.

construction may require review under this statute.²⁶⁹ One approach to assist with this requirement is to work with the state to establish a programmatic agreement regarding how it will work with FEMA to deal with historic preservation issues as they arise.²⁷⁰

FEMA must comply with state historic preservation laws as well. A federal district court previously enjoined FEMA where FEMA was alleged not to have properly consulted with the State Historic Preservation Officer.²⁷¹

b. THU Safety

i) A Case Study: Hurricane Katrina

FEMA issued approximately 140,000 manufactured homes, travel trailers, and park model trailers to survivors in the unprecedented direct housing mission after Hurricanes Katrina and Rita in 2005. FEMA intended to house survivors in large mobile home sites set up across the Gulf Coast, but state and local officials wanted survivors located in or very near their devastated communities to encourage rapid rebuilding and recovery efforts. FEMA modified the housing plan to accommodate state and local concerns by placing MHUs on survivors' private property wherever feasible. In many cases, private property lot sizes were too small to accommodate a mobile home, so FEMA provided smaller travel trailers instead. As a result, the majority of MHUs used in the direct housing mission after Katrina and Rita were travel trailers.

Mobile homes are intended for long-term occupancy, and HUD regulates their construction and safety, including formaldehyde emissions from the materials used to construct a mobile home. Travel trailers are smaller, transportable, and intended for occasional recreational use. At the time, there was no formaldehyde regulation or standard governing residential air quality for travel trailers.

²⁶⁹ 44 C.F.R. § 206.110(m).

²⁷⁰ 16 U.S.C. § 470.

²⁷¹ See *Haynes Blvd. Preservation Association v. Julich*, 143 F. Supp. 2d 628 (E.D. La. 2001). The federal district court enjoined FEMA for not having properly consulted with the State Historic Preservation Officer.

ii) Formaldehyde Standards for Composite Wood Products Act

In July 2010, Congress passed the Formaldehyde Standards for Composite Wood Products Act,²⁷² establishing national standards for formaldehyde emissions from various wood products of the type used in travel trailers²⁷³ based on similar standards adopted by the California Air Resources Board. The new standards will become effective six months after the Environmental Protection Agency (EPA) adopts regulations for testing and enforcement. At the time of printing, EPA has promulgated regulations on this subject, expected to publish in the *Federal Register* in December 2016.²⁷⁴ Please contact Office of Chief Counsel (OCC) for further details. The law also requires HUD to update its regulations for formaldehyde emission levels of products installed in manufactured homes.

FEMA's THUs meet HUD standards for formaldehyde in their construction.²⁷⁵

c. Ongoing Operations: Revocable License and Recertification of Eligibility

If FEMA determines that it is appropriate to assign a THU to an individual or household, the applicant must sign the Manufactured Housing Unit Revocable License and Receipt For Government Property (Revocable License), FEMA Form 009-0-5,²⁷⁶ which outlines FEMA's terms and conditions for participation in a direct assistance program, and FEMA's rights and responsibilities, as well as, the applicant's.

²⁷² Pub. L. 111-199 (2010), 15 U.S.C. § 2601 *note*.

²⁷³ Note that as a policy matter, FEMA no longer uses travel trailers as part of its THU inventory for temporary housing assistance.

²⁷⁴ See <https://www.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products>

²⁷⁵ See 24 C.F.R. §§ 3280.308-.309.

²⁷⁶ [https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Disaster%20Housing%20Operations%20Toolbox/FEMA%20Form%20009-0-5%20\(Previously%20FF%2090-69D\)%20English_Revision.pdf](https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Disaster%20Housing%20Operations%20Toolbox/FEMA%20Form%20009-0-5%20(Previously%20FF%2090-69D)%20English_Revision.pdf). The Spanish language form is FEMA Form 009-0-6 and is available at [https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Disaster%20Housing%20Operations%20Toolbox/FEMA%20Form009-0-6\(previously%20FF%2090-69D\)%20Spanish_Revision.pdf](https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Disaster%20Housing%20Operations%20Toolbox/FEMA%20Form009-0-6(previously%20FF%2090-69D)%20Spanish_Revision.pdf).

FEMA previously used lease agreements to house disaster survivors but now uses a revocable license to clarify that the relationship between FEMA and the disaster survivor is temporary and not one of landlord-tenant and that the disaster survivor should be working to move into a permanent housing situation in anticipation of the end of the housing program.

The Revocable License contains the following conditions:

- Acknowledgement that the unit is federal property provided as a discretionary benefit and that the government retains the right to revoke the license to use the unit at any time after written notice;
- The duty to meet all FEMA program eligibility criteria for continuing to occupy the unit;
- The duty to obtain and occupy permanent housing at the earliest possible time;
- The duty to comply with any enforcement or removal action;
- The duty to assign to FEMA any insurance benefits for temporary lodging that the applicant receives or to which he or she is entitled;
- The duty to pay monthly rent or penalty fees, if applicable;
- Acknowledgement that the applicant will be responsible for damage to the unit or for charges for enforcement actions; and
- The duty to comply with all rules listed in the license, all park or group site rules, and relevant ordinances for private property sites.

FEMA regulations require that all recipients of temporary housing assistance establish a permanent housing plan to obtain and occupy

permanent housing at the earliest possible time.²⁷⁷ FEMA monitors applicants' progress toward completion of their permanent housing plan through a periodic recertification process to ensure that they have a verifiable continued need for FEMA-provided temporary housing assistance.²⁷⁸ Recertification caseworkers meet periodically with applicants to review their progress in achieving their permanent housing plan.²⁷⁹

d. Ending a Direct Housing Mission

Terminating direct housing missions following large disasters can be very challenging when some individuals and households experience great difficulty transitioning back to self-sufficiency after the trauma of a major disaster. In some instances, FEMA must act to revoke the license and terminate an applicant's direct housing assistance prior to termination of the housing program overall. In other cases, FEMA must act because the program itself has terminated due to the lapse of the period of assistance.²⁸⁰

i) License Revocation

The Stafford Act and FEMA regulations authorize FEMA to terminate direct housing assistance to individuals and households living in FEMA THUs.²⁸¹ FEMA may initiate termination action for reasons that include but are not limited to:

- Ineligibility under IHP;²⁸²

²⁷⁷ 44 C.F.R. § 206.114(a). *See also* 44 C.F.R. § 206.111. *Permanent housing plan* means a realistic plan that, within a reasonable time frame, puts the disaster survivor back into permanent housing that is similar to his or her pre-disaster housing situation.

²⁷⁸ *Id.* at § 206.114(b). *See also IHPUG*, Chapter 5, Section III(B), *Recertification Process for Continued Assistance*, pp. 65-66.

²⁷⁹ *Id.*

²⁸⁰ *See IHPUG*, Chapter 5, Section III(E), *Reasons for Terminating Direct Temporary Housing Assistance*, p. 69.

²⁸¹ Stafford Act § 408, 42 U.S.C. § 5174(b), (i) and (j); 44 C.F.R. § 206.117(b)(1)(ii)(G).

²⁸² Examples of program ineligibility include failure to establish or work toward a permanent housing plan; failure to respond to recertification requests; abandonment of the unit; failure to verify identity/citizenship status; and primary residence not damaged.

- Adequate, alternate housing is available;²⁸³
- Fraud or misrepresentation;²⁸⁴
- General violations;²⁸⁵
- Major violations;²⁸⁶
- Expiration of assistance period;²⁸⁷
- Failure to pay rent after 18 months;²⁸⁸
- Expiration of the Period of Assistance.²⁸⁹

The currently available termination policies, procedures, and forms, including required notices and rights to appeal, are found on the IA intranet website.²⁹⁰

ii) Program Termination

The Stafford Act authorizes direct housing for 18 months following the date of declaration;²⁹¹ FEMA may extend that period if it is in the public interest due to extraordinary circumstances.²⁹² The RA or the RA's

²⁸³ 44 C.F.R. § 206.117(b)(1)(ii)(G)(2).

²⁸⁴ *Id.* § 206.117(b)(1)(ii)(G)(3).

²⁸⁵ *Id.* § 206.117(b)(1)(ii)(G)(4). General violations include unleashed or unattended pets, guests, or vehicles; parking violations; failure to keep premises clean and sanitary; excessive noise disturbing other occupants; and violation of lease or rental agreement. *See IHPUG*, Chapter 5, Section III(E), *Reasons for Terminating Direct Temporary Housing Assistance, General Violations*, p. 69.

²⁸⁶ *Id.* Major Violations or immediate threats to health and safety include criminal acts or a non-criminal act that threatens the immediate health or safety of the occupant or other persons in the area. *IHPUG*, Chapter 5, Section III(E), *Reasons for Terminating Direct Temporary Housing Assistance, Conduct Violations*, p. 69.

²⁸⁷ 42 U.S.C. § 5174(c)(1)(B)(iii); 44 C.F.R. § 206.110(e) and 44 C.F.R. § 206.117(b)(1)(ii)(G)(1).

²⁸⁸ *IHPUG*, Chapter 5, Section III(E), *Reasons for Terminating Direct Temporary Housing Assistance, General Violations*, p. 69.

²⁸⁹ 44 C.F.R. § 206.117(b)(1)(ii)(G)(1).

²⁹⁰ https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Pages/Housing.aspx

²⁹¹ Stafford Act § 408(c)(1)(B)(iii), 42 U.S.C. § 5174(c)(1)(B)(iii).

²⁹² *Id.*

delegated Disaster Recovery Manager must submit the request for extension to the Assistant Administrator for Recovery, preferably at least 90 days prior to the end of the assistance period to allow sufficient time for review and determination.

FEMA may charge up to FMR for continued THU occupancy after the 18-month period, and failure to pay rent is grounds for terminating further direct housing assistance.²⁹³ FEMA calculates FMR for a THU based on the HUD FMR for rental resources in the county or parish where the unit is located and based on the size of the unit.²⁹⁴ FEMA considers the ability to pay as well as monthly household income when adjusting the monthly rent amount.²⁹⁵

In addition to rent, FEMA charges a monthly penalty fee when an occupant remains in a THU after the initial or extended period of assistance has ended; when the temporary housing agreement or direct assistance has been terminated; or when an occupant who has purchased a THU fails to relocate the unit to an alternate location within 30 days of the sale as required. Furthermore, a damage fee may be charged when the occupant causes damage to the THU beyond normal wear and tear, due to negligence or violation of the terms and conditions of the temporary housing agreement.²⁹⁶

e. Disposing of THUs - Sales and Donations

i) Sales to THU Occupants

FEMA may sell the units that it has purchased for use as temporary disaster housing to the individual or household occupying the unit at a price that is “fair and equitable” if the occupant lacks permanent housing and has a site for the THU that complies with local codes and ordinances and

²⁹³ Stafford Act § 408(c)(1)(B)(iv), 42 U.S.C. § 5174(c)(1)(B)(iv). *See also IHPUG*, Chapter 5, Section III(D), *Rent Collection for FEMA Temporary Housing Unit*, p. 67-68.

²⁹⁴ 44 C.F.R. § 206.117(b)(1)(ii)(F).

²⁹⁵ *See IHPUG*, Chapter 5, Section III(D), *Rent Collection for FEMA Temporary Housing Unit*, p. 67-68; *See also*, definition of financial ability at 44 C.F.R. § 206.111.

²⁹⁶ *See* 44 C.F.R. § 206.117(b)(1)(ii)(H); *See also IHPUG*, Chapter 5, Section III(G). *Penalty Fees*, pp. 71-72.

regulations applicable to floodplain management and wetland protection.²⁹⁷

A THU occupant purchasing his or her unit must agree to obtain and maintain hazard insurance and flood insurance if the unit will be located in an SFHA.²⁹⁸

ii) Other Methods of Disposal

At the conclusion of a direct housing mission, FEMA sends used THUs to a temporary housing storage area, where FEMA personnel or contractors inspect them based on guidance from the Logistics Management Directorate to determine if the units should be disposed of or can be reused. The Stafford Act and FEMA regulations and policy set forth certain requirements for disposal of THUs through sale or donation.²⁹⁹

However, all of FEMA's sales to persons who were not occupants of the temporary housing go through the General Services Administration, the U.S. government agency with full authority and an established process to sell personal property.³⁰⁰

FEMA may also sell, transfer, or donate THUs to a state or other governmental entity, or a voluntary organization for the sole purpose of

²⁹⁷ 44 C.F.R. § 206.118(a)(1)(i). FEMA considers "fair and equitable" to be fair and equitable to both the applicant and the government.

²⁹⁸ Stafford Act § 408(d)(2), 42 U.S.C. § 5174(d)(2); 44 C.F.R. § 206.118(a)(1). *See also IHPUG*, Chapter 5, Section VI(B), *MHU Sales to Occupants*, pp. 81-84;

²⁹⁸ *Id.* § 408(d)(2)(A)(iv), 42 U.S.C. § 5174(d)(2)(A)(iv); 44 C.F.R. § 206.118(a)(1)(iii).

²⁹⁹ Stafford Act § 408(d)(2), 42 U.S.C. § 5174(d)(2); 44 C.F.R. § 206.118; *See also IHPUG*, Chapter 5, Section VI, *Disposing of MHUs through Sales to Occupants and Donations*, pp. 81-86.

³⁰⁰ Personal property is essentially everything that is not real estate. The Federal Management Regulations govern the disposal of personal property. *See* 41 C.F.R. Ch. 201, *et seq.*

providing temporary housing to survivors after a disaster or emergency, if the receiving entity agrees to certain conditions.³⁰¹

FEMA's policy on donated housing units sets forth the respective costs of the parties and requires that the recipient sign an agreement with FEMA establishing the conditions of the transfer, including a commitment that it will use the units for a minimum period of time as temporary housing for disaster survivors.³⁰²

3. Multi-Family Lease and Repair (MLR) Program

FEMA may also provide direct temporary housing assistance by entering into lease agreements with owners of multi-family rental property units and making repairs or improvements to make temporary housing available for individuals and households eligible for FEMA assistance.³⁰³ This is FEMA's Multi-Family Lease and Repair (MLR) Program, which is intended to make temporary housing available to eligible applicants who are unable to make use of financial temporary housing assistance due to a lack of available housing resources.³⁰⁴

The Sandy Recovery Improvement Act of 2013 (SRIA)³⁰⁵ amended the Stafford Act to authorize the lease of multi-family property units and the necessary repairs to make them suitable for use as temporary housing.³⁰⁶ FEMA may provide consideration to the property owner in the form of financial payments, or in the performance of repairs and improvements to the property.³⁰⁷ FEMA may contract for or issue a mission assignment

³⁰¹ The receiving agency must agree to comply with the nondiscrimination provisions of Stafford Act § 308, 42 U.S.C. § 5151, and to purchase hazard and flood insurance. 42 U.S.C. 5174(d)(2)(B)(ii); 44 C.F.R. § 206.118(a)(2)(1).

³⁰² IHPUG, Chapter 5, Section VI(C), *MHU Donations to Qualified Public Agencies and Private Organizations*, pp. 84-86.

³⁰³ 42 U.S.C. § 5174(c)(1)(B)(ii).

³⁰⁴ 42 U.S.C. § 5174(c)(1)(B). See IHPUG, Chapter 5, Section IV. *Multi-Family Lease and Repair (MLR)*, p. 73.

³⁰⁵ The Sandy Recovery Improvement Act (SRIA) Pub .L. 113-2 (2013). SRIA amended § 408(c)(1)(B) of the Stafford Act, and makes permanent a pilot program initiated by the Post Katrina Emergency Management Reform Act (PKEMRA), Pub. L. 109-295, giving FEMA explicit authority to lease and repair rental units for use as direct temporary housing.

³⁰⁶ See Stafford Act § 408(c)(1)(B)(ii), 42 U.S.C. § 5174(c)(1)(B)(ii).

³⁰⁷ See IHPUG, Chapter 5, Section IV. *Multi-Family Lease and Repair (MLR)*, pp. 73-76.

tasking to another federal agency such as the U.S. Army Corps of Engineers to do the necessary work.³⁰⁸

MLR may be authorized by the Assistant Administrator for Recovery³⁰⁹ when it is determined to be a cost-effective alternative to other temporary housing options, such as the provision of THUs under the Direct Housing Operations Program (DHOP).³¹⁰ It is not intended to repair or improve individual units to re-house existing tenants.³¹¹ Temporary Housing provided through this provision is subject to the 18-month period of assistance,³¹² and applicants are subject to the general eligibility criteria and generally to the termination procedures discussed earlier under the DHOP.

- To be considered for MLR, properties must meet the following requirements:³¹³
- The property must have previously been used as multi-family housing;
- The property must be located in areas covered by a major disaster or emergency declaration;
- FEMA will only authorize repairs or improvements to properties to the extent necessary to serve as safe and adequate temporary housing;
- The property may not require repairs and improvements exceeding the value of the lease agreement;

³⁰⁸ *Id.*

³⁰⁹ *Id.* See also FEMA FDA 0106-1, *Delegation of Authority to the Regional Administrators*, dated 03/02/2016, Appendix B, p. B-9, Section 34, subsection a regarding the authority to pursue a direct housing mission at: https://portalapps.fema.net/apps/employee_tools/forms/Pages/Directives.aspx.

³¹⁰ Stafford Act § 408(c)(1)(B)(ii)(I)(bb), 42 U.S.C. § 5174(c)(1)(B)(ii)(I)(bb).

³¹¹ *IHPUG*, Chapter 5, Section IV. *Multi-Family Lease and Repair (MLR)*, p. 73.

³¹² See *IHPUG*, Chapter 5, Section III. *Direct Temporary Housing Assistance Terms and Conditions*, p. 64.

³¹³ See *IHPUG*, Chapter 5, Section IV. *Multi-Family Lease and Repair (MLR)*, pp. 73-76.

- The cost and time associated with making the repairs or improvements must be cost effective and in the government's best interest;
- The property must be repairable within two months;
- The property must be within reasonable access to community services;
- The property owner must be capable of providing all property management services, including building maintenance, except when FEMA obtains the property through lease or contract from another government entity, in which case FEMA may directly provide such services; and
- The property must not be located in an SFHA or in a potential area for flooding as identified on the Advisory Flood Hazard Information.

4. Disaster Housing Assistance Program (DHAP)

The Disaster Housing Assistance Program (DHAP) is a rental assistance program to provide temporary rental payments and case management services to disaster evacuees. This program provides families with necessary assistance as they rebuild their lives and move back toward self-sufficiency. DHAP is administered by the HUD in coordination with FEMA.³¹⁴

DHAP is a possible option for presidentially declared disasters, where FEMA authorizes temporary housing and FEMA's recertification process determines that a need exists for long-term assistance. FEMA also utilized

³¹⁴ The Secretary of DHS delegated grant making authority (6 U.S.C. § 112(b)(2) for purposes of DHAP to the FEMA Administrator pursuant to DHS Delegation 09501, dated 08/10/2012 at http://dhsconnect.dhs.gov/policies/Documents/09501_Delegation_to_the_Administrator_of_FEMA_Disaster_Housing_Assistance_Program.pdf. The FEMA Administrator has re-delegated this authority to the FEMA Assistant Administrator for Response and Recovery pursuant to FEMA Delegation, FDA 0106-2, dated 02/01/2013 at https://portalapps.fema.net/apps/employee_tools/forms/Directives/FDA_0106-2.pdf.

DHAP for Hurricanes Ike and Gustave in 2008³¹⁵ and for Hurricane Sandy in 2013.³¹⁶

Under DHAP, when FEMA determines that disaster survivors need housing assistance beyond that provided under IHP guidelines for temporary housing, it refers those survivors to HUD, which then uses its local Public Housing Authorities for delivery of DHAP services.

B. Repair and Replacement Assistance (Financial Assistance)

1. General Eligibility

IHP Housing Assistance provides financial assistance for the repair or replacement of non-insured/under-insured owner-occupied primary residences made uninhabitable or destroyed by a declared disaster event.³¹⁷ See the eligibility criteria discussed earlier in Section II.D, *Eligibility for IHP* (particularly regarding Disaster-Related Necessary Expenses and Serious Needs and Unmet Needs) regarding insurance and its effect on assistance. In 2013, FEMA updated its housing assistance regulations to provide greater clarity regarding the eligibility criteria for repair, replacement, and housing construction assistance.³¹⁸

³¹⁵ In 2008, DHAP for Hurricanes Ike and Gustav was instituted to assist the disaster survivors from those hurricanes. On February 5, 2010, FEMA Administrator Craig Fugate extended the program until May 27, 2010, giving approximately 11,000 families displaced by Hurricanes Ike and Gustav more time to transition to longer-term housing solutions. The Ike/Gustave Interagency Agreement (IAA) is available at https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10902.pdf. A DHS Office of Inspector General (OIG) Audit for the Katrina/Rita and Ike/Gustave DHAPs, # 11-102, August 2011, *Effectiveness and Costs of FEMA's Disaster Housing Assistance Program*, is available at https://www.oig.dhs.gov/assets/Mgmt/OIG_11-102_Aug11.pdf.

³¹⁶ The Sandy IAA is available at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Supporting%20Documents/FINAL%20DHAP-Sandy%20IAA%20032513.pdf. See also http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/sandy.

³¹⁷ Stafford Act § 408(c)(2) and (3), 42 U.S.C. § 5174(c)(2) and (3).

³¹⁸ See 78 FR 66856, (Nov. 7, 2013); 44 C.F.R. §206.117.

Owners are eligible for the full spectrum of IHP assistance, including repair or replacement assistance for owner-occupied private residences.³¹⁹ “Owner-occupied” means that the residence is occupied by:

- The legal owner;
- A person without formal title who does not pay rent but is responsible for the payment of taxes or maintenance; or
- A person with lifetime occupancy rights with formal title vested in another.³²⁰

Proof of ownership and ownership or occupancy rights may be an issue in island or insular area disasters because of family compounds, adverse possession, hereditary family lands, and cultural traditions. There may also be an issue on tribal lands where the land is owned or controlled by the tribe or held in trust by the United States but the occupant owns the dwelling. Therefore, deeds or mortgage documents may not always be available or applicable, so FEMA may accept other suitable documentation to establish ownership.³²¹

The maximum amount of assistance available to an applicant (individual or household) for either repair or replacement assistance per declaration is the IHP maximum amount of assistance for the fiscal year in question.³²²

Applicants who receive repair or replacement assistance will be subject to NFIP flood insurance requirements to obtain and maintain flood insurance

³¹⁹ Stafford Act § 408(c) (2) (B) and (c) (3) (B), 42 U.S.C. § 5174(c) (2) (B) and (c) (3) (B). Because they do not own their residence, renters may receive ONA but not repair or replacement assistance for the residence where they were living.

³²⁰ See 44 C.F.R. § 206.111, *Definitions*.

³²¹ For example, FEMA generally used certifications by the Village Matai or Chief for disasters in American Samoa to establish ownership and occupancy to the damaged dwelling where the land is held communally. FEMA also works with tribal governments to obtain certifications for dwellings on tribal lands.

³²² For disasters declared in FY 2018 (Oct. 1, 2017–Sept. 30, 2018), this amount is \$34,000. 82 Fed.Reg. 47568 (October 12, 2018). See Stafford Act § 408(h), 42 U.S.C. § 5174(h). Prior to the 2006 PKEMRA amendments to Stafford Act § 408(c)(2) and (3), there was a \$5,000 maximum allowable repair assistance amount and a \$10,000 maximum allowable amount.

if their property is located in an SFHA.³²³ See the *National Flood Insurance Program (NFIP) Coverage Requirement* section earlier in this chapter.

Applicants for repair or replacement assistance are subject to NEPA and other environmental laws.³²⁴ See discussion on *Environmental and Historic Preservation Site Considerations*, Section III(A)(2)(a), earlier in this chapter. Projects funded with replacement assistance may be subject to National Historic Preservation Act requirements for ground disturbing activities and construction.³²⁵

2. Repair Assistance

IHP repair assistance is available for the repair of owner-occupied private residences, utilities, and residential infrastructure, including private access routes³²⁶ that have damaged by a declared event.³²⁷ The purpose is to repair the home to a safe and sanitary living or functioning condition, not to return a home to its condition before the disaster.³²⁸

FEMA may provide up to the IHP maximum for home repair; then the applicant may apply for an SBA disaster loan for additional repair assistance.³²⁹ See the previous discussion, *The Duplication of Benefits (DOB) Prohibition and the Sequence of Delivery*.

Applicants are responsible for obtaining all permits or inspections applicable to that state or as local building codes require.³³⁰

³²³ 44 C.F.R. § 206.110(k).

³²⁴ 44 C.F.R. § 206.110(l).

³²⁵ 44 C.F.R. § 206.110(m).

³²⁶ See IHPUG, Chapter 4, Section VI. *Privately-Owned Access Routes*, pp. 53-55.

³²⁷ Stafford Act § 408(c)(2)(A)(i), 42 U.S.C. § 5174(c)(2)(A)(i).

³²⁸ *Id.*

³²⁹ See Stafford Act § 408(c)(2)(B), 42 U.S.C. § 5174(c)(2)(B).

³³⁰ 44 C.F.R. § 206.117(b)(2)(vi).

Applicants may be eligible for financial assistance for the repair of real property components³³¹ in their primary residence if:³³²

- They meet general IHP eligibility criteria discussed in Section II(D) of this chapter;³³³
- The component was functional immediately prior to the declared event;
- The component was damaged by the disaster; and
- Repair of the component is necessary to ensure the safety or health of the occupant to make the residence functional.

Repairs to the primary residence or replacement of items must be disaster related and must be of average quality, size, and capacity, taking into consideration the needs of the occupant.³³⁴ Applicants are responsible for obtaining all permits or inspections applicable to that state or tribe or as local building codes require.³³⁵

Repairs to the primary residence are limited to restoration of the dwelling to a safe and sanitary living or functioning condition and may include the following items:³³⁶

- Structural parts of a home (including, foundation, outside walls, roof); ³³⁷
- Windows, doors, floors, walls, ceilings, cabinetry;³³⁸

³³¹ “Real property component” or “Component” means each individual part of a dwelling that makes it habitable as enumerated in 44 C.F.R. § 206.117(b)(2)(ii). 44 C.F.R. § 206.117(a).

³³² 44 C.F.R. § 206.117(b)(2)(i).

³³³ 44 C.F.R. § 206.113.

³³⁴ 44 C.F.R. § 206.117(b)(2)(iii).

³³⁵ 44 C.F.R. § 206.117(b)(2)(vi).

³³⁶ 44 C.F.R. § 206.117(b)(2)(ii).

³³⁷ 44 C.F.R. § 206.117(b)(2)(ii)(A)

³³⁸ 44 C.F.R. § 206.117(b)(2)(ii)(B) and (E).

- Utilities, including electric, gas, water, and sewage systems;³³⁹
- Heating, ventilating, and air conditioning system;³⁴⁰
- Entrance and exit ways from the home, including privately owned access roads and bridges;³⁴¹
- Blocking, leveling, and anchoring of a mobile home and reconnecting or resetting its sewer, water, electrical, and fuel lines and tanks;³⁴² and
- Eligible hazard mitigation measures that reduce the likelihood of future damage to the residence, utilities, or infrastructure.³⁴³

Assistance for flood-damaged real property in basements is limited to damaged items that result in unsafe and unsanitary living conditions that affect the ability of the dwelling³⁴⁴ and, in some cases, may be limited to removal for damages presenting a hazard (i.e., wet/moldy sheetrock or cabinets) in non-essential living areas.³⁴⁵

An applicant who disputes a FEMA repair eligibility determination may appeal the determination pursuant to the general IHP appeal requirements³⁴⁶ discussed in Section VI of this chapter, *Appeals*. The applicant must also provide proof that the component meets the requirements of 44 C.F.R. § 206.117(b)(2)(i), including that it was functional before the declared event and proof that the declared event caused it to stop functioning.³⁴⁷ If the applicant disputes the amount of

³³⁹ 44 C.F.R. § 206.117(b)(2)(ii)(D).

³⁴⁰ 44 C.F.R. § 206.117(b)(2)(ii)(C).

³⁴¹ 44 C.F.R. § 206.117(b)(2)(ii)(F).

³⁴² 44 C.F.R. § 206.117(b)(2)(ii)(G).

³⁴³ 44 C.F.R. § 206.117(b)(2)(ii)(H). FEMA has built into repair line items funds for good construction practices that may incorporate mitigation measures, such as strapping water heaters or oil tanks that need replacing and elevating electrical panels that need replacing.

³⁴⁴ IHPUG, Chapter 4, Section V(B), *Limitations and Exclusions*, p. 53.

³⁴⁵ *Id.*

³⁴⁶ See 44 C.F.R. § 206.115.

³⁴⁷ 44 C.F.R. § 206.117(b)(2)(vii).

repair assistance awarded, the applicant must also provide justification for the amount sought.³⁴⁸

3. Replacement Assistance

IHP Replacement Assistance is available for the replacement of owner-occupied private residences damaged by a declared event.³⁴⁹

Applicants who meet all of the following criteria (as verified by an inspection) may be eligible for replacement assistance:³⁵⁰

- The applicant meets the general IHP eligibility criteria discussed in Section II(D) of this chapter;³⁵¹
- The residence was functional immediately before the disaster;
- The residence was destroyed by the disaster;
- The damage is not covered by insurance;
- Repair is not feasible or cannot ensure health, safety, or functionality of the residence; and
- Replacement is necessary to ensure the safety or health of the occupant.

Applicants who receive replacement assistance may either: (1) replace their residence in its entirety for the statutory maximum or less; or (2) use the assistance as a down payment on a new permanent residence that is greater in cost than the statutory maximum.³⁵² Replacement assistance

³⁴⁸ *Id.*

³⁴⁹ Stafford Act § 408(c)(3), 42 U.S.C. § 5174(c)(3); 44 C.F.R. § 206.117(b)(3). *See also IHPUG*, Chapter 4, Section VII. *Replacement Assistance*, pp. 56-57.

³⁵⁰ 44 C.F.R. § 206.117(b)(3).

³⁵¹ *See* 44 C.F.R. § 206.113 for general IHP eligibility factors.

³⁵² 44 C.F.R. § 206.117(b)(3).

used to purchase property in an SFHA is subject must meet the requirements to obtain and maintain flood insurance.³⁵³

An applicant who disputes a FEMA replacement eligibility determination may appeal the determination pursuant to the general IHP appeal requirements³⁵⁴ discussed in Section VI of this chapter, *Appeals*, and must provide proof that repair:

- Is not feasible; or
- Will not ensure occupant safety or security; or
- Will not make the home functional.³⁵⁵

If the applicant disputes the amount of replacement assistance awarded, the applicant must also provide justification for the amount sought.³⁵⁶

An applicant who appeals FEMA's determination that the residence is not destroyed may submit supporting documentation that the residence is destroyed, including a condemnation notice form the local government authority designating it destroyed by the disaster.³⁵⁷ FEMA will conduct a second inspection to verify and designate whether the residence is destroyed due to disaster-related damage.³⁵⁸

C. Permanent or Semi-Permanent Construction

FEMA may provide financial assistance *or* direct assistance to individuals or households to construct permanent or semi-permanent

³⁵³ Stafford Act § 408(c)(3)(B) specifically prohibits the waiver of applicable flood insurance purchase requirements. *See also* 44 C.F.R. § 206.110(k)(3)(i)(C).

³⁵⁴ *See* 44 C.F.R. § 206.115.

³⁵⁵ *See* 44 C.F.R. § 206.117(b)(3)(iv).

³⁵⁶ *Id.*

³⁵⁷ *See IHPUG*, Chapter 4, Section VII(C), *Appeal Considerations*, p. 57.

³⁵⁸ *Id.*

housing in insular areas³⁵⁹ outside the continental United States and in other locations in cases in which³⁶⁰

- The applicant meets the general IHP eligibility criteria discussed in Section II(D) of this chapter;³⁶¹
- The residence was functional immediately prior to the event;³⁶²
- The residence was damaged by the event;³⁶³
- The damage is not covered by insurance;³⁶⁴
- The residence was primary and owner-occupied;³⁶⁵
- No alternative housing resources are available;³⁶⁶ and
- The types of temporary housing assistance FEMA normally deploys—such as rental assistance, temporary sheltering assistance, or providing THUs directly to applicants—are unavailable, infeasible, or not cost effective.³⁶⁷

This type of assistance occurs only in very unusual situations, in locations specified by FEMA, where no other type of housing assistance is possible. Construction must be consistent with current minimal local building codes and standards where they exist or minimal acceptable construction industry standards in the area.

³⁵⁹ Insular Areas include American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Marianas. *See* 48 U.S.C. § 1469a.

³⁶⁰ Stafford Act § 408(c)(4), 42 U.S.C. § 5174(c)(4); 44 C.F.R. § 206.117(b)(4). *See also* IHPUG, Chapter 5, Section VII. *Permanent Housing Construction (PHC)*, pp. 86-88.

³⁶¹ 44 C.F.R. §§ 206.117(b)(4)(A) and 206.113.

³⁶² *Id.* at 206.117(b)(4)(B).

³⁶³ *Id.* at 206.117(b)(4)(C).

³⁶⁴ *Id.* at 206.117(b)(4)(D).

³⁶⁵ *Id.* at 206.117(b)(4)(E).

³⁶⁶ *Id.* at 206.117(b)(4)(F).

³⁶⁷ *Id.*

Construction will aim toward average quality, size, and capacity, taking into consideration the needs of the occupant.³⁶⁸

If the home is located in an SFHA, the homeowner must comply with flood insurance purchase requirements and local flood codes and requirements,³⁶⁹ as well as with applicable environmental and historic preservation requirements.³⁷⁰

While financial assistance under permanent housing construction (PHC) is capped at the IA max grant amount, there is no set monetary cap for direct assistance, although it must be cost effective.³⁷¹ PHC is a scalable, flexible form of housing assistance that allows FEMA to tailor assistance to meet the needs of the affected community as demonstrated by the following examples, which include an insular area, a state outside of the continental United States, (OCONUS) and a tribal reservation in the continental United States (CONUS).

³⁶⁸ 44 C.F.R. 206.117(b)(ii)

³⁶⁹ See 44 C.F.R. § 206.110(k)(3).

³⁷⁰ 44 C.F.R. §§ 206.110(l) and (m) and 206.117(c)(4)(ii).

³⁷¹ Stafford Act § 408(b)(2)(A), 42 U.S.C. § 5174(b)(2)(A).

Case Examples

American Samoa (Insular Area):

FEMA utilized permanent housing construction (PHC) authority in American Samoa, DR-1859-AS, for the construction of 39 permanent homes following the September 29, 2009, earthquake and tsunami that devastated American Samoa.

Alaska (OCONUS):

PHC authority is not always used for new or ground-up construction. For example, in Galena, Alaska (DR-4122), FEMA initially authorized limited repair PHC for direct shipping of repair supplies and repair to eligible existing homes. PHC was later authorized for new construction.³⁷² Additionally, FEMA required use of voluntary organizations for conducting PHC-funded repairs and approved direct assistance for repair through PHC only upon a determination that voluntary organization resources were unavailable or not cost effective.

Oglala Sioux Tribe, Pine Ridge Reservation (CONUS):³⁷³

FEMA first used PHC authority within the CONUS in 2015 for FEMA-4237-DR-OST, also the first tribal declaration to include Individual Assistance. FEMA has been providing PHC to either repair those eligible homes (owner-occupied primary residence with a FEMA verified loss affecting habitability) that can feasibly be brought up to a habitable standard, and for the installation of approximately 200 new MHUs where the eligible homes cannot feasibly be repaired to a habitable state or are considered destroyed. The provision of MHUs was an appropriate form of housing under PHC under the circumstances,³⁷⁴ considering that Temporary Housing Assistance was not available, feasible, or cost effective;³⁷⁵

³⁷² Subsequently, FEMA approved PHC for new construction for a handful of applicants in the form of pre-packaged home kits.

³⁷³ See the DHS OIG Report, OIG-16-05-D, FEMA's *Plan to Provide Permanent or Semi-Permanent Housing to the Oglala Sioux Tribe of the Pine Ridge Indian Reservation in South Dakota*, dated Nov. 5, 2015 at <https://www.oig.dhs.gov/assets/GrantReports/2016/OIG-16-05-D-Nov15.pdf>.

IV. IHP: Other Needs Assistance (ONA)

A. In General

Other needs assistance (ONA)³⁷⁶ provides financial help to both owners and renters with other serious or necessary disaster-related unmet needs, separate and distinct from housing assistance. Much of what ONA covers, including specific personal property, is agreed upon with the states/tribes, which must pay a cost share.³⁷⁷ There are lists of ONA-eligible expenses, as well as amounts to be awarded—all worked out in advance with each affected state.³⁷⁸ Needs must be serious or necessary, as well as disaster related, to be eligible for ONA.

A “serious need” for an item or service is present if the item or service is essential for an applicant to prevent, reduce, or overcome a disaster-related hardship, injury, or adverse condition.³⁷⁹ This assistance takes the form of additional financial payments or the reimbursement of disaster-related expenses.

A “necessary expense” means the cost associated with acquiring the item or service.³⁸⁰ FEMA provides only financial assistance (not direct

³⁷⁴ MHUs are a standard form of housing utilized on the Reservation; FEMA had MHUs available in its inventory; and FEMA could quickly mobilize to begin hauling and installing MHUs.

³⁷⁵ There was a lack of available alternative housing due to the remoteness of the reservation and an acute pre-existing housing shortage. While THU installation was feasible, it was determined that Direct Housing Operations Program (DHOP) implementation would not be feasible or cost effective, as applicants would not be able to purchase the units, donation on site was not likely, applicants were not likely to find other adequate housing upon termination of the program, and removal of the units would be problematic, all of which would result in a failed program. In addition, repair of many of the homes was considered infeasible due to their fragile state, so the DHOP coupled with repair assistance would not lead to a permanent housing solution.

³⁷⁶ *Id.* § Stafford Act Section 408(e) and 42 USC Section 5174(e).

³⁷⁷ *See* 44 C.F.R. § 206.119; Stafford Act Section 408(g)(2)(B). *See also IHPUG, Chapter 6, Other Needs Assistance (ONA)*, pp. 89-114.

³⁷⁸ 44 C.F.R. § 206.111. As of October 2016, only one tribal declaration has included IA. Prior to the 2013 SRIA changes to the Stafford Act, IA on a tribal reservation would have involved the state as it related to ONA. At this time, tribes do not routinely submit ONA administrative plans prior to issuance of a declaration.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

assistance) under the ONA program, and it is cost-shared between the federal and state/tribal governments at a 75% to 25% rate.³⁸¹

The categories of assistance available under ONA include medical, dental, child care,³⁸² and funeral items or services, as well as personal property, transportation, and other expenses.³⁸³ The other expenses include the Group Flood Insurance Policy discussed later, as well as an additional category, referred to as miscellaneous items or services, which the state/tribe determines in consultation with FEMA. This gives the state/tribe the flexibility to provide needed assistance in a manner or of a type not spelled out in the regulations, as long as this need is also serious or necessary and related to the disaster.³⁸⁴

B. FEMA/Joint/State/Tribe Program Administration

FEMA provides the states/tribes with three administrative options for processing ONA: FEMA,³⁸⁵ joint, or state/tribe.³⁸⁶ By November 30 of each year,³⁸⁷ every state/tribe must choose one of these options, which will be executed if the state receives a declaration in the following year.³⁸⁸

FEMA Option:³⁸⁹ FEMA is the administrator of ONA. FEMA will coordinate with the state/tribe but FEMA is responsible for

³⁸¹ Stafford Act § 408(e). Stafford Act § 408(f)(1) and (g)(2), 42 U.S.C. § 5174(e) and (f)(1) and (g)(2). The Stafford Act does not authorize reduction or waiver of this cost share.

³⁸² See Stafford § 408(e)(1), which was amended by Section 1108 of SRIA, Pub. L. 113-2, 127 Stat. 4 (2013), to include child care expenses.

³⁸³ 44 C.F.R. § 206.119(b).

³⁸⁴ 44 C.F.R. § 206.119(b)(2)(ii).

³⁸⁵ Stafford Act § 408(e), 42 U.S.C. § 5174(e). 44 C.F.R. § 206.120(a) and (b).

³⁸⁶ Stafford Act § 408(f)(1)(A). 44 C.F.R. § 206.120(b).

³⁸⁷ Even if the state does not plan to make any changes, the state must submit a letter to FEMA by November 30 stating that the State Administrative Plan is still current. See *id.* § 206.120(c)(2).

³⁸⁸ See FEMA Form 010-0-11, *Individuals and Households Program (IHP) – ONA Administrative Option Selection* at <https://www.fema.gov/media-library/assets/documents/31206>.

³⁸⁹ See *IHPUG*, Chapter 6, Section I(B), *ONA Cost Share and Administration*, p. 91.

implementing all functional elements and will bill the state/tribe for its portion of the ONA cost share.

Joint Option:³⁹⁰ The state/tribe is the administrator of ONA. FEMA participates in providing ONA with the state/tribe. Both FEMA and the state/tribe are responsible for implementing specific functional elements. Under this option, the state/tribe must submit an administrative plan (State/Tribal Administrative Plan) for review and approval by the RA.³⁹¹

State/Tribe Option:³⁹² The state/tribe is the administrator of ONA and is responsible for all functional elements. Under this option, the state/tribe must submit an administrative plan (State/Tribal Administrative Plan) for review and approval by the RA.

³⁹⁰ *Id.*

³⁹¹ The FEMA-State/Tribe Agreement will include an IA Program Addendum for either a joint or state/tribal ONA administration carried out under a cooperative agreement or a grant.

³⁹² See *IHPUG*, Chapter 6, Section I(B), *ONA Cost Share and Administration*, p. 91.

Tribal IA Declarations

As discussed in Chapter 3, *Declarations*, federally recognized Indian tribes became authorized to directly request declarations in January 2013 and are no longer required to go through the states.³⁹³ FEMA's regulations, including its ONA administration regulations, have not been updated to reflect these changes, although FEMA has been working on finalizing pilot guidance for tribal declarations.³⁹⁴ To date, there has been one major disaster declaration that included IA for a tribe.³⁹⁵ The FEMA Regions are working with tribes regarding the annual option selection form and required administrative plans for the joint/tribal options. In the event of an IA tribal declaration, the FEMA Regional Office must work with the tribe to ensure that necessary ONA forms and applicable plans are executed as soon as possible to ensure timely provision of assistance.

To administer ONA directly, either alone or jointly with FEMA, a state/tribe must have a FEMA-approved State/Tribal Administrative Plan, describing in detail the staffing schedule, assignment of responsibilities, and program procedures.³⁹⁶ The state/tribe may submit amendments to the RA in writing at any time during non-disaster periods.³⁹⁷

FEMA provides 75% of the funding for ONA, and the states provide 25%, regardless of which entity administers the program.³⁹⁸ If a state/tribe administers the ONA program, it may receive 5% of the costs of the program as an administrative fee.³⁹⁹

³⁹³ Stafford Act §§ 401(b) and 501(c), 42 U.S.C. §§ 5170(b) and 5191(c). Amendments to the Stafford Act provide that "State" is deemed to also refer to tribal governments. Stafford Act § 103, 42 U.S.C. § 5123.

³⁹⁴ See <http://www.fema.gov/media-library/assets/documents/113382>. The draft guidance describes the process for ONA option selection and administrative plans.

³⁹⁵ FEMA-4237-DR-OST, was issued on August 7, 2015, for the Oglala Sioux Tribe of the Pine Ridge Reservation. ONA has been provided under the FEMA option. See <http://www.fema.gov/disaster/4237>.

³⁹⁶ *Id.* § 206.120(d). See the Administrative Plan template at <https://www.fema.gov/media-library/assets/documents/31206>.

³⁹⁷ *Id.*

³⁹⁸ Stafford Act § 408(g)(2), 42 U.S.C. § 5174(g)(2).

³⁹⁹ See 44 C.F.R. § 206.120(a).

The state/tribe must select its administration option prior to the disaster declaration. Once the President declares a disaster, however, the state/tribe has three days to amend the State Administrative Plan⁴⁰⁰ with respect to those items that the state/tribe is willing to include as eligible items under the IHP program.

C. ONA Cost Share

Under the Stafford Act, states/tribes have a 25% cost share for ONA grants. Regardless of whether ONA is administered by FEMA, the state, or jointly, the federal cost share for ONA is 75%, while the remaining non-federal share is “to be paid from funds made available by the State.”⁴⁰¹

Neither the President nor FEMA has authority to adjust the federal cost share for ONA since the Stafford Act specifies the federal share as a specific percentage of the total cost.⁴⁰² However, the program statute (i.e., the Stafford Act) may define or limit the types of assets that may be applied to the non-federal share.⁴⁰³ If the legislation is silent with respect to the types of assets that may be counted, the statute will generally be construed as permitting an “in kind” or “soft” match—

⁴⁰⁰ Stafford Act § 408(f)(1)(B), 42 U.S.C. § 5174(f)(1)(B), and 42 C.F.R. § 206.120(c)(3)(ii).

⁴⁰¹ Stafford Act § 408(g)(2)(B), 42 U.S.C. § 5174(g)(2)(B). Pursuant to Stafford Act § 103, any reference to “state” with respect to governments or officials is deemed to refer also to Indian tribal governments and officials as appropriate; accordingly, this cost share requirement for states also applies to tribes. 42 U.S.C. § 5123.

⁴⁰² Unlike Public Assistance grants, where the Stafford Act § 406 establishes that the federal share shall be not less than 75% for ONA, allowing for an adjustment of the federal cost share, for ONA, Stafford Act § 408 explicitly provides that the federal share shall be 75%, giving no authority to adjust the federal cost share for ONA. See U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, 10-95, Vol.2, 3rd ed., GA0-06-382SP (Washington, D.C.: Feb. 2006) [hereinafter GAO Red Book] available at <http://www.gao.gov/legal/red-book/overview>. Cost-share requirements may also be referred to as “matching” requirements.

Note that the Insular Areas Act does provide such authority for insular area grants and that Congress has passed special legislation signed by the President, providing for a 100% federal cost share for Hurricane Katrina disaster assistance.

⁴⁰³ GAO Red Book, Vol 2, pp. 10-96.

that is, the matching share may include the reasonable value of property or services as well as cash.⁴⁰⁴

1. Prohibition on Use of a Donated Resources Credit Soft Match for the State's ONA Cost Share

Section 408 specifically requires states to pay the ONA non-federal share “from funds made available by the State.”⁴⁰⁵ This is the only cost-sharing provision in the Stafford Act that refers to how states/tribes must satisfy their cost-sharing obligations for FEMA assistance programs. Other cost sharing provisions of the Stafford Act, such as Public Assistance⁴⁰⁶ and Hazard Mitigation Grant Programs,⁴⁰⁷ refer only to the federal share amount. States/tribes must satisfy their ONA cost share out of state/tribe “funds.”

The Stafford Act does not allow states/tribes to count donated resources—such as volunteer labor or donations of supplies of food and water, temporary repair programs, or donations of public space or cots to house and shelter disaster survivors—toward satisfying their cost share requirement for ONA assistance.⁴⁰⁸

2. Using Grant Funds from Other Federal Authorities to Satisfy the ONA State Cost Share

Generally, recipients (grantees) may not satisfy their non-federal cost share obligation with funds from other federal agencies or grants.⁴⁰⁹

⁴⁰⁴ GAO Red Book, Vol. 2, pp. 10-97 (internal citations omitted).

⁴⁰⁵ Or tribe per Stafford Act § 103, *References*, 42 U.S.C. § 5123.

⁴⁰⁶ Stafford Act § 406(b)(1), 42 U.S.C. § 5172(b)(1).

⁴⁰⁷ Stafford Act § 404(a), 42 U.S.C. § 5170c(a).

⁴⁰⁸ See Stafford Act § 408(g)(2)(B), 2 U.S.C. § 5174 (g)(2)(B); 44 C.F.R. 13.24(b), 2 C.F.R. § 200.306(b).

⁴⁰⁹ 44 C.F.R. § 13.24(b)(1) (2014), 2 C.F.R. § 200.306(b); See GAO Red Book, Volume 2, 10-93. Note that 44 C.F.R. Part 13 was rescinded, effective December 26, 2014 and replaced with the Uniform Administrative Requirements, Cost Principles, and Audit requirements for Federal Awards (Uniform Guidance) found in 2 C.F.R. for all Stafford Act disasters and emergencies declared on or after December 26, 2014: <https://www.gpo.gov/fdsys/pkg/FR-2014-12-19/pdf/2014-28697.pdf>.

However, in some cases, authorizing statutes allow federal funds to be used to satisfy the cost share for other federal grants.⁴¹⁰

Examples of federal funds that may be used to satisfy the non-federal cost share include HUD Community Development Block Grant Disaster Recovery (CDBG-DR) funds.⁴¹¹ CDBG funds that are used to meet a non-federal cost-share requirement must meet the purpose and eligibility requirements of both the federal source program and the IA program.⁴¹²

The Housing and Community Development Act of 1974, 42 U.S.C. § 5305(a)(9), as amended, authorizes Community Development Block Grant (CDBG) funds to be used as the non-federal share under any other grant, including programs or activities administered by FEMA, when the program is undertaken as part of an eligible community development program. On their face, categories eligible for ONA assistance do not appear to be eligible community development activities, but this is a determination for HUD to make.

⁴¹⁰ *Id.* See also Housing and Community Development Act of 1974, Pub. L. 93-383, (1974), codified as amended, 42 U.S.C. § 5305(a)(9).

⁴¹¹ GAO Red Book, Volume 2, 10-93.

⁴¹² 42 U.S.C. § 5305(a)(9).

Case Example

Hurricane Sandy made landfall at Atlantic City, New Jersey, on October 27, 2012, creating a powerful storm surge in its deadly northeast quadrant. The hurricane severely impacted the coastal areas of New Jersey. FEMA awarded over \$57.2 million in ONA to individuals. New Jersey sought to apply the value of volunteer labor, donated food, supplies, sheltering, and crisis counseling services provided by voluntary assistance organizations such as the American Red Cross toward its ONA cost-share.

New Jersey also sought to apply Community Development Block Grant Disaster Recovery (CDBG-DR) funds the state received from the U.S. Department of Housing and Urban Development (HUD). New Jersey's CDBG-DR approved plan set aside \$50,000,000 in CDBG-DR funds for state and local government entities that lacked the resources to provide some or all of the FEMA required cost-share for public assistance projects, and the state sought to apply these funds toward its ONA cost-share requirement.

FEMA denied New Jersey's request to apply the value of the donated resources from volunteer labor and donations of other resources toward its ONA cost share on the basis that the Stafford Act § 408(g) specifically requires states to use state funds to satisfy its ONA cost share. FEMA referred New Jersey's request (to apply CDBG funds towards its ONA cost share) to HUD for a determination of the issue of whether ONA activities were eligible CDBG-DR activities, or to seek a waiver of CDBG requirements.

D. Treatment of Insurance

To ensure that the federal government does not provide duplicate benefits, disaster applicants must provide FEMA with information about any insurance proceeds received for damage incurred in the disaster.⁴¹³ Specifically, ONA assistance may be available if an applicant or household receives real property insurance proceeds in an

⁴¹³ Stafford Act § 312, 42 U.S.C. § 5155; 44 C.F.R. §206.191.

amount less than the max IA grant and the proceeds are insufficient to cover the applicant's necessary expenses or serious needs.⁴¹⁴

E. ONA Eligibility Processing Procedures and FEMA/SBA Cross Referrals

The categories of ONA assistance break down into SBA dependent or non-SBA dependent groupings.⁴¹⁵ Because applicants may be eligible to receive low-interest, long-term loans from SBA to help with personal property, transportation, and storage and moving expenses, FEMA calls these programs "SBA dependent."

The Small Business Act authorizes the SBA to provide a physical disaster loan to assist disaster survivors with permanent housing repair or replacement, or to assist with needs arising from the loss of personal property.⁴¹⁶ An applicant must meet a minimum income test, which the SBA establishes, to be eligible for these loans.

Unless FEMA finds that the individual or household will not be able to pass SBA's income test, the applicants must first apply to the SBA for a loan for these SBA dependent expenses before requesting assistance from ONA.⁴¹⁷

If approved to the full level of need, SBA loans eliminate the need for ONA grants for the SBA dependent ONA categories.⁴¹⁸ If applicants do not meet SBA's income test, FEMA may immediately process applicants who apply for SBA dependent categories of assistance in the ONA program.

FEMA determines whether the applicant meets that minimum income standard in instances where the applicant initially contacts FEMA

⁴¹⁴ 44 C.F.R. § 206.113(a)(4).

⁴¹⁵ See the FEMA Individual Assistance Sequence of Delivery at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Documents/IHP%20Sequence%20of%20Delivery.pdf. See also IHPUG, *Chapter 6 Other Needs Assistance*, Figure 27: *Other Needs Assistance, Non-SBA-Dependent and SBA Dependent*, p. 90 at <https://www.fema.gov/media-library/assets/documents/124228>

⁴¹⁶ The Small Business Act § 7(b)(1); 15 U.S.C. § 631, *et seq.*

⁴¹⁷ See 44 C.F.R. § 206.119(a).

⁴¹⁸ See 44 C.F.R. § 206.191(d)(2).

rather than the SBA.⁴¹⁹ FEMA first refers the applicant to SBA if it determines that the individual's or household income does, in fact, meet SBA minimum income guidelines, and the applicant requires financial assistance for personal property, transportation, or moving and storage needs (SBA dependent categories).⁴²⁰

At the same time, FEMA assesses whether the applicant requires assistance with disaster-related funeral, medical, child care, and dental expenses. ONA is generally the sole source of possible aid in these categories, and FEMA provides assistance for these purposes without regard to whether a disaster survivor may obtain an SBA loan.⁴²¹

SBA refers the applicant back to FEMA for assistance with unmet needs once it denies an applicant's disaster loan application or if the amount it provides under the loan is insufficient to meet the applicant's disaster damage needs.⁴²²

FEMA may concurrently, or at a later date, refer an applicant for potential additional assistance from the SBA for home repair or replacement if FEMA is unable to meet all of the applicant's needs. For these categories, FEMA grant assistance is provided before an SBA loan.

F. SBA Application Dependent ONA Categories

FEMA awards assistance for different types of disaster-related personal property expenses as determined by a standardized, line item list. A state may request that an item be added or deleted (zeroed out) from

⁴¹⁹ SBA, Office of Disaster Assistance, Standard Operating Procedures [hereinafter SBA SOP], Chap. 2 ¶ 2.1 available at <https://www.sba.gov/content/disaster-assistance-program-posted-11-07>.

⁴²⁰ *Id.*, See also PPM, Other Needs Assistance (ONA), III.S.1, *SBA/NPSC Program Review SOP*. See https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/Forms/AllItems.aspx?InitialTabId=Ribbon%2EDocument&VisibilityContext=WSSTabPersistence

⁴²¹ However, per the SBA SOP cited, at p. 92, 5. a. *Medical, Dental & Funeral Expenses*, SBA does allow for loan eligibility in limited circumstances when the applicant has received the maximum IHP total grant award and continues to have unmet disaster-related medical personal property needs.

⁴²² 44 C.F.R. § 206.119(a).

a particular category of personal property. FEMA then approves or disapproves the item for that given disaster.⁴²³

1. **Clothing**

FEMA's goal with respect to clothing assistance⁴²⁴ is to provide the minimum amount of assistance to meet the needs of a household.⁴²⁵ If a household member at the time of the inspection has damaged clothing but still has clothing available to meet his or her essential needs,⁴²⁶ FEMA does not provide a clothing award.⁴²⁷ ONA thus bases its clothing awards on the amount of *undamaged* clothing the individual possesses and not the amount of clothing damaged.⁴²⁸

If the inspector verifies that an individual has adequate undamaged clothing, that individual is not eligible for clothing assistance.⁴²⁹ Volunteer agencies often provide clothing to individuals; however, FEMA considers such clothing expendable so there is no DOB issue. Therefore, the applicant's household is still eligible for clothing assistance if they received some clothing from a voluntary agency before applying to the IHP.⁴³⁰

⁴²³ In general, see IHPUG, Chapter 6, Section III, *SBA-Dependent*, beginning p. 105.

⁴²⁴ 4 C.F.R. § 206.119(c)(1)(i).

⁴²⁵ PPM, ONA Guidance Job Aids, III.O.7.b.ja. *ONA: Clothing Processing Job Aid*. Part B.2. at

https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/ONA%20Clothing%20Processing%20Job%20Aid.docx.

⁴²⁶ FEMA considers an essential need for clothing as: the amount of clothing items deemed necessary per household member for seven days, if existing clothing has been destroyed or lost. IHPUG, Chapter 6, Section III(A), *Personal Property Assistance*, pp. 104-105. See also PPM ONA Guidance Job Aids III O.7. *ONA Personal Property SOP*, Part D at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/ONA%20Personal%20Property%20SOP.docx.

⁴²⁷ PPM ONA Guidance Job Aids III O.7. *ONA Personal Property SOP*, Part D.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *ONA Personal Property SOP*, Part D.1.d.

2. **Appliances**

FEMA may provide assistance under ONA for repair or replacement of household items, furnishings, or appliances.⁴³¹ Assistance with appliances begins with an initial inspection report. The inspector assesses the damaged appliances and makes the determination of Not Affected (by the disaster), Insured, Landlord-owned (meaning owned by someone other than the applicant),⁴³² Repair (X), or Replace (Z).⁴³³

FEMA does not provide financial assistance to repair or replace items that are not affected by the declared disaster event, or for landlord-owned items (in cases involving rental property). FEMA delays payment for insured items until there is an insurance settlement so a determination can be made regarding whether there continues to be unmet needs.

FEMA has determined line item limits that represent the number of that type of appliance necessary to meet the needs of a household.⁴³⁴ The agency determines an applicant's need for a particular appliance based on the line item limit compared to the number of that particular appliance the applicant has that are not affected, insured, or landlord owned.⁴³⁵ For example, the line item limit FEMA has established for a window air conditioner is two.⁴³⁶

The only age-related line items are toys for household members under age 17, high chairs, cribs, playpens, and strollers. Car seats are not age-related, but a dependent requiring this item must reside in the household.⁴³⁷

⁴³¹ 44 § 206. 119(c)(1)(ii). See also IHPUG, Chapter 6, Section III(A), *Personal Property Assistance*, p. 105.

⁴³² See PPM ONA Guidance Job Aids III O.7.f.ja. *ONA: Landlord-owned Processing at* https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npscscs/applicant_processing/Guidance/Forms/AllItems.aspx.

⁴³³ *ONA Personal Property SOP*, Part C.1.

⁴³⁴ PPM, ONA Guidance Job Aids, III.O.7.c.ja. *ONA: Appliance Processing Job Aid at* https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npscscs/applicant_processing/Guidance/ONA%20Appliance%20Processing%20Job%20Aid.docx.

⁴³⁵ *Id.* See also *ONA Personal Property SOP*, Part C.2.b.

⁴³⁶ *ONA: Appliance Processing Job Aid at* Part B.

⁴³⁷ *Id.* at Part C.3.

ONA uses specific line items based on the Americans with Disabilities Act (ADA)⁴³⁸ to address personal property that is specific to applicants with disabilities. These items, eligible for repair or replacement only if owned by the applicant or household prior to the disaster, currently consist of:

- ADA accessible raised toilet seat;
- ADA accessible refrigerator;
- ADA accessible washer;
- ADA accessible bed; and
- ADA accessible computer.⁴³⁹

3. Home Furnishings

ONA also provides assistance for household items and furnishings damaged or destroyed in disasters.⁴⁴⁰ Under ONA, the level of damage to furniture within specific rooms of a residence, as recorded by inspection, determines eligibility for assistance.⁴⁴¹ The four specific room types eligible under this category are kitchen, bathroom, living room, and bedrooms.⁴⁴²

The ONA program has pre-determined the composition of each room type and comprised a standardized personal property room list.⁴⁴³ Neither the number nor the composition of the four room types can be changed or added to, nor may FEMA modify the prices assigned by the contractor

⁴³⁸ The Americans with Disabilities Act of 1990, 42 U.S.C § 12101, *et seq.*,

⁴³⁹ *IHPUG*, Chapter 6, Section III(A), *Personal Property Assistance, Accessible Items*, p. 108. *See also ONA Personal Property SOP*, Part C.3. *See also* PPM ONA Guidance Job Aids III O.7.g.ja. *ONA: Standard Personal Property Line Items Job Aid*, Part N.

⁴⁴⁰ 44 C.F.R. § 206.119(c)(1)(ii).

⁴⁴¹ *IHPUG*, Chapter 6, Section III(A), *Personal Property Assistance, Room Furnishings*, p. 107.

⁴⁴² *Id* at Part E.1.c.

⁴⁴³ *See ONA Standard Personal Property Line Items Job Aid. See also ONA Personal Property SOP* at Part E.

to the rooms.⁴⁴⁴ Rooms the landlord or other non-dependent household members furnished are ineligible.⁴⁴⁵

4. Essential Tools

ONA covers equipment or tools required by an employer as a condition of employment or items required as a condition of an applicant's or dependent household member's education.⁴⁴⁶ FEMA considers items used in self-employment, such as tools or equipment, a business expense and therefore not eligible for assistance under this category.⁴⁴⁷ FEMA must verify all damage through an on-site inspection.⁴⁴⁸ The following are included on the list of eligible items:⁴⁴⁹

- Schoolbooks and supplies are eligible if a school requires the applicant to supply these items for educational courses or schooling, including homeschooling, trade school courses, and college.
- Uniforms are eligible when the applicant is responsible for their replacement.
- Applicants are responsible for replacing computers if required by school or employer and a power surge did not cause the damage.⁴⁵⁰
- Occupational tools do not have a set award amount. Receipts up to \$800, or the maximum allowable amount, whichever is less, determine the amount paid. In addition, if the item was not verified at inspection, ONA requires a statement

⁴⁴⁴ *ONA Personal Property SOP* at Part E.1.b.

⁴⁴⁵ *Id.* at Part E.1.g.

⁴⁴⁶ 44 C.F.R. § 206.119(c)(1)(iii).

⁴⁴⁷ *ONA Personal Property* at Part F.6.a. See also *IHPUG*, Chapter 6, Section III(A), *Personal Property Assistance, Essential Tools*, p 107.

⁴⁴⁸ *Id.* at Part F.1.

⁴⁴⁹ *Id.* at Part F.4. See also PPM, ONA Guidance Job Aids, III.O.7.eja. *ONA Essential Tools Processing Job Aid*, at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/ONA%20Essential%20Tools%20Processing%20Job%20Aid.docx.

⁴⁵⁰ *ONA Personal Property* at Part F.4.c and F.6.e.

from the employer on company letterhead verifying the necessity and type of tool required, an itemized list of the replacement cost for each tool required, and the place of potential purchase, including a verifiable statement, estimate, or bill stating that the disaster caused the damage.⁴⁵¹

5. Stored Personal Property

In general, personal property stored away from the damaged dwelling, such as at a public storage facility, is viewed as non-essential and not eligible for ONA. The concept is that if the applicant does not need the items for everyday use, then they are not presently essential. ONA may, however, pay for damaged personal property items stored away from the home if FEMA determines the item(s) to be a serious need or necessary expense.⁴⁵²

Since stored items are most often located away from the damaged dwelling, the initial inspection does not process them as part of the applicant's claim. Instead, the applicant submits a letter explaining the essential need for the stored personal property.⁴⁵³ The agency then reviews the damage listed with a case-by-case determination of those items chosen for payment.⁴⁵⁴ A claim under this heading does not include clothing stored within the damaged dwelling.⁴⁵⁵

Landlord-Owned Property

Landlord-owned property (non-occupant owned) is not eligible for reimbursement or replacement.

⁴⁵¹ ONA Personal Property at Part F.4.d.

⁴⁵² PPM, ONA Guidance, III.O.8, *ONA Stored Personal Property SOP*, Part A.1 at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/ONA%20Stored%20Essential%20Personal%20Property%20SOP.docx.

⁴⁵³ *Id.* at Part C.

⁴⁵⁴ *See ONA Stored Personal Property SOP.*

⁴⁵⁵ *Id.* at Part F.2.a.i.

6. Transportation⁴⁵⁶

Disaster-related transportation expenses for repair or replacement, as verified by an inspector or a mechanic, may be eligible for assistance under ONA.⁴⁵⁷ The program pays for the repair, replacement, and towing, and the cost of repair estimates.⁴⁵⁸ Eligible vehicles may include cars, vans, trucks, motorcycles, boats, bikes, or other vehicles that the state designates for a particular disaster.⁴⁵⁹

The state may establish the amount of the award at the time of the disaster.

Eligibility for the award depends on several conditions:⁴⁶⁰

- The damaged vehicle must comply with state laws regarding vehicle registration, inspection, and/or insurance requirements prior to the disaster.
- The SBA either denies a loan or determines the applicant is ineligible for a loan due to income, or the applicant receives an SBA loan that is insufficient to cover his or her other needs related to necessary expenses and serious needs.
- The applicant does not have comprehensive vehicle insurance or has insufficient comprehensive vehicle coverage.
- In general, the applicant has no other useable or working vehicle or is able to justify the need for a second household vehicle.

The program may also pay for other transportation related expenses incurred as a result of a disaster, such as ferry fees or subway fares.⁴⁶¹

⁴⁵⁶ Stafford Act § 408(e)(2), 42 U.S.C. § 5174(e)(2); 44 C.F.R. § 206.119(c)(2).

⁴⁵⁷ 44 C.F.R. § 206.119(c)(2)(i).

⁴⁵⁸ IHPUG, Chapter 6, Section III(B), *Transportation Assistance, Vehicle Repair Expenses*, p. 110.

⁴⁵⁹ IHPUG, Chapter 6, Section III(B), *Transportation Assistance, Conditions of Eligibility*, p. 109.

⁴⁶⁰ *Id.*

⁴⁶¹ 44 C.F.R. § 206.119 (c)(2)(ii).

However, FEMA does not currently have a standard process in place to capture these costs.

Case Example

Following the mudslides in Oso, Washington, in March and April 2014 (DR-4168-WA), FEMA provided commuting cost assistance under ONA for residents with increased commuting distances and costs due to closure of roads blocked by the mudslide debris. *See* <https://www.fema.gov/news-release/2014/04/21/commuting-cost-assistance-available-eligible-sr530-slide-survivors>.

7. Moving and Storage Expenses

ONA assists applicants with expenses incurred when moving personal property items into storage to avoid additional storm damage.⁴⁶² Damage to the primary residence must be present and confirmed by an on-site inspection, and the move back must be to the same residence.⁴⁶³

G. Non-SBA Application Dependent ONA Categories

The following categories of assistance are non-SBA dependent (i.e., there is no requirement that the applicant seek assistance from the SBA in the form of a loan before qualifying for these classes of ONA). FEMA reimburses the applicants for these ONA items based upon receipts for appropriate expenditures rather than advancing fixed amounts—except for funeral expenses, which are paid on receipts or verifiable estimates.⁴⁶⁴

⁴⁶² 44 C.F.R. § 206.119(c)(5).

⁴⁶³ IHPUG, Chapter 6, Section III(C), *Moving and Storage Assistance*, p. 111. *See also* PPM, ONA Guidance, III.O.6, *ONA Moving and Storage*) at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/npscs/applicant_processing/Guidance/ONA%20Moving%20and%20Storage%20SOP.docx.

⁴⁶⁴ *See IHPUG*, Chapter 6, Section II, *Non-Small Business Administration (SBA)-Dependent*, p. 93.

1. Funeral Expenses

Other needs assistance (ONA) provides financial assistance to an individual or household that experiences unexpected, uninsured expenses associated with the death or disinterment of a loved one attributed to a presidentially declared emergency or major disaster.⁴⁶⁵

a. Maximum Amount of Funeral Cost Assistance

The state establishes a maximum dollar amount or sub cap for funeral expenses to be used when it receives an emergency or major disaster declaration that includes IHP.⁴⁶⁶ The limit may be per decedent or per household. The state/tribe provides this amount to FEMA via the ONA Administrative Option Selection Form, which the state/tribe submits annually. In catastrophic events or unusual circumstances, FEMA consults with the affected state/tribe's ONA representative to determine if the state seeks to exceed the established maximum limit cost.

b. Eligible expenses

Funeral expenses eligible for assistance under the program include:

- Cost of casket or urn
- Mortuary services
- Transportation of the deceased and/or up to two family members into the area to identify the decedent (if required by state/local authorities)
- Up to five death certificates
- Burial plot or cremation niche

⁴⁶⁵ Stafford Act § 408(e)(1), 42 U.S.C. § 5174(e)(1); 44 C.F.R. § 206.119(b)(1) and (c)(4); *IHPUG*, Chapter 6, Section II(A), *Funeral Assistance*, pp. 93-96.

⁴⁶⁶ This is, of course, limited by the overall IA max grant amount for IHP.

- Interment or cremation
- Marker or headstone in a public cemetery or private burial site
- Cost of reinternment, if disinterment is caused by the declared disaster and occurs in a family cemetery on private property.

2. Medical and Dental Expenses

Unmet medical and dental expenses that occur as a result of a disaster are eligible for assistance.⁴⁶⁷ Incurred costs eligible for reimbursement include hospital visit(s), the cost of any medication associated with the disaster-related injuries, and the cost for the repair or replacement of medical equipment.⁴⁶⁸ In addition, expenses related to the purchase or rental of a generator after the incident start date to power life sustaining medically required appliances or equipment may be eligible for assistance under Miscellaneous Assistance.⁴⁶⁹ There is no specified maximum amount for these expenses other than the overall statutory limit for the IHP maximum.

3. Child Care Expenses

The Sandy Recovery Improvement Act of 2013 (SRIA), Pub. L. No. 113-2, amended section 408(e)(1) of the Stafford Act (42 U.S.C. § 5174(e)(1)) to provide the specific authority to pay for “child care” expenses as a category of IHP disaster assistance in addition to funeral, medical, and dental expenses.⁴⁷⁰ FEMA’s implementing IHP regulations have not been updated yet to include child care expenses. Please refer to the general IHP

⁴⁶⁷ Stafford Act § 408(e)(1), 42 U.S.C. § 5174(e)(1); 44 C.F.R. § 206.119(b)(1).

⁴⁶⁸ 44 C.F.R. § 206.119(c)(3). See IHPUG, Chapter 6, Section II(B), *Medical and Dental Assistance*, pp. 97-99.

⁴⁶⁹ See IHPUG, Chapter 6, Section II(B), *Medical and Dental Assistance, Limitations and Exclusions*, p. 98.

⁴⁷⁰ See § 1108 of the SRIA, Pub. L. 113-2, 127 Stat. 4 (2013), which amends Stafford Act § 408(e)(1) to add child care as an eligible expense under ONA.

and ONA regulations regarding eligibility criteria, as well as FEMA policy and guidance specific to child care.⁴⁷¹

The IRS has confirmed that, similar to other types of ONA assistance, child care assistance shall not be counted as a part of a disaster survivor's gross income for tax purposes.⁴⁷²

a. Eligible Household

If the child is an occupant of multiple households e.g. divorced or non-cohabiting parents, who apply for FEMA assistance, only the applicant with whom the child resides for the majority of the calendar year will be eligible for assistance.⁴⁷³

b. Scope of Assistance: Time Period and Amount

The date of eligibility for child care services commences on the beginning date of the incident period for the declared event and continues through the end of the IHP 18-month assistance period unless it is extended.

The applicant may be awarded no more than eight weeks cumulative assistance *per child* or *household* or the state maximum amount of assistance for child care *for the household*, whichever is less.⁴⁷⁴ Any funds provided will be applied against the maximum amount of IHP financial assistance allowed per household.⁴⁷⁵

⁴⁷¹ See IHPUG, Chapter 6, Section II(B), *Child Care Assistance*, pp. 99-101. See also PPM, SOPS & Job Aids, ONA Guidance, III.O.10. *ONA Child Care* at https://intranet.fema.net/orr/orr_programs/recovery_programs/npsc/applicant_processing/Guidance/Forms/AllItems.aspx.

⁴⁷² See IRS Publication 17, Section 12, Other Income, Welfare and Other Public Assistance Benefits, Disaster Relief Grants at <https://www.irs.gov/uac/about-publication-17>.

⁴⁷³ IHPUG, Chapter 6, Section II(B), *Child Care Assistance, Limitations and Exclusions*, p. 101.

⁴⁷⁴ *Id.*

⁴⁷⁵ Stafford Act Section 408(h)(1), 42 U.S.C § 5174(h)(1); 44 C.F.R. § 206.110(b).

c. Eligible Costs

Eligible expenses include the recurring fee for service of providing child care services, and, if a new child care service provider is required as a direct result of the disaster, any applicable registration fee or health inventory fee.⁴⁷⁶ Fees for extracurricular activities, trips, optional fees, and transportation are ineligible.⁴⁷⁷ Medical care or services, educational services such as after school tutoring, and recreational camps or clubs are also considered ineligible.⁴⁷⁸

4. Miscellaneous or Other Expenses

Under the Miscellaneous Expense category of the ONA provision, FEMA can provide funds for items and/or services that are commonly used to facilitate a household's disaster recovery, including a limited amount for items not owned prior to the major disaster or emergency.⁴⁷⁹ The costs associated with certain items purchased or leased after the start of the disaster incident period may be eligible for reimbursement.

Those items are generally limited to humidifiers, dehumidifiers, generators, chainsaws, carbon monoxide detectors, weather radios, and smoke detectors,⁴⁸⁰ although additional items may be requested by the state/tribal government to assist the specific recovery needs of their residents. The state/tribal government may request additional items during the annual selection of the ONA Administrator⁴⁸¹ or within 72 hours of the declaration of a disaster.⁴⁸²

Applicants must acquire the equipment within 30 days of the incident start date or up to the last day of the incident period, whichever is later.⁴⁸³

⁴⁷⁶ *IHPUG*, Chapter 6, Section II(B), *Child Care Assistance, Conditions of Eligibility* pp. 99-100.

⁴⁷⁷ *IHPUG*, Chapter 6, Section II(B), *Child Care Assistance, Limitations and Exclusions*, p. 101.

⁴⁷⁸ *Id.*

⁴⁷⁹ Stafford Act § 408(e)(2), 42 U.S.C. § 5174(e)(2); 44 C.F.R. §§ 206.119(b)(2)(ii) and (c)(6)(ii).

⁴⁸⁰ *IHPUG*, Chapter 6, Section II(D), *Assistance for Miscellaneous Items*, pp. 102-103.

⁴⁸¹ 44 C.F.R. § 206.120(c)(3)(i)

⁴⁸² 44 C.F.R. § 206.120(c)(3)(ii)

⁴⁸³ *IHPUG*, Chapter 6, Section II(D), *Assistance for Miscellaneous Items, Conditions of Eligibility*, p. 102. Generators have a more limited time period for acquisition.

Note that ONA processes damaged items owned prior to the disaster under the Personal Property expense category of ONA and not under Miscellaneous/Other.

H. Group Flood Insurance Policy (GFIP)

The Group Flood Insurance Policy (GFIP) is an NFIP policy.⁴⁸⁴ FEMA may pay \$600⁴⁸⁵ under ONA⁴⁸⁶ for three years of flood insurance for eligible ONA recipients of assistance for flood-damaged property (personal and real) located in an SFHA⁴⁸⁷ on which FEMA places a first-time flood insurance requirement.⁴⁸⁸ See the *National Flood Insurance Program (NFIP) Coverage Requirement* section earlier in this chapter.

The original purpose of the GFIP was to provide a temporary means for the grant recipients—often low-income persons or those on fixed incomes—to have flood insurance coverage for a period of three years following a flood loss. Disaster survivors under the program must buy and maintain their own flood insurance at the end of the three years to be eligible for future disaster aid to repair flood loss damage.⁴⁸⁹ Owners of dwellings must maintain coverage at the address of the flood-damaged property for as long as the address exists.⁴⁹⁰

The flood insurance requirement is reassigned to any subsequent owner of the flood-damaged address.⁴⁹¹ For renters, coverage must remain on the contents for as long as the renter resides at the flood-damaged rental unit.⁴⁹² Applicants who use their assistance to purchase a dwelling are required to maintain flood insurance coverage

⁴⁸⁴ 44 C.F.R. §§ 61.17 and 206.119(d).

⁴⁸⁵ *Id.* at §§ 61.17(b).

⁴⁸⁶ *Id.* at 206.119(c)(6)(i) and (d)(1).

⁴⁸⁷ *Id.* at 206.119(d)(2).

⁴⁸⁸ 44 C.F.R. § 206.110(k).

⁴⁸⁹ *NFIRA*, 42 U.S.C. § 5154a; 44 C.F.R. § 206.110(k)(3). The NIFRA requirement led to the GFIP program. If a homeowner does not purchase an individual flood insurance policy after three years, when the GFIP policy lapses, the homeowner will not receive FEMA assistance if impacted by another flood.

⁴⁹⁰ 44 C.F.R. § 206.110(k)(3)(i)(A).

⁴⁹¹ *Id.*

⁴⁹² 44 C.F.R. § 206.110(k)(3)(i)(B).

for as long as the dwelling exists and is located in a designated SFHA. The flood insurance requirement is reassigned to any subsequent owner of the dwelling.⁴⁹³

Applicants who have not exceeded the IHP maximum are eligible for a GFIP upon referral to ONA for personal property assistance.⁴⁹⁴ The GFIP will also cover their IHP Housing Assistance repair/replacement flood insurance coverage requirement. There must be no previous flood insurance requirement for the property, and the applicant must ultimately receive an ONA award for flood damage.⁴⁹⁵

Applicants who are non-compliant with a prior flood insurance requirement under IHP or as required by SBA⁴⁹⁶ will be ineligible for future flood insurable real and/or personal property assistance.⁴⁹⁷ Applicants who are non-compliant (called NCOMPs) but who receive an HA referral are eligible for rental assistance and direct housing assistance (THUs) because neither is subject to the NFIRA restriction.

GFIP insured applicants are not covered if they are determined to be ineligible based on NFIP exclusions.⁴⁹⁸ Applicants need to review their Certificate of Flood Insurance to determine whether the list of policy exclusions affect them. If their damaged property (real or personal) is ineligible for coverage, applicants should notify the NFIP in writing to have their name removed from the GFIP and to have the flood insurance maintenance requirement expunged from the data-tracking system.⁴⁹⁹

V. Additional Individual Assistance (IA) Programs

In addition to IHP and ONA, FEMA is authorized to implement, fund, and make available additional federal disaster assistance programs to

⁴⁹³ *Id.* at § 206.110(k)(3)(i)(C).

⁴⁹⁴ *See* 44 C.F.R. § 206.119(d)(1).

⁴⁹⁵ *IHPUG*, Chapter 6, Section III(D), *Group Flood Insurance Policy*, pp. 112-114.

⁴⁹⁶ Generally, for the life of the loan for property located in an SFHA. *See* 42 U.S.C. § 4012a(a).

⁴⁹⁷ 44 C.F.R. §§ 206.110(k)(3)(ii) and 206.113(b)(8).

⁴⁹⁸ *Id.* at § 206.119(d)(3).

⁴⁹⁹ *Id.*

families and individual survivors of presidentially declared disasters. A state may ask for these programs as part of its declaration request.

A. Disaster Case Management (DCM) Services

1. Description

The Stafford Act authorizes Disaster Case Management (DCM) Services in major disasters, through direct or financial assistance, to state, tribe or local government agencies or qualified private organizations to provide disaster survivors with case management services to identify and address unmet needs.⁵⁰⁰

When a state/tribe requests, FEMA may authorize DCM to identify and assist disaster survivors who continue to have significant disaster-caused unmet needs after they have exhausted their personal resources, insurance, and immediate disaster-related grant benefits.

DCM uses a spectrum of services to provide clients with the support they need to establish and successfully complete their own long-term recovery goals and be well on their way to self-sufficiency without further need of assistance through FEMA.

2. Requirements for DCM Implementation⁵⁰¹

The governor/chief executive of an impacted state/tribe may request DCM 1) as part of the state/tribe's Request for a Presidential Disaster Declaration that includes Individual Assistance or 2) via a written request to the FEMA FCO within 15 days of the date of declaration. The requirements for granting DCM are as follows:

- DCM is only available for major disaster declarations.

⁵⁰⁰ Stafford Act § 426, 42 U.S.C. §5189d.

⁵⁰¹ For more details on the DCM Program and Grant Application process, See The Disaster Case Management Program Guidance at: https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Pages/DCM.aspx.

- The major disaster declaration must include IA.
- A DCM Assessment Team must deploy to the disaster area to conduct a comprehensive assessment of the state/tribe's disaster case management resources available to implement DCM while identifying the gaps in service that exists due to the disaster.
- Program Management and Operation

The DCM contains two programs—Immediate Disaster Case Management (IDCM) and state/tribe DCM Grant Program. IDCM may be provided through invitational travel to voluntary agencies; mission assignment to other federal agencies; or implementation of an interagency agreement (IAA), a contract, and/or a state/tribe DCM Grant Program application approved by FEMA. IDCM may last up to 90 days. The state/tribe DCM Grant is a federal grant that makes funds available to the state/tribe to implement a Disaster Case Management Program by utilizing providers that offer DCM services for long-term disaster-caused unmet needs. A state/tribe may elect to only apply for a DCM Grant, which shall not exceed 24 months from the date of the declaration.

B. Crisis Counseling Assistance and Training

1. Overview

The Stafford Act authorizes the Crisis Counseling Program (CCP) to provide supplemental funding to states/tribes for the provision of services and training to alleviate mental health issues experienced by survivors that are caused or aggravated by a declared disaster or its aftermath.⁵⁰²

⁵⁰² Stafford Act § 416, 42 U.S.C. § 5183; 44 C.F.R. § 206.171. *See also* https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Pages/CrisisCounselingProgram.aspx.

The program may only be authorized for major disaster declarations.⁵⁰³ The assistance provided at no cost to the disaster survivor. This program is for counseling and not treatment.⁵⁰⁴

- Immediate Services Program (ISP) – provides funding for services up to 60 days following the disaster declaration date and is intended to help the state or local mental health agency respond to and meet the immediate mental health needs of disaster survivors by providing screening, diagnostic, and counseling techniques, as well as outreach services such as public information and community networking.
- Regular Services Program (RSP) – provides funding for up to nine months following the disaster declaration date and assistance to persons affected by a presidentially declared disaster by providing funding, for crisis counseling, community outreach, consultation, and education services.

2. Program Monitoring and Administration

FEMA administers CCP at the federal level through an IAA with the U.S. Department of Health and Human Services⁵⁰⁵ Substance Abuse and Mental Health Services Administration (SAMHSA) while state/tribe mental health agencies administer it locally.⁵⁰⁶

SAMHSA's Center for Mental Health Services Emergency Mental Health and Traumatic Stress Services Branch works with FEMA to provide technical assistance, consultation, and training for state, tribal, and local mental health personnel and to provide grant administration and program oversight. For more information on the CCP, *see* SAMHSA's website at <http://www.samhsa.gov/dtac/ccp>.

⁵⁰³ 44 C.F.R. § 206.171(d).

⁵⁰⁴ <http://www.fema.gov/media-library/assets/documents/24411>. *See generally*, <http://www.samhsa.gov/dtac/ccp>.

⁵⁰⁵ *See generally* 44 C.F.R. § 206.171(a) and (i)(2).

⁵⁰⁶ 44 C.F.R. § 206.171(c).

3. Eligibility

a. Individuals

To be eligible for either CCP, an individual must be a resident of the designated disaster area or must have been located in the area at the time the disaster occurred.⁵⁰⁷

b. The State/Tribe

The purpose of CCP assistance is to supplement available state, tribal, and local government resources. Therefore, a state's application for CCP grant funds must demonstrate that services are required because of the severity and magnitude of the disaster and that the need for crisis counseling and training in the affected area is beyond the capacity of state, tribal, and local resources.⁵⁰⁸

ISP and RSP funding are separate. A state/tribe may request funding for either or both programs, depending on need, by application to FEMA, copied to SAMHSA's Center for Mental Health Services. The application for ISP must be submitted no later than 14 days following the declaration of a major disaster.⁵⁰⁹ The application for RSP must be submitted no later than 60 days after the Presidential declaration.⁵¹⁰

⁵⁰⁷ 44 C.F.R. § 206.171(h).

⁵⁰⁸ 44 C.F.R. § 206.171(f)(1)(i) and (f)(2); 44 C.F.R. § 206.171(g)(1)(i) and (g)(2).

⁵⁰⁹ 44 C.F.R. § 206.171(f)(1).

⁵¹⁰ 44 C.F.R. § 206.171(g).

New Rules Regarding Use of Faith Based Groups to Provide Social Services

Many faith based organizations are involved in response and recovery activities both at the local and national level. If they provide social services⁵¹¹ pursuant to direct or indirect DHS financial assistance, including Stafford Act funding, they may be subject to DHS regulations to ensure nondiscrimination.⁵¹²

C. Disaster Legal Services (DLS)

1. Program Description

The Stafford Act authorizes Disaster Legal Services (DLS)⁵¹³ assistance to provide free, non-fee-generating legal services (including legal advice, counseling, and representation) to low-income individuals who are unable to secure adequate legal services but require such services as a result of a declared major disaster.⁵¹⁴

The low-income standard is not based on income *per se* but on the applicant's financial ability to secure adequate legal services, regardless of whether that insufficiency existed prior to or as a result of the disaster.⁵¹⁵ This policy is not considered to be in violation of the Stafford Act nondiscrimination requirement regarding economic status.⁵¹⁶

Following a major disaster declaration, FEMA, through a Memorandum of Agreement between FEMA and the Young Lawyers Division (YLD) of the American Bar Association, provides free legal services to disaster victims

⁵¹¹ This would include DCM and CCP.

⁵¹² 6 C.F.R. Part 19.

⁵¹³ Stafford Act § 415, 42 U.S.C. § 5182.

⁵¹⁴ Disaster Legal Services [hereinafter DLS] is not available for emergency declarations. *See* Stafford Act § 415, 42 U.S.C. § 5182.

⁵¹⁵ 44 C.F.R. § 206.164(a).

⁵¹⁶ Stafford Act § 308(a), 42 U.S.C. § 5151(a); 44 C.F.R. § 206.11; 44 C.F.R. §§ 206.164(a) and (b).

for the securing of Stafford Act benefits and for other disaster-related claims.⁵¹⁷

YLD coordinates with participating attorneys, law firms, nonprofit legal services providers, Legal Services Corporation recipients, state and local bar associations, and pro bono organizations to provide legal assistance under the DLS Program.⁵¹⁸ The FEMA IA staff coordinates with the YLD DLS National Director and the YLD District Representative for the impacted state.⁵¹⁹ The YLD District Representative may request that OCC Field Counsel staff participate in disaster specific DLS volunteer attorney trainings and consult on applicant cases.⁵²⁰

2. Forms of DLS Assistance

DLS assistance includes legal counseling and advice, referral to appropriate sources of legal services, and legal representation. The RA or his or her representative refers cases that may generate a fee to private attorneys through lawyer referral services.⁵²¹

Participating lawyers typically provide assistance with:

- Insurance claims, such as life, medical, property, etc.;
- Counseling and advice about landlord/tenant problems;
- Drafting powers of attorney;
- Replacement of wills and other important legal documents destroyed in a disaster;

⁵¹⁷ See 44 C.F.R. § 206.164 (c) and (e). See also, Memorandum of Understanding with American Bar Association:

https://www.americanbar.org/publications/the_affiliate/2012/september_october_2012/disaster_legal_services_dls_free_legal_assistance_to_natural_disaster_survivors.html.

⁵¹⁸ It is not unusual for a Legal Aid group or the state bar association to operate the DLS hotline.

⁵¹⁹ See the FEMA IA DLS intranet site at https://intranet.fema.net/org/orr/orr_programs/recovery_programs/ia_programs/Pages/Disaster%20Legal%20Services.aspx.

⁵²⁰ See the DLS Training Manual at http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/dls/fema_training_program.authcheckdam.pdf.

⁵²¹ 44 C.F.R. § 206.164(b).

- Estate administration, including guardianships and conservatorships;
- Home repair contracts and contractors;
- Consumer protection matters, remedies, and procedures; and
- FEMA appeals and other disaster-related actions against the government.

3. Conditions and Limitations

- DLS is for low-income survivors of presidentially declared disasters only;
- Legal representation is limited to non-fee generating cases⁵²² and legal issues related to or arising from the declared disaster;⁵²³
- FEMA funds the administrative costs of the DLS program coordinated through the YLD;
- Should it be necessary for FEMA to pay attorneys to provide disaster legal services, the RA shall determine the amount of compensation and, at his or her discretion, and may pay for related administrative costs requested;⁵²⁴ and
- DLS assistance is subject to FEMA's policies of nondiscrimination.

⁵²² A "fee generating case" is defined in the C.F.R. as "one which would not ordinarily be rejected by local lawyers as a result of its lack of potential remunerative value." 44 C.F.R. § 206.164(b). This would include cases where attorneys might expect to receive a percentage of a court or jury award or settlement.

⁵²³ 44 C.F.R. § 206.164(e).

⁵²⁴ 44 C.F.R. § 206.164(d).

D. Disaster Unemployment Assistance (DUA)

1. General Purpose and Overview

The Stafford Act provides for special federally funded weekly benefits and re-employment services to workers and self-employed individuals whose employment has been lost or interrupted as a direct result of a declared major disaster⁵²⁵ and who are not eligible for regular state unemployment insurance benefits.

The purpose of Disaster Unemployment Assistance (DUA) is to temporarily provide for replacement of a portion of the survivor's income for basic necessities. There have been major disaster declarations that have provided very limited IA (e.g., including DUA but not IHP) for designated areas.⁵²⁶ See Chapter 3, *Declarations*.

FEMA has delegated federal responsibility for DUA implementation and administration to the Secretary of Labor, U.S. Department of Labor (DOL).⁵²⁷ DOL oversees the program in coordination with FEMA.

At the state level, unemployment insurance agencies administer DUA under agreements with the Secretary of Labor.⁵²⁸ FEMA provides funds to the Secretary of Labor, or his or her designee, who makes funds available to these agencies for direct payment of DUA benefits to individuals and reimbursement of state administrative costs.

Because the Welfare Reform Act of 1996 affects the authority of the federal government to provide cash benefits to disaster survivors, individuals who wish to receive DUA benefits must provide proof of identity and demonstrate their status as U.S. citizens, U.S. nationals, or

⁵²⁵ Stafford Act § 410; 42 U.S.C. § 5177 and 44 C.F.R. § 206.141. Note that Disaster Unemployment Assistance is not available for emergency declarations.

⁵²⁶ Examples include: 2001 Florida Severe Freeze Disaster, FEMA-1359-DR-FL (DUA and HM); 2006 Hawaii Earthquake Disaster, FEMA-1664-DR-HI (Maui County for IA, limited to DUA; DUA further limited to the communities of Kaupo, Kipahulu, and Hana); and 2007 California Severe Freeze Disaster, FEMA-1689-DR-CA (DUA and Food Commodities).

⁵²⁷ 44 C.F.R. § 206.141.

⁵²⁸ See the DOL DUA Handbook at https://wdr.doleta.gov/directives/attach/ETAH/356/ETHand356_toc.pdf.

qualified aliens.⁵²⁹ This is irrespective of state law eligibility criteria for regular unemployment benefits.

2. Benefit Duration and Amounts

DUA benefits are payable to individuals only for weeks of unemployment in the Disaster Assistance Period, which begins with the first day of the week following the incident period opening date, and for up to 26 weeks after the declaration date,⁵³⁰ as long as the individual's unemployment continues to be a direct result of the declared disaster event.⁵³¹

State law determines the maximum weekly benefit amount for unemployment compensation in the state where the disaster occurred.⁵³² However, the minimum weekly amount is half (50%) of the average benefit amount in the state.

The DUA benefit provision in the Stafford Act specifically provides that “assistance for a week of unemployment shall not exceed the maximum weekly amount authorized under the unemployment compensation law of the state in which the disaster occurred.”⁵³³

For more information on Disaster Unemployment Assistance, please consult the DOL's DUA handbook at https://wdr.doleta.gov/directives/attach/ETAH/356/ETHand356_toc.pdf.

E. Food Benefits and Commodities – Direct and Indirect

Ensuring that disaster survivors and emergency responders have access to food⁵³⁴ is one of the most immediate concerns following a major disaster or emergency, and it is critical to FEMA's effective management of the federal disaster response and recovery efforts.

⁵²⁹ Welfare Reform Act, Pub. L. No. 104-193, (1996), as amended, 8 U.S.C. § 1611; *See also* Social Security Act § 303(f), Pub. L. 74-271 (1935), 42 U.S.C. § 503(f); 20 C.F.R. § 603.1(b).

⁵³⁰ Stafford Act § 410(a), 42 U.S.C. § 5177. 20 C.F.R. § 625.7.

⁵³¹ 20 C.F.R. § 625.4(d).

⁵³² 20 C.F.R. § 625.11.

⁵³³ Stafford Act § 410(a), 42 U.S.C. § 5177(a).

⁵³⁴ Stafford Act § 413, 42 U.S.C. § 5180; 44 C.F.R. § 206.151.

The Stafford Act provides for this critical need following a disaster through the ready and convenient availability of adequate food stocks in order for immediate mass feeding and distribution of food to disaster survivors anywhere in the United States.⁵³⁵ This section pertains only to food and not to water.

1. Direct Distribution of Food

The USDA receives direct funding from Congress to purchase food commodities necessary to provide adequate food supplies for use in any area of the United States in the event of a major disaster or emergency in that area.⁵³⁶

2. Mass/Congregate Feedings

Congregate feeding involves the feeding of large groups of persons, typically in designated local shelters, schools, churches, community centers, soup kitchens, and/or mobile kitchens. In accordance with the Stafford Act, and to fulfill its National Response Plan functions, the USDA's Food and Nutrition Service (FNS) donates foods that USDA purchased to maintain and replenish available food stocks in every state and some U.S. territories.⁵³⁷

In the event of a declared emergency or major disaster, and where the state has requested and been granted food commodities as part of an IA request, state agencies may receive and distribute USDA donated foods.

⁵³⁵ *Id.* This section, § 413(b), authorizes the Secretary of Agriculture to use Title 7 appropriated funds as a means of ensuring proper § 413 implementation and compliance.

⁵³⁶ 7 U.S.C. § 612(c). *See* Agricultural Adjustment Act of 1935, Pub. L. No. 74-320 (1935), § 32 as amended, 7 U.S.C. § 501, *et seq.*, and Department of Agriculture Appropriations Act, FY 2000, Pub. L. No. 106-78 (2000), as amended, 7 U.S.C. § 612(c), 15 U.S.C. § 714(c) (Individual Hardship Cases), authorizing the USDA to provide commodities acquired in connection with the USDA's § 32 operations and as authorized by 15 U.S.C. § 714(c) and 7 U.S.C. § 612(c), to individuals in case of hardship, as the Secretary of Agriculture determines.

⁵³⁷ *See* Stafford Act § 413(b), 42 U.S.C. § 5180. USDA's Food and Nutrition Service [hereinafter FNS] is the designated primary agency for ESF-11 (food), as outlined in the National Response Plan.

In the case of a presidentially declared emergency or major disaster, if a nonprofit disaster organization, such as the American Red Cross⁵³⁸ or the Salvation Army, wishes to use USDA donated commodities for congregate feeding, that organization must first submit an application to the state for review and approval.⁵³⁹

If the state is providing congregate feeding as a result of a presidentially declared emergency or major disaster, it has authority, without prior FNS approval, to immediately release state or local stocks of USDA-donated food to disaster relief organizations for the congregate feeding of disaster survivors at shelters and other state-approved mass feeding sites.⁵⁴⁰

Although prior approval for release is not required, the state must notify the FNS Regional Office of the release of USDA food stocks within 24 hours of release. The state must forward pertinent information, including but not limited to projections of the number of persons and meals expected to be served, length of time, and type of commodities needed.

3. Food Stock Direct to Household Distribution

In certain limited instances, circumstances may make it impossible or impracticable to conduct congregate feeding at shelters or other centrally located mass distribution sites, necessitating a short-term direct to household distribution of commodities. In such instances, the state may distribute food directly to households and FNS will, at the state's request, replace the USDA foods used. The state must:

⁵³⁸ The American Red Cross is the primary disaster relief organization responsible for coordinating feeding in a state where a disaster occurs.

⁵³⁹ The application submission and review procedure is different depending on whether there is a residentially declared disaster or a "situation of distress." For a situation of distress, responsibility for approval of the application lies with the FNS.

⁵⁴⁰ According to the FNS, congregate feeding may continue as long as it is needed in a presidentially declared major disaster or emergency. In congregate feeding, the disaster organization prepares meals in large quantities and serves them cafeteria style in a central location. U. S. Department of Agriculture, Food and Nutrition Service, USDA Foods Program Disaster Manual [hereinafter USDA Disaster Food Manual] (Apr. 2011), at 3.

- Request and receive prior approval from FNS Headquarters for the distribution of foods directly to households for preparation and consumption at home;
- Comply with the duration timeline set by FNS Headquarters for household distribution of commodities;
- Take reasonable steps to prevent households from participating in other individual household food assistance programs, such as FNS' food stamps or Supplemental Nutrition Assistance Program (SNAP)⁵⁴¹; and
- Collect and maintain household information as part of the distribution.
- Food Commodities Stock Replacement or Reimbursement

FNS will replace, or reimburse the state for, USDA commodities used pursuant to an emergency or major disaster declaration if the state provides appropriate documentation with its commodity replacement request. The FNS has no authority to replace commodities that are lost, destroyed, contaminated, or otherwise rendered unusable in an emergency or major disaster due to flooding, fire, wind, power outage, or other cause. The state will have to apply to FEMA for financial assistance for the loss.⁵⁴²

For more information on USDA authorities to provide direct food assistance during in disasters, please consult the FNS website at: <http://www.fns.usda.gov/disaster/disaster-assistance>.

⁵⁴¹ FNS Supplemental Nutrition Assistance Program, <http://www.fns.usda.gov/snap>.

⁵⁴² *Id.*

F. Benefits and Distribution: Disaster Supplemental Nutrition Assistance Program (D-SNAP) ⁵⁴³

1. General Program Purpose And Description

In addition to the USDA authorities discussed earlier, the Stafford Act authorizes distribution of coupon allotments through electronically issued food coupon or food stamp benefits of the USDA FNS.⁵⁴⁴ This is the Disaster Supplemental Nutrition Assistance Program (D-SNAP).⁵⁴⁵ USDA FNS can authorize the issuance of disaster food assistance as a stand-alone program, even in the absence of a presidentially declared major disaster and wider grant of IA.⁵⁴⁶

2. Eligibility Procedures and Requirements

The D-SNAP program⁵⁴⁷ provides grants to individuals via the state and includes direct payments restricted to food purchasing through electronic benefits. Households found to be in need of food assistance receive allotments of electronic food stamp benefits they can use to buy food in authorized food stores.

The eligible household allotment varies according to household size, income, and allowable deductions; the state or U.S. territory agency responsible for federally aided public assistance programs, through local welfare officials, determines the household allotment.

Generally, to be eligible for this Stafford Act assistance, the disaster survivor must be a member of a low-income household in a disaster area

⁵⁴³ Formerly called Food Coupons and Distribution. See the Food and Nutrition Act of 2008 § 4115, Pub. L. No. 110-246 (2008).

⁵⁴⁴ Stafford Act § 412, 42 U.S.C. § 5179.

⁵⁴⁵ Stafford Act § 412, 42 U.S.C. § 5179. The normal food assistance that FNS provides, the “food stamp program,” is now referred to as SNAP. D-SNAP is the disaster food assistance program through which FNS provides assistance under section 412 of the Stafford Act. SNAP and D-SNAP are now fully electronic.

⁵⁴⁶ *Id.* D-SNAP is not available for emergency declarations.

⁵⁴⁷ See Disaster Food Stamp Program Guidance.

and unable, due to the disaster, to purchase adequate amounts of nutritious foods.⁵⁴⁸

Non-qualified aliens, ineligible students, and other household members who do not qualify for the SNAP program may qualify for this D-SNAP disaster food assistance.⁵⁴⁹ Persons already participating in SNAP at the time of the disaster may be eligible for D-SNAP as a supplement to their normal food benefits.

For more information on the D-SNAP program, please consult USDA's D-SNAP handbook at https://fns-prod.azureedge.net/sites/default/files/D-SNAP_handbook_0.pdf

3. Duplication of Emergency Food Benefits

A household cannot receive D-SNAP benefits and direct food distributions simultaneously. States must take reasonable steps to prevent households from participating in both the D-SNAP and direct to household food distribution programs, and they must collect and maintain household information as part of the distribution.

G. Relocation Assistance

1. Description

The Uniform Relocation Act (URA)⁵⁵⁰ provides protection and relocation assistance to individuals whose property the federal government acquires or who are otherwise displaced from their residence as a result of federally funded projects,⁵⁵¹ by ensuring that displaced persons will be treated fairly

⁵⁴⁸ See *Id.*; Stafford Act § 412, 42 U.S.C. § 5179.

⁵⁴⁹ See the D-Snap Guidance, Figure 1. Comparison of Eligibility Standards for SNAP and D-SNAP, page 3 at http://www.fns.usda.gov/sites/default/files/D-SNAP_handbook_0.pdf.

⁵⁵⁰ Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 (URA), 42 U.S.C. § 4601, *et seq.*; 49 C.F.R. Part 24. See also Stafford Act § 414, 42 U.S.C. § 5181; 44 C.F.R. § 206.161.

⁵⁵¹ Typically, the federal government or a state exercises eminent domain for a federally funded project.

and equitably and will receive assistance in relocating from the property they occupy.⁵⁵²

This statute applies to renters,⁵⁵³ as well as owners of property. Those who are “lawfully present” in the United States may benefit from the URA,⁵⁵⁴ rather than the stricter standard in the Welfare Reform Act.⁵⁵⁵ See Section II(B) *Assistance Registration Process*. The assistance the URA provides is actual out-of-pocket moving expenses and any reasonable increase in rent and utility costs.⁵⁵⁶

The Stafford Act provides that if an individual is eligible for housing relocation assistance from the federal government, the fact that the individual is unable to occupy the residence from which the individual is relocating because of a presidentially declared major disaster will not prevent the individual from being entitled to relocation assistance.⁵⁵⁷

Relocation Assistance under the URA may become an issue following disasters when communities acquire, demolish, or relocate at-risk properties through Hazard Mitigation Grant Program (HMGP) funds. See Chapter 7, *Hazard Mitigation Assistance*, for more information on property acquisition programs.

HMGP property owners who choose to sell their properties to the community as a result of a FEMA property acquisition or buyout program using HMGP funds do so voluntarily and are not eligible for relocation

⁵⁵² The URA defines a “displaced person” as: “Any person (individual, family, partnership, association, or corporation) who moves from real property, or moves personal property from real property as a direct result of (1) the acquisition of the real property, in whole or in part, (2) a written notice from the Agency of its intent to acquire, (3) the initiation of negotiations for the purchase of the real property by the Agency, or (4) a written notice requiring a person to vacate real property for the purpose of rehabilitation or demolition of improvements, provided the displacement is permanent and the property is needed for a federal or federally assisted program or project.” 42 U.S.C. § 4601(6).

⁵⁵³ 49 C.F.R. § 24.101(a)(2).

⁵⁵⁴ See 42 U.S.C. § 4605(a); 49 C.F.R. § 24.208.

⁵⁵⁵ Welfare Reform Act, Pub. L. No. 104-193 (1996), as amended, 8 U.S.C. § 1611;

⁵⁵⁶ 49 C.F.R. § 24.204(c)(2).

⁵⁵⁷ *Id.*; 44 C.F.R. § 206.161; See also 49 C.F.R. § 24.403(d), *Additional rules governing replacement housing payments*, which includes very similar language.

assistance.⁵⁵⁸ However, tenants of residential properties acquired by localities through FEMA property acquisition projects who are forced to leave their homes involuntarily may be eligible for assistance under the URA.⁵⁵⁹

2. Guidance and Policies

The U.S. Department of Transportation is the designated federal lead agency for the URA and has delegated lead agency responsibility to the Federal Highway Administration (FHWA).⁵⁶⁰ The regulations for the URA contain a provision similar to (but more expansive than) the provision in the Stafford Act,⁵⁶¹ stating that the federal government will deny no person a replacement housing payment solely “because the person is unable to meet the occupancy requirements for a reason beyond his or her control, including: (1) A disaster, an emergency, or an imminent threat to the public health or welfare, as determined by the President.”⁵⁶²

a. Constructive Residential Occupancy

The FHWA has interpreted both the Stafford Act and FHWA’s own regulations to mean that, upon a determination of “constructive residential occupancy,” URA residential relocation benefits and payments “will be provided to otherwise eligible residentially displaced persons without regard to their inability to meet prescribed occupancy requirements.”⁵⁶³

⁵⁵⁸ See Hazard Mitigation Assistance Unified Guidance Addendum, pp. 27-30 (2015); <https://www.fema.gov/media-library/assets/documents/103279>.

⁵⁵⁹ *Id.*

⁵⁶⁰ See generally 49 C.F.R. § 24.2(16).

⁵⁶¹ Stafford Act § 414, 42 U.S.C. § 5180

⁵⁶² 49 C.F.R. § 24.403(d).

⁵⁶³ Federal Highway Administration [hereinafter FHWA] Memorandum, *Uniform Act Eligibility in Areas Affected by Hurricane Katrina* (Oct. 6, 2005) [hereinafter FHWA Uniform Act Memo]; http://www.fhwa.dot.gov/real_estate/uniform_act/policy_and_guidance/katrinaguid.cfm. Although specifically issued “to provide guidance concerning Uniform Act eligibility . . . for those projects located within areas impacted by Hurricane Katrina,” the memo addresses the failure in general to meet Uniform Act occupancy standards due to displacement caused by the occurrence of all presidentially declared disaster or emergency events.

The finding of “constructive residential occupancy” is a determination that, if the disaster or emergency event had not occurred, the residential occupant would have occupied the property within the URA’s occupancy requirements until the federally funded project displaced it.

The FHWA, in accordance with of the Stafford Act and FHWA’s own regulations,⁵⁶⁴ recommends that the following factors be considered in making the determination of “constructive residential occupancy:”⁵⁶⁵

- The claimant’s actual occupancy of the dwelling just prior to the displacing disaster or emergency event;
- The existence of a lease or other legal tenancy covering a tenant’s right to occupancy prior to and through the disaster or emergency event;
- An owner’s legal right to return to the evacuated property, rebuild, and occupy a dwelling; and any other factors indicating whether the claimant would have been in occupancy at the time of residential displacement by the federally funded acquisition project except for the occurrence of the disaster or emergency event.

b. Eligibility Caveats

As mentioned previously, the occupancy provision applies only to occupants of residential properties, including manufactured home occupants, and does not apply to businesses.

Residential displacement must be involuntary; that is, property owners not subject to an exercise of eminent domain, who choose to sell their properties in connection with a FEMA or state property acquisition project, and who act voluntarily, are not eligible for URA assistance.

Tenants involuntarily displaced by voluntary sales might be eligible. Except for physical occupation as of the date of displacement by the

⁵⁶⁴ See FHWA Uniform Act Memo.

⁵⁶⁵ *Id.*

federally funded project, all URA eligibility requirements continue to apply.⁵⁶⁶

For further information on implementation of relocation assistance under the URA, please consult the FHWA's website at:
http://www.fhwa.dot.gov/real_estate/uniform_act/.

H. Transportation Assistance to Individuals and Households

This provision allows FEMA to pay for returning an evacuee to his or her home to oversee reconstruction or repair of the home and to finally return home.⁵⁶⁷ It authorizes the federal government to support the return home of evacuees and provides transportation assistance to disaster survivors displaced from their residences, including assistance needed to move among temporary shelters or to return to the original residence. FEMA has not yet issued a policy or regulations to implement this provision of the Stafford Act.⁵⁶⁸

I. Cora Brown Fund

The Cora Brown Fund is a specific account that FEMA administratively established under the Stafford Act's gift acceptance and use authority,⁵⁶⁹ and it is the only continuing account under this authority to administer cash awards for long-term unmet needs.

Grants from the Cora C. Brown Fund⁵⁷⁰ (the Fund) are made possible by the late Cora C. Brown of Kansas City, Missouri who, upon her death in the late 1970s, bequeathed a portion of her estate to the United States to be used expressly for the relief of human suffering caused by natural disasters and not caused or attributed to by war or acts of war.

⁵⁶⁶ *Id.*

⁵⁶⁷ Stafford Act § 425, 42 U.S.C. § 5189c.

⁵⁶⁸ This provision was enacted as part of PKEMRA, Pub. L. No. 109-195 (2006), § 889(f).

⁵⁶⁹ Stafford Act § 701(b), 42 U.S.C. § 5201(b); 44 C.F.R. § 206.181. *See Cora Brown Fund Fact Sheet* (April 2018).

⁵⁷⁰ *Id.*

FEMA interprets this requirement to exclude terrorist attacks, so the Fund was unavailable for assistance associated with the September 11, 2011, attacks.⁵⁷¹

The Fund is meant to provide disaster assistance of last resort as a final step in the IA sequence of delivery, for use when all other avenues of obtaining assistance have been exhausted. Fund amounts are modest, between \$2,000 and \$10,000.⁵⁷²

Eligible Fund recipients are the survivors (individuals, families, groups, or their agents)⁵⁷³ of presidentially declared natural disasters or emergencies not caused by or attributable to war. The Fund has certain restrictions, however. It is available only for presidentially declared major disasters or emergencies, only in designated areas, and only after a recommendation by the appropriate RA.

The ultimate authority to use the fund is at the discretion of the Associate Administrator for Response and Recovery, or his or her designee.⁵⁷⁴ Funds must be used in a manner consistent with other federally mandated disaster assistance or insurance programs.⁵⁷⁵

⁵⁷¹ See 44 C.F.R. § 206.181(a).

⁵⁷² See 44 C.F.R. § 206.181(c)(1).

⁵⁷³ For example, an award for a service to a “group” of disaster survivors occurred when Cora Brown funds were applied for and awarded directly to Louisiana and Mississippi so that those “agent” states could continue providing Stafford Act § 426 Phase I Case Management services to individuals and families affected by the 2005 hurricanes. *Id.* §§ 206.181(a) and (c)(4).

⁵⁷⁴ 44 C.F.R. § 206.181(c)(1).

⁵⁷⁵ For example, “to comply with the Flood Disaster Protection Act of 1973 . . . any [Cora Brown Fund] award for acquisition or construction purposes shall carry a requirement that any adequate flood insurance policy be purchased and maintained.” *Id.* § 206.181(c)(6).

Case Example

In DR-1547, South Carolina, which was declared for Public Assistance only, two individuals' mobile homes were destroyed as a result of this disaster and they had need for Individual Assistance. However, there were not enough individuals needing assistance to warrant a major declaration for IA. Individual Assistance staff worked with other agencies, including voluntary organizations, to identify funding to assist these families. However, they were unable to obtain sufficient assistance from other sources and still had a need for IA Assistance. They were awarded \$10,200 each from the Cora Brown Fund.

VI. Appeals

Applicants may appeal any FEMA decision regarding eligibility or the amount of assistance awarded within 60 days after notification of the award or denial of assistance.⁵⁷⁶ FEMA must decide the appeal within 90 days of receiving notice of the appeal.⁵⁷⁷ The applicant (or a designee) must send in a written appeal, sign it, and give the reasons for an appeal. If the designee files the appeal, the applicant must provide a statement giving that person the authority to do so.⁵⁷⁸

The RA or a designee has the authority to make the appeal decision, except in cases of ONA appeals, where the state has chosen the option to administer ONA.⁵⁷⁹ In virtually every declared disaster, the RA delegates the processing of appeals for IHP to the Recoupment and Appeals Department of the NPSC using the NEMIS system.

When the state chooses to administer ONA, the appropriate state official receives and reviews the initial decision and makes the appeal determination. The appropriate FEMA or state official notifies the applicant of the receipt of the appeal.⁵⁸⁰ The decision of the appellate

⁵⁷⁶ Stafford Act § 423, 42 U.S.C. § 5189a; 44 C.F.R. § 206.115(a).

⁵⁷⁷ 44 C.F.R. § 206.115(f).

⁵⁷⁸ *Id.* § 206.115(b).

⁵⁷⁹ 44 C.F.R. § 206.115(c).

⁵⁸⁰ *Id.*

authority is final,⁵⁸¹ which means that the applicant must then file suit in federal district court under the Administrative Procedures Act, if the applicant wishes to contest the decision.⁵⁸²

The federal regulations implementing the right to appeal list the decisions that applicants may appeal. They include:⁵⁸³

- Eligibility for assistance, including recoupment;
- The amount and/or type of assistance;
- The cancellation or rejection of an initial or late application;
- The denial of continued housing assistance;
- FEMA's intent to collect rent from occupants of a housing unit provided by FEMA;
- The termination of direct housing assistance;
- The denial of a request to purchase or the sales price of a FEMA-provided housing unit; and
- Any other eligibility-related decision.

During the appeal process, it may be necessary for applicants to submit additional supporting documentation within the applicable appeal period in order for FEMA to process the appeal. A failure to supply this information will result in FEMA's denial of the appeal without examining the underlying circumstances that may be involved.

When FEMA receives a complete appeal request, FEMA may resolve the appeal either based on an additional inspection or on

⁵⁸¹ 44 C.F.R. § 206.115(e).

⁵⁸² 5 U.S.C. § 706.

⁵⁸³ 44 C.F.R. § 206.115.

documentation that the applicant has submitted.⁵⁸⁴ Although all decisions can be appealed, FEMA and/or the state may not have the authority to resolve an appeal in the applicant's favor. These situations include, for example, where FEMA denied assistance to an applicant who lived in an undesignated county or where the applicant had already reached the IHP limit of assistance.

A. General Program Requirements for Appeals

Initially, applicants must meet the general program requirements of identity, lawful residency, and disaster-related necessary expense.⁵⁸⁵ Applicants denied assistance for failure to include these general requirements have the right to appeal this decision and must provide the necessary documentation, such as a signed Declaration and Release, Form 009-0-3, within the designated appeal period.⁵⁸⁶

There are instances where an applicant appeals an assistance determination but fails to meet or comply with status, time frame, or information requirements. A failure to provide timely or complete information in an appeal will likely result in a denial of the appeal without an examination of the underlying circumstances involved.⁵⁸⁷

Thus, applicants who do not appeal for further assistance within the 60-day time frame are ineligible for additional assistance. Applicants who appeal for further assistance who do not submit the required Declaration and Release (Form 009-0-3); proof of insurance; and/or proof of occupancy, ownership, or identity when required to do so are also ineligible for additional assistance.

Beyond these general eligibility requirements, FEMA handles appeals under the various categories of assistance in similar ways. One distinction in processing appeals arises in the categories of HA and ONA—specifically for personal property and transportation assistance.

⁵⁸⁴ See 44 C.F.R. § 206.115 and PPM, Cross Topic Guidance, IV.A.1. Appeal Processing.

⁵⁸⁵ 44 C.F.R. § 206.113.

⁵⁸⁶ See 44 C.F.R. § 206.115(a).

⁵⁸⁷ See PPM, Cross Topic Guidance, IV.A.1. Appeal Processing.

These are the only two categories that may warrant Appeal Inspections.

B. Category Specific Verification Appeals

Applicants must meet program category specific verification requirements to be eligible for assistance.⁵⁸⁸ The applicant may present these verifications at the time of inspection or submit them to FEMA by mail or fax. Listed here are some of the specific requirements and their designated categories:⁵⁸⁹

- Occupancy – All HA categories, Personal Property, Moving and Storage, Misc./Other expenses
- Ownership – Repair Assistance, Replacement Assistance, Permanent Housing Construction, Transportation
- Primary Residence – All HA categories, Personal Property, Moving and Storage, Misc./Other Expenses
- Insurance/Lack of Insurance – All HA and ONA categories except Misc./Other
- Vehicle Registration – Transportation

VII. Recovering Improper Payments – Recoupment

A. Legal Authority

Federal law requires that every federal agency shall collect claims of the United States government for money or property arising out of the activities of the agency.⁵⁹⁰ In addition, every agency must periodically review all of its activities and programs to identify those that may have significant improper payments.

⁵⁸⁸ PPM, Cross Topic Guidance, IV.V.2.ja., Verification Requirements Chart

⁵⁸⁹ 44 C.F.R. § 206.113; PPM, Cross Topic Guidance, IV.V.2.ja. Verification Requirements Chart.

⁵⁹⁰ The Debt Collection Act of 1996, Pub. L. No. 104-34; 31 U.S.C. § 3711(a).

Further, President Obama issued an executive order that demonstrated a commitment to reducing payment errors and eliminating waste, fraud, and abuse in federal programs.⁵⁹¹ The order stated that “executive departments and agencies should use every tool available to identify and subsequently reclaim the funds associated with improper payments.”⁵⁹²

Thorough identification of improper payments promotes accountability at executive departments and agencies; it also makes the integrity of federal spending transparent to taxpayers. Reclaiming the funds associated with improper payments is a critical component of the proper stewardship and protection of taxpayer dollars. The executive order declared that the federal government will not tolerate waste, fraud, and abuse by entities receiving federal payments, and reclaiming these funds underscores that commitment.⁵⁹³

FEMA may not violate appropriations statutes, which require that each federal agency only use funds for the purposes for which Congress appropriated the funds.⁵⁹⁴ DHS regulations set forth the department-wide procedures for the collection of debts.⁵⁹⁵ DHS further notified FEMA that it should pursue debt collection “aggressively” and administer appropriate collection processes.⁵⁹⁶

Moreover, FEMA regulations require recipients of assistance to return funds to FEMA and/or the state when FEMA or the state determines

⁵⁹¹ Exec. Order 13520, Reducing Improper Payments (Nov. 20, 2009), 3 C.F.R. 274 (2010).

⁵⁹² *Id.*

⁵⁹³ *Id.*

⁵⁹⁴ See 31 U.S.C. § 1301(a) (This is only one part of a three-element rule. To determine whether appropriations are legally available, the elements of *purpose*, *time*, and *amount* must be observed. In addition to ensuring the purpose of the expenditure was within the bound of Congress’ intention, the agency must ensure the obligation occurs within the time limits applicable to the appropriation. In addition, the obligation and expenditure must be within the amount Congress has established. 31 U.S.C. § 1502; 31 U.S.C. § 1341. See also General Accountability Office, Principles of Federal Appropriations Law, pp. 4-6 (3rd Ed. 2004)).

⁵⁹⁵ See 44 C.F.R. § 206.191(f); 6 C.F.R. Part 11 (adopting the Department of Treasury regulations at 31 C.F.R. §§ 900-903). See also IHPUG, Chapter 7, *Recovery of Program Funds*, pp. 115-121.

⁵⁹⁶ *Id.*

that the assistance was provided erroneously, that the applicant spent the funds inappropriately, or that the applicant obtained the assistance through fraudulent means.⁵⁹⁷

B. Overpayment Determination

Individuals and households may owe a debt to the government as a result of overpayments these individuals and households received following a disaster. The overpayments occur for a variety of reasons. FEMA calls the process of recovering these funds “recoupment.” FEMA is legally required to collect these funds, and federal law imposes no statute of limitations on how many years back the government may go.⁵⁹⁸

However, FEMA’s records retention requirements, pursuant to its current system of collection, state that FEMA will destroy records pertaining after a certain time period. For the IHP program and temporary housing, records will be destroyed three years after closeout.⁵⁹⁹ This restricts the agency’s ability to initiate the review of certain records older than their required date of destruction to determine if an individual owes a debt to the government as a result of overpayments these individuals and households received.

FEMA will request that a disaster survivor return FEMA financial disaster assistance when it determines that the disaster survivor was not eligible to receive such assistance and recovery of funds is required by the Stafford Act or federal regulations. These cases include, but are not limited to, those with the following circumstances.

- **Duplication of Benefits:** FEMA may require that the disaster survivor return funds to FEMA and/or the state when it is determined that assistance has been provided by, or is available

⁵⁹⁷ 44 C.F.R. § 206.116.

⁵⁹⁸ 31 U.S.C. 3716 (e)(1).

⁵⁹⁹ 78 Fed. Reg. 25,282 (Apr. 30, 2013) at 25,287.

from, another source, such as insurance or another federal agency.⁶⁰⁰

- **Erroneous Payment:** FEMA may require that the disaster survivor return funds to FEMA and/or the state when it is determined that assistance was provided erroneously to the applicant.⁶⁰¹
- **Inappropriately Spent Payment:** FEMA may require that the disaster survivor return funds to FEMA and/or the state when it is determined that assistance was inappropriately spent.⁶⁰²

C. Recovering the Debt

After FEMA has identified a debt and determined that the facts require recovery of the funds, FEMA may request additional information from a disaster survivor before formally establishing a debt. Once a debt has been established, FEMA will notify the disaster survivor in writing of the debt using a Notice of Debt (NOD).

The notice will explain why the funds must be repaid, how to appeal the decision (including the process for requesting an administrative oral hearing), and the applicant's right to request a payment plan or compromise of the debt due to an inability to pay. The applicant has 60 days to appeal the decision contained in the NOD.⁶⁰³

Interest begins to accrue on the date of delinquency but shall be waived if the debt is repaid within 30 days of after the date on which interest began to accrue.⁶⁰⁴

If the debtor appeals, FEMA will conduct an oral or paper hearing to review the debt and make a final agency decision concerning the debt. FEMA will certify a debt for collection following a final agency

⁶⁰⁰ 44 C.F.R. 206.116(a).

⁶⁰¹ 44 C.F.R. 206.116(b).

⁶⁰² 44 C.F.R. 206.116(b).

⁶⁰³ Recovery Policy RP9430.1 Recovery of Disaster Assistance Money (2014); *IHPUG*, p.17.

⁶⁰⁴ 31 U.S.C. § 3717 as implemented by 31 C.F.R. § 901.9(b) and 6 C.F.R. § 11.10.

decision that concludes the debtor owes the funds or, if the debtor does not appeal, 14 days after the expiration of the 60-day appeal period for the NOD.

Once FEMA certifies and processes a debt for collection, there is no further ability to appeal to challenge the validity or amount of the certified debt until after the debt is transmitted to the U.S. Department of the Treasury (Treasury) and Treasury seeks to collect the debt.

However, the debtor may request a payment plan, request a compromise of the debt, and/or show inability to pay. FEMA may send a letter to the debtor (called a Letter of Intent) to advise the debtor that his or her debt has been certified and processed for collection and of the remaining options to avoid collection (payment plan, compromise, inability to pay).

Once FEMA certifies and transmits a debt to Treasury, Treasury may choose a variety of options to collect the debt, including garnishing a debtor's non-federal wages (called Administrative Wage Garnishment), and offsetting their federal wages, tax return, or federal benefits such as social security.

If Treasury chooses Administrative Wage Garnishment to recover the funds owed to the federal government, the applicant may have further opportunity to appeal the debt, regardless of whether or not the applicant received adequate notice of the debt, and the debt may be referred back to FEMA for a paper or oral hearing.⁶⁰⁵

If Treasury garnishes an applicant's wages or offsets his or her federal benefits, and the applicant claims to have never received the original NOD owed to the agency and the options to appeal, Treasury may refer the debt back to FEMA.

FEMA will evaluate whether the debtor was given proper notice and determine whether a new NOD needs to be issued. FEMA will request

⁶⁰⁵ 6 C.F.R. § 11.5; 44 C.F.R. § 285.11; Financial Management Service, Suggested Guidelines and Reference Materials for Administrative Wage Garnishment Hearing Officials (Jan. 2009).

documentation from a debtor demonstrating that, at the time the NOD was sent, the debtor was receiving mail at an address other than where the NOD was sent.

If the debtor provides adequate documentation, a new NOD will be issued, all accrued interest and penalties will be removed, the debt will be returned to its original amount owed, and the debtor will be afforded full appeal rights.⁶⁰⁶

D. Recoupment Litigation

In *Ridgely v. FEMA*,⁶⁰⁷ plaintiffs filed litigation on behalf of disaster applicants from hurricanes Katrina and Rita, alleging that FEMA violated the Stafford Act, the Administrative Procedure Act, and the Fifth Amendment of the Constitution with respect to its: (1) distribution of temporary housing assistance (approximately 110,000 disaster applicants); and, (2) recoupment procedures (approximately 124,000 disaster applicants).

With respect to recoupment, in particular, plaintiffs alleged FEMA's process provided inadequate explanation for the reasons for recovery and failed to provide a meaningful hearing. On June 14, 2007, the district court certified the class and entered a preliminary injunction against FEMA on constitutional due process grounds, prohibiting FEMA from terminating temporary housing assistance or moving forward with any recoupment until it put new procedures in place.

FEMA complied with the preliminary injunction related to recoupment, ceased all recoupment, and withdrew its previous recoupment notices until it could alter its procedures for recoupment. FEMA recognized it could do a better job with respect to the clarity of

⁶⁰⁶ Recovery Policy RP 9410.1 Recovery of Disaster Assistance Money (2014).

⁶⁰⁷ *Ridgely v. FEMA*, 2007 U.S. Dist. LEXIS 38461 (E.D. La. May 25, 2007); *injunction granted at Ridgely v. FEMA*, 2007 U.S. Dist. LEXIS 43009 (E.D. La. June 13, 2007); *vacated in part, remanded in Ridgely v. FEMA*, 512 F.3d 727, 2008 U.S. App. LEXIS 130 (Fifth Cir. La. 2008); *later proceeding at Ridgely v. FEMA*, 2010 U.S. Dist. LEXIS 136368 (E.D. La. Dec. 13, 2010).

its notices advising applicants of why they had a debt and of their appeal rights.

Following the termination by FEMA of its recoupment actions, the district court dismissed this portion of the complaint as moot. Recoupment actions for all disasters were on hold until March 15, 2011, when FEMA published its revised recoupment guidelines and processes.

FEMA changed its recoupment procedures to provide for an oral hearing where the matter cannot be decided based on the documents alone (for example, when there is a question of credibility or veracity). OCC's Alternative Dispute Resolution Division provides the oral hearings.

FEMA appealed the preliminary injunction as it related to the temporary housing assistance class. On January 4, 2008, the Fifth Circuit vacated the preliminary injunction because it determined that FEMA's statute and regulations, standing alone, do not create a property interest in temporary housing assistance that requires such due process.

However, the Fifth Circuit determined that there was still a possibility that FEMA created a property interest based on its implementation of the statute and regulations post-Katrina and remanded it back to the district court for a hearing on the merits of that issue. FEMA settled the action, and the court approved the settlement on December 13, 2010.

FEMA Disaster Assistance Recoupment Fairness Act of 2011 (DARFA)

From March 2011 to December 2011, FEMA mailed nearly 90,000 Notices of Debt arising from Hurricanes Katrina and Rita and considered thousands of appeals and requests for compromise. Some members of Congress subsequently expressed concern about the fairness of FEMA's debt collection where the debt resulted from FEMA error and when a significant amount of time passed before FEMA notified the survivor of the debt. Consequently, in December 2011, Congress passed the FEMA Disaster Assistance Recoupment Fairness Act of 2011, or DARFA (Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 § 565 (2011)), which authorized FEMA to waive certain debts arising from improper payments to disaster survivors for disasters declared between August 28, 2005, and December 31, 2010, based on an equity and good conscience standard. FEMA subsequently waived more than 17,000 debts pursuant to this authority before it expired in March 2013.⁶⁰⁸

⁶⁰⁸ See Memorandum of Law from Chief Counsel Brad Kieserman re Expiration of DARFA Authority on March 26, 2013.

CHAPTER 7
Hazard Mitigation Assistance
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Hazard Mitigation Assistance

I. Introduction

Mitigation is any sustained action taken to reduce or eliminate long-term risk to people and property from hazards and their effects¹; it is one of FEMA's core missions.² This definition distinguishes actions that have a long-term impact from those that are more closely associated with immediate preparedness, response, and recovery activities. Hazard mitigation is the only phase of emergency management specifically dedicated to breaking the cycle of damage, reconstruction, and repeated damage.

FEMA provides federal assistance for hazard mitigation under four grant programs:

- Pre-Disaster Mitigation (PDM)³
- Flood Mitigation Assistance (FMA) program⁴
- Hazard Mitigation Grant Program (HMGP)⁵
- Public Assistance (PA) Mitigation⁶

States, territories, tribal governments, and communities are encouraged to take advantage of funding that these programs provide in either the pre- or post-disaster timelines, depending on the program. Together, these programs provide significant opportunities to reduce or eliminate potential losses to states, tribal governments,

¹ 6 U.S.C. § 314a(9)(A).

² 6 U.S.C. § 313(b)(1).

³ Stafford Act § 203; 42 U.S.C. § 5133.

⁴ 42 U.S.C. § 4104c; 44 C.F.R. Part 79.

⁵ Stafford Act § 404; 42 U.S.C. § 5170c.

⁶ Stafford Act § 406(e); 42 U.S.C. § 5172(e).

and local assets through hazard mitigation planning and project grant funding. Each Hazard Mitigation Assistance (HMA) program has different statutory authority, and as such, each program differs slightly in scope and intent.

The Pre-Disaster Mitigation (PDM) Program, which is authorized under the Stafford Act, is designed to assist states, territories, federally recognized tribes, and local communities in implementing a sustained pre-disaster natural hazard mitigation program. The goal is to reduce overall risk to the population and structures from future hazard events, while also reducing reliance on federal funding in future disasters. This program awards planning and project grants, management costs, and provides opportunities for raising public awareness about reducing future losses before disaster strikes. PDM grants are funded annually by congressional appropriations and are awarded on a nationally competitive basis.⁷

The Flood Mitigation Assistance (FMA) program is authorized by Section 1366 of the National Flood Insurance Act of 1968, as amended with the goal of reducing or eliminating claims under the National Flood Insurance Program (NFIP). FMA provides funding to states, territories, federally recognized tribes, and local communities for projects that reduce or eliminate long-term risk of flood damage to structures insured under the NFIP. FMA funding is available for flood hazard mitigation projects, plan development, and management costs. Funding is appropriated by Congress annually.⁸

The remaining two programs, the Hazard Mitigation Grant Program (HMGP)⁹ and Public Assistance (PA),¹⁰ provide HMA following the President's major disaster declaration. Chapter 5 discusses PA Mitigation, while this chapter focuses on the HMGP, which provides

⁷ See Stafford Act § 203; 42 U.S.C. § 5133 and program guidance materials, which are available at <https://www.fema.gov/pre-disaster-mitigation-grant-program>.

⁸ See 42 U.S.C. § 4104c; 44 C.F.R. Part 79 and program guidance materials, which are available at <https://www.fema.gov/flood-mitigation-assistance-grant-program>.

⁹ See Stafford Act § 404, 42 U.S.C. § 5170c; 44 C.F.R. Parts 80 and 206, subpart N and program guidance materials, which are available at <https://www.fema.gov/hazard-mitigation-assistance>.

¹⁰ Stafford Act § 406; 42 U.S.C. § 5172(c)(1)(B)(iii), (c)(2)(B)(iii); 44 C.F.R. § 206.226(e). See Chapter 5, *Public Assistance*, for further details.

funding to states, territories, tribal governments, local governments, and eligible private nonprofits (PNPs) to implement hazard mitigation measures following a Presidential major disaster declaration.

II. Availability of HMGP Assistance

The key purpose of HMGP is to ensure that the opportunity to take critical mitigation measures to reduce the risk of loss of life and property from future disasters is not lost during the reconstruction process following a disaster. HMGP is available when authorized under a Presidential major disaster declaration, either statewide or in the areas of the state requested by the governor. Tribal governments may also submit a request for a major disaster declaration within their impacted area.

The amount of HMGP funding available to the applicant is based upon the estimated total of federal assistance, subject to the sliding scale formula outlined in 44 C.F.R. § 206.432(b) that FEMA provides for disaster recovery under the Presidential major disaster declaration. Eligible HMGP projects commonly include, but are not limited to, the acquisition and demolition or relocation of at-risk structures to create open space; elevation of structures subject to flood risk; structural retrofits to reduce risk of seismic and wind damage; and both localized and non-localized flood reduction projects.¹¹ HMGP funded projects typically have a 75% federal share and require a 25% non-federal cost share or match.¹²

¹¹ Hazard Mitigation Assistance Guidance FY15 (2015) (hereinafter FY15 HMAG), Part I, at 10; Part III, E.1, Table 3 at 33, and 36;

¹² If an area falls under the Insular Areas Act (American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands), the non-federal cost share for PA, Other Needs Assistance (ONA) or HMGP is mandatorily waived under \$200,000. If the cost share is \$200,000 or more, any cost sharing arrangement becomes discretionary under 48 U.S.C. 1469a(d). *See also* Cost Sharing, Hazard Mitigation Assistance Guidance (HMAG) FY15 (2015), Part III.C at 27. Note: the FY15 HMAG applies to Presidential major disaster declarations (Stafford Act) made on or after the date of HMAG's publication (Feb. 27, 2015) and PDM and FMA Programs whose application cycles commence after the date of publication. For major disaster declarations or PDM and FMA awards made in prior years, see the appropriate HMAG for that year.

A. HMGP and the Major Disaster Declaration

Under the Stafford Act, HMGP assistance is only available following a declared major disaster.¹³ A major disaster will not be declared solely to provide HMGP. HMGP is only available if PA or Individual Assistance (IA) is designated for the major disaster.¹⁴ A governor must request HMGP assistance in the disaster declaration in order for HMGP assistance to be available.¹⁵

In order for HMGP to be authorized, the state, territory, or Indian tribal government must request HMGP assistance in its request for a major disaster declaration, and the President must authorize HMGP assistance in the major disaster declaration. Unlike IA or PA, HMGP does not have to be limited only to areas affected by the disaster. As such, a governor or tribal chief executive may request HMGP for the entire state, territory, or tribal area, or he or she may request it for specific jurisdictions.¹⁶ HMGP also does not have to be applied to the specific hazard that caused the disaster. HMGP is typically requested and authorized for the entire state or tribal area.

B. Mitigation Planning Requirement

1. Mitigation Plans

The mitigation planning process includes the identification of hazards and assessment of risk, which leads to the development of a comprehensive mitigation strategy for reducing risks to life and property. The mitigation strategy section of the plan identifies a range of specific mitigation actions and projects being considered to reduce risks to new and existing buildings and infrastructure. The section includes an action plan

¹³ 42 U.S.C. § 5170c(a): “The President may contribute up to 75% of the cost of hazard mitigation measures which the President has determined are cost-effective and which substantially reduce the risk of future damage, hardship, loss, or suffering in any area affected by a major disaster.” *See also* description of cost share in the section on Global Match later in this chapter

¹⁴ *See* 42 U.S.C. § 5170c(a) which provides for HMGP allotted funding based on Stafford Act grant funding (IA and PA) for the major disaster, thus making HMGP funding dependent on the provision of the IA and/or PA programs.

¹⁵ *See* 44 C.F.R. §§ 206.36(c)(4), 206.40(a); FY13 HMAG, Part I, B.1, at 4.

¹⁶ 44 C.F.R. Part 206; FY13 HMAG, Part VIII, A.1, at 96.

describing how identified mitigation activities will be prioritized, implemented, and administered.¹⁷

Reviewing and incorporating information from the state, tribal or local mitigation plan can help an applicant or subapplicant facilitate the development of mitigation project alternatives. Linking the existing mitigation plan to project scoping can support the applicant and subapplicant in selecting the most appropriate mitigation activity that best addresses the identified hazard(s), while taking into account community priorities. In particular, the mitigation strategy section of the plan identifies a range of specific mitigation activities that can reduce vulnerability and includes information on the process that was used to identify, prioritize, and implement the range of mitigation actions considered.

Recipients of a mitigation planning subgrant award adopt a FEMA-approved mitigation plan, or they must implement planning-related activities approved by FEMA (e.g., incorporating new data into the Risk Assessment, or updating the mitigation strategy to reflect current disaster recovery goals).¹⁸ All eligible mitigation planning activities must be consistent with the requirements in 44 C.F.R. Parts 79, 201 and 206 Subpart N.¹⁹

2. State/Tribal Mitigation Plan Requirement

Applicants for HMGP funding must have a FEMA-approved state or tribal (standard or enhanced) mitigation plan²⁰ at the time of the disaster declaration and at the time FEMA obligates HMGP funding to the recipient to be eligible for a FEMA obligated HMGP award.²¹ States and tribal

¹⁷ 44 C.F.R. Parts 201 and 206.

¹⁸ See 44 C.F.R. §§ 201.1, 201.4201.6, 201.7.

¹⁹ See 44 C.F.R. § Part 201, 44 C.F.R. § 206.430-430-434(c)(3)

²⁰ Local Multi-hazard Mitigation Planning Handbook (2013),

<http://www.fema.gov/library/viewRecord.do?id=3336>, State Mitigation Plan Review Guide (2015), <https://www.fema.gov/media-library/assets/documents/101659> Tribal Multi-Hazard Mitigation Planning Guidance (2010), <http://www.fema.gov/library/viewRecord.do?id=4135>.

²¹ See 42 U.S.C. §§ 5165(a) & 5170c(a); 44 C.F.R. §§ 201.4(a) & 206.431 (definition of “Standard State Mitigation Plan”, “Tribal Mitigation Plan” and “Enhanced State Mitigation Plan.”)

governments acting as recipients must also have an approved mitigation plan (standard or enhanced) in order to be eligible to receive non-emergency Stafford Act assistance, such as PA categories C - G, with a major disaster declaration.²²

States and tribal governments applying directly to FEMA for assistance that do not have a FEMA approved plan in effect at time of declaration have a limited number of days in which to develop a state or tribal mitigation plan, respectively, and to obtain FEMA approval of the plan, in order to have HMGP and PA categories C through G authorized under the declaration.

3. Local Mitigation Plan Requirement

HMGP subapplicants for mitigation projects must have a FEMA-approved local or tribal mitigation plan at the time of obligation of funds. For HMGP, the FEMA Regional Administrator (RA) may grant an exception to the local or tribal mitigation plan requirement in “extraordinary circumstances,” when an applicant provides an appropriate justification.²³ If FEMA grants this exception, FEMA must approve a local or tribal mitigation plan within 12 months of the award of the project subaward to that community.²⁴ FEMA guidance further defines “extraordinary circumstances.”²⁵

In all cases, FEMA must approve a local or tribal mitigation plan within 12 months of the award. If a FEMA does not approve within this timeline, FEMA will terminate the project subaward and will not reimburse any costs incurred after the termination notice.²⁶

C. HMGP Funding Allocation

FEMA allocates HMGP funding based on a percentage of the estimated total federal assistance provided by FEMA pursuant to the major

²² 44 C.F.R. §§ 201.4(a), 206.226(b). See Chapter 5, *Public Assistance*, for further details.

²³ 44 C.F.R. § 201.6(a)(3).

²⁴ FY15 HMAG, Part III, E.5.3, at 45.

²⁵ See 44 C.F.R. § 201.6; FY15, Part III, E.5.3, at 45-46.

²⁶ 44 C.F.R. § 201.6(a)(3).

disaster declaration, which includes IA and PA, excluding administrative costs, for that Presidential major disaster declaration.²⁷ Generally, the state or tribal applicant is allocated up to 15% of such assistance or 20% of such assistance if it has an enhanced mitigation plan at the time of declaration.²⁸

For extremely large disasters, where the estimated aggregate disaster assistance under PA and IA exceeds \$2 billion, the HMGP allocation is up to 15% of the first \$2 billion of the estimated aggregate amount of disaster assistance; up to 10% for the next portion of the estimated aggregate amount more than \$2 billion and up to \$10 billion; and 7.5% for the next portion of the estimated aggregate amount more than \$10 billion and up to \$35.333 billion.²⁹

Applicants with a FEMA-approved state or tribal enhanced mitigation plan are eligible for HMGP funding not to exceed 20% of the estimated total federal assistance under the Stafford Act, up to \$35.333 billion of such assistance, excluding administrative costs authorized for the disaster.³⁰

D. HMGP Funding Allocation Lock-in

To account for refinements to the estimated amounts of PA and IA under the major disaster declaration, FEMA estimates the amount of HMGP funding allocated under the declaration at defined times following the major disaster declaration based on PA and IA estimates at those times.³¹ FEMA will provide an initial estimate of the level of HMGP funding for a given disaster within 35 days of the disaster declaration or soon thereafter, in conjunction with calculation of the preliminary lock-in amount(s) for management costs.³²

²⁷ See 42 U.S.C. § 5170c(a); 44 C.F.R. § 206.432(b); FY15 HMAG, Part VIII, A.2.4, at 98-99.

²⁸ See 44 C.F.R. § 201.5.

²⁹ *Id.*

³⁰ See 42 U.S.C. § 5165(e); 44 C.F.R. §§ 201.5(a), 206.432(b)(1), (b)(2); FY15 HMAG, Part VIII, A.2.4, at 99.

³¹ 42 U.S.C. § 5170c; 44 C.F.R. § 206.432(a), (b); FY15 HMAG, Part VIII, A.4, at 100.

³² HMAG (2015), Part VIII, A.4, at 100.

The 6-month estimate is no longer the floor or a guaranteed minimum funding for HMGP. The 12-month lock-in is the maximum amount available.³³ Prior to 12 months, total obligations may not exceed 75% of any current estimated amount of available HMGP funds, without the concurrence of the RA, or a Federal Coordinating Officer (FCO) with Disaster Recovery Manager authority, and the Office of the Chief Financial Officer (OCFO).³⁴

FEMA will establish the HMGP funding ceiling for each disaster at 12 months after the disaster declaration. This amount, also known as the “lock-in” value for HMGP, is the maximum that FEMA can obligate for eligible HMGP activities. The OCFO will continue to provide HMGP estimates prior to 12 months; however, these estimates will not represent a minimum or floor amount.³⁵ Amounts obligated prior to 12 months based on 75% of the estimated HMGP available will not be de-obligated if the obligated amount exceeds the 12-month lock-in.

In rare circumstances, when a catastrophic disaster results in major fluctuations in projected federal expenditures, FEMA may, at the request of the recipient, conduct an additional review 18 months after the major disaster declaration. If the resulting review shows that the amount of funds available for HMGP is different than previously calculated, FEMA will adjust final lock-in amount accordingly.³⁶

E. State Administrative Plan (SAP) Requirement

The state must have an approved State Administrative Plan (SAP) for administration of the HMGP, in accordance with FEMA’s HMGP regulations, before it can receive HMGP funds.³⁷ The SAP is a procedural guide that details how the recipient will administer the HMGP. The SAP may become an annex or chapter of the state’s overall emergency response and operations plan or comprehensive mitigation program strategy. At a minimum, the SAP must: designate the state

³³ *Id.* at 101.

³⁴ *Id.* at 101. see 44 C.F.R. § 207.5.

³⁵ *Id.* at 101.

³⁶ *Id.* at 101.

³⁷ 44 C.F.R. § 206.433(d); FY15 HMAG, Part VIII, A.2 at 96.

agency that will act as recipient; identify the State Hazard Mitigation Officer (SHMO); identify staffing requirements and resources, including a procedure for expanding staff temporarily following a disaster, if necessary; and establish procedures to guide implementation activities, including recipient management costs and distribution of subrecipient management costs.³⁸

F. Management Costs

FEMA regulations establish the amounts, allowable uses, and procedures for HMGP management costs.³⁹ Management costs include indirect costs, administrative expenses, and any other expenses not directly chargeable to a specific project that are reasonably incurred by a recipient or subrecipient in administering and managing a HMGP grant award.⁴⁰

44 C.F.R. Part 207 establishes the amounts, allowable uses, and procedures for HMGP management costs. FEMA provides HMGP management costs at a rate of 4.89% of the HMGP ceiling.⁴¹ The recipient, in its SAP, will determine the amount, if any, of management costs it will pass through to the subrecipient.⁴² Management costs are provided outside of and separate from the HMGP ceiling amount. There is no additional cost share requirement for HMGP management costs.⁴³

FEMA will establish the amount of funds that it will make available for management costs by a lock-in, which will act as a ceiling for management cost funds available to a recipient, including its subrecipients. FEMA will determine, and provide to the recipient, management cost lock-ins at 30 days (or soon thereafter), at 6

³⁸ 44 C.F.R. §§ 206.437 & 206.439(b); FY15 HMAG, Part VIII, A.2, at 97; *See also* 44 C.F.R. Part 207.

³⁹ *Id.* Part 207.

⁴⁰ *Id.* § 207.2.

⁴¹ 44 C.F.R. § 207.5(b)(4)(ii).

⁴² 44 C.F.R. §§ 207.4(c)(2), 207.7(b); FY15 HMAG, Part VIII, A. 5, at 102.

⁴³ FY 15 HMAG, Part VIII, A.5, at 102.

months, and at 12 months from the date of declaration, or upon the calculation of the final HMGP lock-in ceiling, whichever is later.⁴⁴

Upon receipt of the initial 30-day lock-in, recipients may request that FEMA obligate 25% of the estimated lock-in amount(s) to the recipient. No later than 120 days after the date of declaration, the recipient must submit documentation to support costs and activities for which the projected lock-in for management cost funding will be used. In extraordinary circumstances, FEMA may approve a request by a recipient to submit supporting documentation after 120 days.

Upon receipt of the 6-month management costs lock-in, and if the recipient can justify a *bona fide* need for additional management costs, the recipient may submit a request to the RA for an interim obligation. Any interim obligation must be approved by the Chief Financial Officer and will not exceed an amount equal to 10% of the 6-month lock-in amount, except in extraordinary circumstances.⁴⁵

The recipient must justify in writing to the RA any requests to change the amount of the lock-in or the cap, extend the time period before lock-in, or request an interim obligation of funding at the time of the 6-month lock-in adjustment. The RA will recommend to the Chief Financial Officer whether to approve the extension, change, or interim obligation. Extensions, changes to the lock-in, or interim obligations will not be made without the approval of the Chief Financial Officer.⁴⁶

Eligible applicant or subapplicant management cost activities may include:

- Solicitation, review, and processing of subapplications and subawards;
- Subapplication development and technical assistance to subapplicants regarding engineering feasibility, benefit cost

⁴⁴ *Id.* § 207.5(b).

⁴⁵ *Id.* § 207.7(e); FY 15 HMAG, Part VIII, A.5 at 103.

⁴⁶ 44 C.F.R. § 207.5(d).

analysis, and environmental and historical preservation documentation;

- Geo-coding mitigation projects identified for further review by FEMA;
- Delivery of technical assistance (e.g., plan reviews, planning workshops, training) to support the implementation of mitigation activities;
- Managing awards (e.g., quarterly reporting, closeout);
- Technical monitoring (e.g., site visits, technical meetings);
- Purchase of equipment, per diem and travel expenses, and professional development that is directly related to the implementation of HMA programs; and
- Staff salary costs directly related to performing the activities listed here.⁴⁷

III. HMGP Eligibility

A. Eligible Applicants/Recipients and Subapplicants/Subrecipients

Generally, the state where the President has declared a major disaster acts as both the applicant and recipient for HMGP assistance.⁴⁸ A tribal government may choose to be a recipient, or it may act as a subrecipient under the state. A tribal government acting as a recipient will assume the responsibilities of a “state” for the purposes of administering the grant.⁴⁹ Subapplicants and subrecipients can

⁴⁷ FY15 HMAG Part III, E.1.5, at 41-42.

⁴⁸ 44 C.F.R. § 206.431, “Generally, the State for which the major disaster is declared is the recipient. However, an Indian tribal government may choose to be a recipient, or it may act as a subrecipient under the State. An Indian tribal government acting as a recipient will assume the responsibilities of a “state,” under this subpart, for the purposes of administering the grant.”; 44 C.F.R. §§ 206.433(a), 206.434(a).

⁴⁹ *Id.*

include state agencies, tribal governments, local governments, or PNPs, as outlined in 44 C.F.R. § 206.433.⁵⁰ A subrecipient, including tribal governments acting as a subrecipient, is accountable to the state recipient.⁵¹

Important Note

On December 26, 2014, Department of Homeland Security (DHS) and FEMA adopted, in its entirety, the government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Common Rule; also referred to as the Supercircular). The Common Rule, which was enacted at 2 C.F.R. Part 200, replaces 44 C.F.R. Part 13, as well as 2 C.F.R. Part 215, Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Learning, Hospitals, and Other Nonprofit Organizations for all grants awarded under emergency or major disaster declarations issued on or after December 26, 2014. *See* section I(D), *Eligible Costs*. Furthermore, the Supercircular includes new terminology for terms commonly used in FEMA PA and HMA guidance (HMAG), such as “award” and “sub-award” instead of “grant” and “subgrant” and “recipient” and “subrecipient” instead of “grantee” and “subgrantee”. These terms and definitions, as well as the definitions found at 2 C.F.R. Part 200, will be applicable to FEMA administration of PA and HMA programs going forward. For full definitions of the new terms used in the Supercircular and 2 C.F.R. Part 200, *See* Appendix H to 2 C.F.R. Part 200 (Definitions of new terminology used in 2 C.F.R. Part 200) and Office of Management and Budget (OMB) Supercircular.

⁵⁰ 44 C.F.R. §§ 206.431, 206.434(a).

⁵¹ 44 C.F.R. § 206.431.

B. Project Eligibility Requirements

HMGP regulations establish the minimum criteria for a project to be eligible for a Hazard Mitigation program grant.⁵² These criteria include requirements that the project, at a minimum:

- Conform to approved state and local mitigation plans.⁵³ The project must address a risk identified in both the state and local mitigation plan.
- Conform to Floodplain Management and Protection of Wetlands and Environmental Considerations regulations.⁵⁴ Compliance with these requirements must be done prior to a project grant award and project implementation.
- Be feasible and independently solve a problem rather than merely identify or analyze hazards or problems.⁵⁵ The proposed project must be technically feasible based on accepted engineering practices and must be implemented to result in actual risk reduction (e.g., studies and plans not part of actual project implementation do not affect risk and are not eligible).
- Be cost-effective and substantially reduce the risk of future damage, hardship, loss, or suffering resulting from a major disaster.⁵⁶ To be cost-effective, the future benefits from damages avoided must be equal to or greater than the cost of the proposed project.

Some other eligibility considerations include the following:

⁵² 44 C.F.R. § 206.434(c).

⁵³ *Id.* FY15 HMAG, Part II, A, at 15; Part III, E.5.5, at 47.

⁵⁴ *See* FY15 HMAG, Part III, E, E.6, E.6.1, at 47-48; 44 C.F.R. Parts 9 and DHS Directive 023-01, Rev. 01 and FEMA Directive 108-1. This includes compliance with all applicable environmental planning requirements, including but not limited to NEPA, NHPA, ESA, EOs 11990 and 11988 (including FEMA's implementing regulations and program guidance).

⁵⁵ *See* FY15 HMAG, Part III, E.4, at 44.

⁵⁶ *See* FY15 HMAG, Part III, E.3, at 44.

- HMGP acquisition and construction projects sited within a Special Flood Hazard Area (SFHA) are eligible only if the jurisdiction in which the project is located is a participating community in the NFIP. There is no NFIP participation requirement for HMGP projects located outside of the SFHA.⁵⁷
- Costs associated with implementation of an activity but incurred prior to grant award are not eligible. Similarly, mitigation activities initiated or completed prior to award are not eligible; FEMA will not reimburse for those costs.⁵⁸
- Further information regarding these eligibility criteria can be found in FEMA's HMAG.⁵⁹

C. Common Eligible Activities

The following are some of the commonly encountered HMGP project activities. This listing of project activities is not exclusive. Further information regarding eligible project activities not listed may be found in FEMA's HMAG.

1. Hazard Mitigation Planning Grants

Up to 7% of the recipient's HMGP ceiling may be used for mitigation planning activities. Planning activities funded under HMA are designed to develop state, tribal, and local mitigation plans and plan updates that meet the planning requirements outlined in 44 C.F.R. Part 201. A mitigation planning subaward must result in a mitigation plan adopted by the jurisdiction(s) and approved by FEMA consistent with the requirements in Parts 201 and 206.⁶⁰

2. Property Acquisition and Structure Demolition or Relocation for Open Space (Buyout)

The acquisition and relocation of at-risk property and the subsequent deeding of that property as open space (acquisition) is a common activity

⁵⁷ 42 U.S.C. § 4106(a); FY15 HMAG, Part III, E.7 at 49.

⁵⁸ 44 C.F.R. § 206.439(c); FY15 HMAG, Part III, E.2 at 42.

⁵⁹ See FY15 HMAG, Part III.

under HMA programs and is often referred to as a buyout. Property acquisition and the Relocation for Open Space program involves the acquisition of at-risk property from willing sellers at fair market value (or pre-disaster fair market value for structures damaged during a declared disaster) and the demolition or relocation of structures on the property to convert the property to open space use in perpetuity in order to restore and/or conserve the natural floodplain functions.⁶⁰

A property eligible for acquisition is one that:

- Will be acquired from a willing, voluntary seller;⁶¹
- Contains a structure that may or may not have been damaged or destroyed as a result of a hazard event;
- Is undeveloped, at-risk land that is part of a project with an adjacent eligible property with one or more existing structure(s) and the total project remains cost-effective⁶²
- If it has incompatible easements or encumbrances, they can all be extinguished;⁶³
- Is not contaminated with hazardous materials at the time of acquisition other than incidental demolition or household waste; and⁶⁴
- Is not part of an intended, planned, or designated project area for which the land is to be acquired by a certain date and/or where there is an intention to use the property for any public or private use that is inconsistent with the open space deed

⁶⁰ FY15 HMAG Addendum 3-5; Stafford Act § 404(b); 42 U.S.C. § 5170c(c); 44 C.F.R. Part 80.

⁶¹ 44 C.F.R. § 80.13(a)(4); FY15 HMAG Addendum, A.1-2, at 1-2.

⁶² See 44 C.F.R. § 80.11(b).

⁶³ 44 C.F.R. § 80.17(b).

⁶⁴ FY15 HMAG Addendum, A.3.3, at 5; A.6.8, at 21.

restrictions and FEMA acquisition requirements (e.g., roads, flood control levees).⁶⁵

Some special project implementation requirements include:

- Use of FEMA model deed language, including conservation provisions to limit the use of property to open space in perpetuity.⁶⁶
- Offers based on pre-event fair market value must use recognized methodologies and then be offset by available amounts of duplicated benefits, if applicable.⁶⁷
- Tenants who must relocate as a result of acquisition of their housing are entitled to assistance as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), as amended.⁶⁸

Acquisition brings forth additional requirements, and further information may be found in applicable FEMA regulations at 44 C.F.R. Part 80, as well as in FEMA's HMAG.⁶⁹ Because of the special aspects of this project type, such as voluntary requirements, permanent implications of open space, and limited future land uses, it is important that FEMA and the state ensure during the applicant briefings that applicants fully understand the project.

⁶⁵ 44 C.F.R. § 80.13(b); FY15 HMAG Addendum, A. 2, at 2.

⁶⁶ 44 C.F.R. §§ 80.13(a)(3); 80.17(e); 44 C.F.R. 206.434(e)(1); FY15 HMAG Addendum, A.2.2, at 3.

⁶⁷ 44 C.F.R. § 80.17(c); FY15 HMAG Addendum, A.6.9.3 at 25-26.

⁶⁸ Pub.L 91-646 (1970), as amended, 42 U.S.C. 4601, *et seq.*; 49 C.F.R. Part 24. Owners participating in FEMA-funded property acquisition and structure demolition or relocation projects are not entitled to relocation benefits because the voluntary program meets URA exceptions. URA relocation benefits to displaced tenants include moving expenses, replacement housing rental payments, and relocation assistance advisory services. A person who is an alien not lawfully present in the United States, is generally not eligible to receive URA relocation benefits or relocation advisory services. 49 C.F.R. § 24.208. This is a different standard than the "qualified alien" standard used for IA and other mitigation assistance considered federal public benefits pursuant to 8 U.S.C. § 1611; FY15 HMAG Addendum, A.6.10, at 27-28.

⁶⁹ *See, e.g.*, FY15 HMAG Addendum A.6, at 17-20.

3. Structure Elevation

Structure elevation⁷⁰ projects are those that physically raise the lowest floor of the structure above Base Flood Elevation, or higher if FEMA or local ordinance requires in order to limit future damage to the structure due to flood waters.⁷¹ Structure elevation takes form through a variety of methods, including elevation on continuous foundation walls or on open foundations, such as piles, piers, posts, or columns, and elevating on fill. FEMA requires that buildings proposed for elevation are structurally sound and capable of being elevated safely.

All projects seeking to elevate buildings or other structures must meet the NFIP design standards; FEMA encourages and, in some circumstances requires,⁷² applicants and subapplicants to comply with American Society of Civil Engineers/Structural Engineering Institute guidelines.⁷³ The following represents a few examples of generally allowable costs associated with structure elevation projects:

- Engineering services for design, structural feasibility analysis, and cost estimate preparation;
- Disconnection of all utilities;
- Physical elevation of the structure and subsequent lowering and attachment of the structure onto a new foundation;
- Costs for repair of lawns, landscaping, sidewalks, and driveways if damaged by elevation activities.

⁷⁰ FY15 HMAG Addendum E.1, at 74.

⁷¹ *Id.*

⁷² FEMA Policy 203-074-1, Minimum Design Standards for Hazard Mitigation Projects in Flood Hazard Areas, (April 2014). [http://www.fema.gov/media-library-data/1398192935992-150e892546cec441ec6f961a023f2cce/Signed ASCE-24-05 Policy.pdf](http://www.fema.gov/media-library-data/1398192935992-150e892546cec441ec6f961a023f2cce/Signed%20ASCE-24-05%20Policy.pdf).

⁷³ *Id.* at E.1, at 79.

4. Mitigation Reconstruction

Mitigation reconstruction⁷⁴ is the construction of an improved, elevated building on the same site where an existing building and/or foundation has been partially or completely demolished or destroyed. Mitigation reconstruction is only permitted for structures outside of the regulatory floodway or Coastal High Hazard Area (Zone V) as identified by the best available flood hazard data. Activities that result in the construction of new living space at or above the base flood elevation will only be considered when consistent with mitigation reconstruction requirements. FEMA requires recipients and subrecipients to design all mitigation reconstruction projects in accordance with American Society of Civil Engineers (ASCE) 24-14.

5. Seismic Retrofit Projects

Mitigation projects undertake seismic retrofitting⁷⁵ with the goal of reducing the risk of death, serious injury, and property damage during a future earthquake event. Typically, eligible mitigation projects accomplish this by securing, bracing, or isolating architectural elements, mechanical equipment, and building contents. Some common examples of non-structural retrofitting seismic mitigation include the provision of secure attachments for:

- Exterior facade panels or brick masonry;
- Architectural ornaments, roof parapets, and chimneys;
- Heavy interior partition walls;
- Utility and mechanical equipment/systems, such as, heating, ventilation, air conditioning, water/sewer, gas, electric, ductwork, pipes, motors, pumps, and fans;
- Communication equipment and distribution; and
- Drop ceilings and pendant lighting.

⁷⁴ FY15 HMAG, Part III, E.1.1.1, at 34.

⁷⁵ Sample Engineering Case Study, Seismic Non-Structural Retrofitting 1 (2014), <http://www.fema.gov/library/viewRecord.do?id=1865>.

6. Wind Shutters

Wind shutters⁷⁶ installed over windows and other openings protect buildings and contents from the damaging effects of hurricanes and other high wind events; however, normal shutter design does not typically protect buildings against extreme wind events such as strong or violent tornadoes. Typically, wind shutters are constructed of wood, plastic, or metal, and are most effective for facilities along or near the coast that are subject to frequent hurricanes and other high wind storms. Although wind shutter materials and systems can vary, the general information required for a complete grant application is fairly uniform.

7. Wildfire Mitigation

Applicants may obtain HMGP funds to mitigate the risk from wildfire to health and safety and of damage to clearly defined vulnerable buildings and structures by funding the following mitigation activities:

- Defensible space that involves the creation of perimeters around residential and non-residential buildings and structures through the removal or reduction of flammable vegetation;
- The application of non-combustible building envelope assemblies, the use of ignition-resistant materials, and the use of proper retrofit techniques in new and existing structures; and
- Vegetation management for hazardous fuels reduction, vegetation thinning, and reduction of flammable materials to protect life and property beyond defensible space perimeters but proximate to at-risk structures.

FEMA may fund above-code projects in communities with fire-related codes and may fund activities that meet or exceed codes currently in effect for buildings and structures that were constructed or activities that were completed prior to the establishment of the local building codes.

As with any HMA-funded project, wildfire mitigation projects must be technically feasible, effective at reducing risk, and designed and

⁷⁶ Sample Engineering Case Study, Wind Shutters 1, <http://www.fema.gov/library/viewRecord.do?id=1864>.

implemented in conformance with all local, state, and federal requirements, which include local and state building codes and land use restrictions. FEMA urges the community or any entity implementing wildfire mitigation to use the materials and technologies that are in accordance with International Code Council, FEMA, U.S. Fire Administration, and the National Fire Protection Association Firewise recommendations, whenever applicable.⁷⁷

a. Mitigation Assistance under Fire Management Assistance Grants (FMAGs)

The Fiscal Year 2015 Homeland Security Appropriations Act⁷⁸ contained a provision (Section 570) authorizing the President to provide HMGP Assistance under Stafford Act Section 420 Fire Management Assistance Grant (FMAG) declarations from March 4, 2015, through September 30, 2015. The pilot period was extended by continuing resolutions until the Consolidated Appropriations Act, 2016 was enacted on December 18, 2015.⁷⁹ As such, this assistance is only available to FMAG declarations made between March 4, 2015 and December 18, 2015.

In September 2015, FEMA established a FMAG-HMGP pilot to implement this provision. Under the FMAG-HMGP pilot, assistance is restricted to mitigation projects in the burn area; however, assistance is available for mitigation of any hazard within the burn area, not just wildfires. HMGP funding amounts are based on a national aggregate calculation of the average cost of historical FMAG declarations in the last five years. For the pilot, \$331,166 is available for state and tribal recipients with standard state or tribal hazard mitigation plans, and \$441,555 for recipients with enhanced state or tribal hazard mitigation plans. Except as specified in Section 570 and the pilot fact sheet,⁸⁰ the usual HMGP eligibility requirements for applicants and projects apply.

⁷⁷ FY15 HMAG Addendum, B.2.1, at 31.

⁷⁸ Pub. L. 114-4 §570, 129 Stat. Ann 74 (2015).

⁷⁹ Pub. L. 114-113.

⁸⁰ http://bhs.idaho.gov/WebFiles/FMAG_HMGP_FAQ_FactSheet.pdf.

8. Safe Rooms

Safe room projects include residential, non-residential, and community safe rooms built for the purpose of the immediate protection of life and safety resulting from structural and building envelope protection.⁸¹ Due to the nature of the hazard to the population presented by extreme winds, safe room mitigation projects must meet stringent design and population criteria for approval. For example, in hurricane events, emergency planners expect the general population to leave the area of anticipated impact and seek shelter elsewhere. As such, FEMA will only consider funding extreme wind mitigation projects designed for a specific population who cannot remove themselves from harm's way during a hurricane.

With respect to tornadoes, the public receives little or no warning prior to impact, and therefore must seek immediate life-saving shelter. This limits the potential occupancy of tornado residential, non-residential, and community safe rooms to on-site occupants only or to those within close proximity.

Additionally, FEMA provides HMGP and PDM funds exclusively for safe room projects designed to achieve “near-absolute protection.” Any lower threshold of protection exposes safe room occupants to a greater degree of risk than is acceptable. This higher design criterion makes general population evacuation and recovery centers ineligible for extreme wind mitigation projects, since communities design such structures to provide longer-term services and housing for people leaving the anticipated impact area.

The requirement that safe rooms provide “near absolute protection” against extreme winds for two hours for tornado events and 24 hours for hurricanes also militates against using general population shelters and long-term recovery centers as event-only safe room projects. This is the required level of design criteria, which all applicants must meet.

⁸¹ FY15 HMAG Addendum, C, 1, at 39.

9. Climate Resilient Mitigation Activities

HMA has added three eligible climate resilient mitigation activities to its three hazard mitigation programs (HMGP, PDM, and FMA). These activities are: Aquifer Storage and Recovery, Floodplain and Stream Restoration, and Flood Diversion and Storage.⁸²

The objective of these activities is to support communities in reducing the risk of harm to people and their property associated with climate change. Climate resilient mitigation activities are available for HMGP funding resulting from a Presidential major disaster declared on or after September 30, 2015, and for HMA funding for which the application period opens on or after that same date.

Drought has been identified as one of the potential hazards resulting from climate change. The effect of the current severe drought in western states underscores the need to provide HMA program resources on mitigation methods for this hazard. By the addition of the three activities, HMA encourages communities to incorporate climate resilient infrastructure into eligible HMA risk reduction activities. HMA also provides information related to the three activities on green infrastructure to reduce risk and increase resilience, and expand ecosystem service benefits.

The three climate resilient mitigation activities may be used to mitigate any applicable natural hazard. However, the activities and their benefits are especially focused on mitigating the impacts of flood and drought conditions through measures that increase water storage and recovery and groundwater re-charge, and use green infrastructure principles for sustainable water resources management. The activities are not an exhaustive list of potential risk reduction actions that can mitigate climate change impacts. FEMA encourages communities to be innovative in developing mitigation projects that reduce risk and offer creative methods to mitigate the impacts of climate change.

⁸² <https://www.fema.gov/media-library/assets/documents/110202>.

10. Other Projects

Up to 5% of the recipient's HMGP ceiling may be used for mitigation measures that are difficult to evaluate against traditional program cost effectiveness criteria (i.e., the "5% Initiative"). For Presidential major disaster declarations for all hazards, an additional 5% of the recipient's HMGP ceiling may be used to fund hazard mitigation measures. To be eligible for this additional 5%, recipients and subrecipients must adopt disaster-resistant building codes or an improved Building Code Effectiveness Grading Schedule score as a condition of the award (prior to closeout).⁸³

Some project activities are not eligible as stand-alone activities and are eligible only when included as a functional component of other eligible mitigation activities. For example, some purchases of real property, easements, generators (in some instances),⁸⁴ or studies (such as engineering or drainage surveys) integral to the implementation of a mitigation project are eligible only when the purchase is required for completion of an eligible mitigation project.⁸⁵

FEMA encourages applicants to pursue activities that fall into a "miscellaneous/other" category that best address mitigation planning and priorities in their community. In this category, FEMA encourages applicants to consider activities that address climate change adaptation and resiliency such as the climate resilient mitigation activities.

Miscellaneous/other projects can also benefit from sustainable development practices focusing on ecosystem-based and hybrid approaches to disaster risk reduction. Project activities in the miscellaneous/other category must meet the standard HMA requirements for application eligibility, cost effectiveness, feasibility, and environmental and historic preservation compliance.

⁸³ FY15 HMAG, Part IV, E1, at 54.

⁸⁴ FY15 HMAG, Part III, E.1.1, at 35. Stand-alone generators and related equipment (e.g., generator hook-ups) are eligible under the 5% initiative. They are eligible for regular HMGP and PDM funding if the generator protects a critical facility and meets other program eligibility criteria.

⁸⁵ FY15 HMAG, Part III, E.2 at 42.

D. Minimum Design Standards for Mitigation Projects in Flood Hazard Areas

FEMA policy requires all applicants using HMA for mitigation projects in flood hazard areas to follow American Society of Civil Engineers (ASCE) Standard 24-05, *Flood Resistant Design and Construction*, or its equivalent as the minimum design standard.⁸⁶ The International Residential Code (IRC) and International Building Code (IBC) (I-Code Series), by reference to ASCE 24-05, include requirements that govern the design and construction of buildings and structures in flood hazard areas. FEMA.⁸⁷

This policy applies to HMA funded structure elevation, dry flood proofing, and mitigation reconstruction projects in flood hazard areas for which the application period opens on or after April 21, 2014, or HMA funded projects in flood hazard areas for which funding is made available pursuant to a major disaster declared on or after April 21, 2014.⁸⁸ The costs necessary to design and construct HMA flood projects in accordance with ASCE 24-05 are eligible costs.⁸⁹

E. Duplication of Programs

FEMA will not provide HMA assistance for activities where FEMA determines that more specific authority for the activity lies with another federal agency or program.⁹⁰ Other authorities include other FEMA programs (for example, IA and PA) and programs of other federal agencies (OFAs), U.S. Army Corps of Engineers (USACE), and the Natural Resources Conservation Service (NRCS). FEMA HMA statutory authorities are mostly general authorities, in that they allow for a wide range of mitigation activities. Other federal authorities may be more specific if that statutory authority specifically enumerates a

⁸⁶ 44 C.F.R. § 206.434(f); FEMA; FEMA Mitigation Policy 203-074-1 (2014), <https://www.fema.gov/media-library-data/1398192935992-150e892546cec441ec6f961a023f2cce/Signed%20ASCE-24-05%20Policy.pdf>; Stafford Act § 323, 42 U.S.C. § 5165a.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 44 C.F.R. § 206.434(f); FY15 HMAG, Part III, D.4, at 31.

particular activity as eligible, whereas HMA authorities do not reference the particular activity.

Also, if another federal authority is more specific, it must be used to the exclusion of HMA grant program authorities, regardless of the appropriated level of funds under either program.⁹¹ For example, FEMA may not use HMGP and PDM funds to fund a levee if USACE or NRCS has authorization to fund a levee in the same project area, or to fund the construction of interoperable communications towers that fall under more specific FEMA preparedness authorities. FEMA may disallow or recoup amounts that duplicate other authorities.

F. Duplication of Benefits

HMA funds cannot duplicate funds received by or available to applicants or subapplicants from other sources for the same purpose.⁹² Examples of other sources include insurance claims, other assistance programs (including previous project or planning grants and subgrants from HMA programs), legal awards, or other benefits companies, or any public or private entity, for the purposes of ensuring that the property has not received money that is duplicative of any possible HMA grants received.

Because the availability of other sources of mitigation grant or loan assistance is subject to available information and the means of each individual applicant, HMA does not require that property owners seek assistance from other sources (with the exception of insurance). However, it is the responsibility of the property owner to report other benefits received, any applications for other assistance, the availability of insurance proceeds, or the potential for other compensation, such as from pending legal claims for damages, relating to the property.⁹³

Where the property owner has an insurance policy covering any loss to the property that relates to the proposed HMA project, the means

⁹¹ United States General Accountability Office, 1 Principles of Federal Appropriations Law, [hereinafter GAO Red Book] 2-21 (3rd ed. 2004); see 44 C.F.R. § 80.9(c) (pertaining to acquisitions).

⁹² Stafford Act § 312, 42 U.S.C. § 5155.

⁹³ 44 C.F.R. § 79.6(d)(7); FY15 HMAG, Part III, D.5, at 31-32.

are available for receiving compensation for a loss or, in the case of NFIP Increased Cost of Compliance (ICC), assistance toward a mitigation project. FEMA will generally require that the property owner file a claim prior to the receipt of HMA funds.⁹⁴

When obtaining information from property owners about other sources of assistance, a Privacy Act statement must be distributed to each owner.

G. Income Tax Implications

The Internal Revenue Code excludes amounts received as a “qualified disaster mitigation payment” from gross income.⁹⁵ A qualified disaster mitigation payment is defined as any amount paid pursuant to the Stafford Act or the National Flood Insurance Act that benefits property owners through the mitigation of their structures.⁹⁶

It does not include payments for acquisition or disposition of property.⁹⁷ If homeowners sell or otherwise transfer property to the federal government, a state or local government, or an Indian tribal government under a hazard mitigation program (e.g., under a buyout program), homeowners can choose to postpone reporting the gain if they buy qualifying replacement property within a certain period of time.⁹⁸ Taxpayers cannot increase the basis of their property by the amount of the grants⁹⁹ and cannot take deductions or credits for expenditures made with grant funds.¹⁰⁰

Because the availability of other sources of mitigation grant or loan assistance is subject to available information and the means of each individual applicant, HMA does not require that property owners seek

⁹⁴ FY15 HMAG, Part III, D.5, at 32.

⁹⁵ 26 U.S.C. § 139(a), 26 § 139(g)(1).

⁹⁶ 26 U.S.C. § 139(g)(2)

⁹⁷ *Id.*

⁹⁸ 26 U.S.C. § 139(g)(1). *See also* <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/FAQs-for-Disaster-Victims-Mitigation-Payments> and <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/FAQs-for-Disaster-Victims>.

⁹⁹ 26 U.S.C. § 139(g)(3).

¹⁰⁰ 26 U.S.C. § 139(h).

assistance from other sources (with the exception of insurance). However, it is the responsibility of the property owner to report other benefits received, any applications for other assistance, the availability of insurance proceeds, or the potential for other compensation, such as from pending legal claims for damages, relating to the property.¹⁰¹

Where the property owner has an insurance policy covering any loss to the property that relates to the proposed HMA project, the means are available for receiving compensation for a loss or, in the case of NFIP Increased Cost of Compliance (ICC), assistance toward a mitigation project. FEMA will generally require that the property owner file a claim prior to the receipt of HMA funds.¹⁰²

Information regarding other assistance received by properties in HMA projects may be shared under 5 U.S.C. § 552a(b) of the Privacy Act of 1974. Uses may include sharing with custodians of property records, such as other federal or other governmental agencies, insurance.

IV. Grants Management

A. Non-Federal Cost Share

HMGP funded projects have a federal cost share of no greater than 75% federal share and require a 25% non-federal cost share or match.¹⁰³

1. Satisfying the Non-Federal Cost Share with other Federal Funds

In general, an applicant may not meet the non-federal cost share requirement with funds from OFAs, unless the respective authorizing statute explicitly allows some federal funds to be used as a cost share for other federal grants. Federal funds that are used to meet a non-federal cost

¹⁰¹ 44 C.F.R. § 79.6(d)(7); FY15 HMAG, Part III, D.5, at 31-32.

¹⁰² FY15 HMAG, Part III, D.5, at 32.

¹⁰³ Stafford Act § 404(a), 42 U.S.C. § 5170c(a); 44 C.F.R. § 206.432(c).

share requirement must meet the purpose and eligibility requirements of both the federal source program and the HMGP grant program.¹⁰⁴

2. Non-Federal Cost Share and Increased Cost of Compliance (ICC) Funds

Applicants may use NFIP ICC claim payments to contribute to the HMGP non-federal cost share requirement, so long as the applicant makes the claim within the time frames allowed by the NFIP. ICC coverage provides for the payment of a claim for the cost to comply with state or community floodplain management laws or ordinances after a direct physical loss by flood. When a building covered by a standard flood insurance policy under the NFIP sustains a flood loss and the state or community declares the building as substantially or repetitively damaged, ICC will help pay up to \$30,000 for the cost to elevate, flood proof, demolish, or relocate the building.¹⁰⁵

ICC payments can only be used for costs that are eligible for ICC benefits; for example, ICC cannot pay for property acquisition but can pay for structure demolition or relocation.¹⁰⁶ FEMA cannot provide HMGP funds for the same costs as ICC funds; if the ICC payment exceeds the required non-federal share, FEMA will reduce the HMGP award to the difference between the cost of the activity and the ICC payment.

3. Global Match

Section 404 of the Stafford Act limits the federal contribution to eligible hazard mitigation measures under HMGP to not more than 75% for total eligible project costs. The remaining 25% of eligible project costs is the non-federal contribution, also known as the non-federal cost share.¹⁰⁷

¹⁰⁴ See GAO Red Book, Vol. 2, 10-93. 3rd edition 2004).

¹⁰⁵ NFIP Increased Cost of Compliance – Guidance for State and Local Officials, FEMA Pub. No. 301, 1-3 (2003) at https://www.fema.gov/media-library-data/20130726-1453-20490-7827/fema301_complete.pdf

¹⁰⁶ FY15 HMAG, Part III, C.2.

¹⁰⁷ Stafford Act § 404(a), 42 U.S.C. § 5170c(a); 44 C.F.R. § 206.432(c). See 2 C.F.R. §§ 200.29, 200.306(b).

Neither the Stafford Act nor the regulations prescribe how the recipient must meet the non-federal cost share requirement.¹⁰⁸

“Global match” is an optional cost share methodology that a recipient may use to satisfy the 25% non-federal match requirement on a program-wide basis, as opposed to a project-by-project basis. In other words, the recipient satisfies the non-federal cost share by providing an equivalent of the required 25% non-federal cost share for the overall amount of HMGP grant award for that disaster. It is not necessary for the non-federal cost share to be 25% for each individual project; rather, it is only necessary that the ratio for all combined projects to be 25% for the disaster.¹⁰⁹

Global match allows the recipient to utilize the cost share "over match" from certain subawards, which may alleviate the financial burden on other subawards. It also increases the cost share flexibility for the application of other cost share methods. The non-federal share can come from a variety of sources, including cash or donated resources (labor and materials) for eligible project costs.¹¹⁰

Cash may come from the recipient, subrecipient, or mitigation recipient. Generally, the non-federal match may not include funds from other federal agencies, unless authorized by statute.¹¹¹ However, some federal grants have an authorizing statute that explicitly allows funds to be used as match for other federal grants. Examples include:

- Department of Housing and Urban Development Community Development Block Grants;
- The U.S. Small Business Administration;
- Bureau of Indian Health Service funds; and
- Appalachian Regional Commission Funds.

¹⁰⁸ *Id.*

¹⁰⁹ FY15 HMAG, Part VIII, A.8, at 104-105.

¹¹⁰ FY15 HMAG, Part III, C at 26; 2 C.F.R. §§ 200.306, 200.434(b).

¹¹¹ 44 C.F.R. § 13.4; 2 C.F.R. § 200.206(b)(5); see GAO Red Book, Vol. 2, 10-62; PA Policy Digest, p. 20; FY15 HMAG, Part C.1, at 28.

In order to effectively manage the program, global match must be detailed in the HMGP Grantee Administrative Plan to explain how the applicant will:

- Apply the approach in a fair and equitable manner;
- Monitor cost share throughout the POP; and
- Address cost share shortfalls.¹¹²

B. Recipient Monitoring of Projects

The state serving as recipient has the primary responsibility for managing HMGP funded projects, in accordance with the SAP, applicable regulations, and 2 C.F.R. Part 200. Office of Management and Budget (OMB) circulars.¹¹³ The Governor's Authorized Representative (GAR) is the person who serves as the grant administrator for all funds provided under the HMGP. He or she is the individual empowered by the governor to execute, on behalf of the state, all necessary documents for disaster assistance.¹¹⁴

The GAR does not have to seek approval from the FEMA RA for project cost overruns that do not require additional federal funds or that the recipient can meet by offsetting cost under-runs on other projects. The GAR also must certify that the recipient and/or subrecipient incurred reported costs in the performance of eligible

¹¹² FY15 HMAG, Part VIII, A.8, at 105.

¹¹³ 4 C.F.R. § 206.437(4)(xi); 44 C.F.R. Parts 13, 206, and 207, 2 C.F.R. Part 200. Note: On December 26, 2014, DHS adopted, in its entirety, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Supercircular). The Supercircular is found at 2 C.F.R. Part 200 and replaces 44 C.F.R. Part 13, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, as well as 2 C.F.R. Part 215, Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Learning, Hospitals, and Other Nonprofit Organizations for all grants awarded on or after December 26, 2014, or authorized under emergency or major disaster declarations issued on or after December 26, 2014. Although grants issued and agreements made prior to December 26, 2014, are subject to the old regulations (44 C.F.R. Part 13 and 2 C.F.R. Part 215) in most cases, contact Office of Chief Counsel (OCC) with questions regarding applicability of the new regulations under 2 C.F.R. Part 200.

¹¹⁴ FY15 HMAG, Part VIII, A.1, p. 96; 44 C.F.R. § 206.2(a) (13).

work, that the approved work was completed, and that the mitigation measure is in compliance with the provisions of the FEMA-State Agreement.¹¹⁵ This area is a source of continuing concern due to recurring post-disaster scrutiny that reveals a failure to understand the reporting requirements on the part of recipients.

As a result, it is important that the requirements are clearly set forth on the front end of the implementation process as to the quarterly reporting component and the offset measures associated with funding shortfalls. There should be no misunderstanding of what these requirements are by either the recipients or subrecipients, and all issues need to be addressed in a timely manner between the recipients and subrecipients.

Recipients shall also submit quarterly progress reports to FEMA indicating the status and completion date for each measure funded. The recipient must describe and include in the report any problems or circumstances affecting completion dates, scope of work, or project costs that the recipient expects to result in noncompliance with approved award conditions.¹¹⁶

C. Program Administration by States (PAS)

The Sandy Recovery Improvement Act of 2013 (SRIA)¹¹⁷ directed FEMA to finalize “the criteria” for program administration by the states (PAS) of the HMGP.¹¹⁸ SRIA authorized implementing a pilot PAS program outside of the normal rulemaking processes, i.e., without a notice and comment period, until such time FEMA promulgates regulations to implement PAS. The purpose of the pilot is for FEMA to delegate additional responsibilities to the state to administer HMGP and thereby streamline the project review process. The state must show it has the capability to assume the additional responsibilities.

¹¹⁵ See 44 C.F.R. § 206.438(b) and (d).

¹¹⁶ 44 C.F.R. § 206.438(c).

¹¹⁷ *SRIA*, Pub. L. 113-2 § 1104, (2013).

¹¹⁸ Stafford Act Section 404(c), 42 U.S.C. 5170c(c).

Participation in the PAS pilot is optional. A state or Indian tribal government may submit a request to FEMA to participate in the pilot at any time. The state, however, must meet minimal criteria to participate. Those criteria are that the state must have: 1) a current FEMA-approved state or tribal mitigation plan; 2) demonstrated past performance in the area in which the state seeks to assume additional tasks; and 3) demonstrated commitment to mitigation.¹¹⁹

Other factors FEMA considers in determining whether to delegate additional responsibilities to the state include the state's staffing plan and the extent of the state's management and hazard mitigation experience. In assuming additional responsibilities, the state has increased control and oversight to implement HMGP grants.

The pilot is flexible in that the State can decide what aspects of HMGP it would like to take on; the state does not have to take on every aspect of HMGP. The state also does not have to participate in PAS for all subsequent disasters; the state can decide on its participation on a single disaster basis.

Some potential tasks FEMA may delegate to the states are already performed by the states such as performing a cost-benefit analysis for a project. For some tasks, the pilot changes FEMA's role. For instance, the current practice is for FEMA to review and approve all grant applications. Under the pilot, the state may opt to conduct the agreed-upon reviews without seeking approval from FEMA. Other examples of tasks FEMA may delegate to the state include approving the local mitigation plan, approving post-award budget revisions (fiscal management), and approving post-award subrecipient scope of work modifications (grants management).

D. Closeout

Under the uniform regulations, the recipient has up to 90 days after the expiration or termination of the grant to submit all financial,

¹¹⁹ Stafford Act Section 404(c)(2), 42 U.S.C. 5170c(c)(2).

performance, and other reports required as a condition of the grant.¹²⁰ FEMA may grant an extension of this time period upon request.¹²¹

The recipient maintains the complete closeout records file for at least three years from the submission date of its single or last expenditure report. The subrecipient is required to keep records for at least three years from the date the recipient submits to FEMA the single or final expenditure report for the subrecipient. The closeout process includes the following steps:

The project and its approved scope of work (SOW) was fully implemented;

- All obligated funds were liquidated and in a manner consistent with the approved SOW;
- All environmental compliance measures or related mitigations were implemented;
- The project was implemented in a manner consistent with the grant or subgrant agreement;
- Recipients submitted the required quarterly financial and performance reports; and
- The grant and subgrant were closed out in accordance with the provisions outlined in subgrant and grant closeout provisions of the FY HMAG.¹²²

V. Appeals

An eligible applicant, subrecipient, or recipient may appeal any determination previously made related to an application for or the

¹²⁰ 44 C.F.R. § 13.50, 2 C.F.R. § 200.343.

¹²¹ *Id.*

¹²² FY15 HMAG, Part VI, F1-3, at 90-92.

provision of federal assistance according to the following procedures.¹²³

- An eligible subapplicant, subrecipient, or recipient may appeal any FEMA determination regarding subapplications or applications submitted for funding under HMGP.¹²⁴ FEMA will only consider appeals in writing that contain documentation that justifies the request for reconsideration. The appeal should specify the monetary figure in dispute and the provisions in federal law, regulation, or policy with which the appellant believes the initial action was inconsistent.
- Whether the appeal is originated by the recipient or by a subapplicant/subrecipient, the appeal must be submitted in writing to the RA by the recipient. The RA is the decision maker on first appeals. If there is an appeal of the RA's decision on any first appeal, the Deputy Associate Administrator (formerly Assistant Administrator) for Mitigation is the decision maker for the second appeal. In some cases, the appeal may involve highly technical issues. In these cases, FEMA may consult independent scientific or technical experts on the subject under appeal.
- Appellants must make appeals within 60 days after receipt of a notice of the action that is being appealed. The recipient must forward any appeal from a subapplicant/subrecipient with a written recommendation to the RA within 60 days of receipt. Within 90 days following the receipt of an appeal, FEMA will notify the recipient in writing of the disposition of the appeal or of the need for additional information.
- If additional information is needed, FEMA will determine a date by which the information must be provided. Within 90 days following the receipt of the requested additional information (or 90 days after the information was due), FEMA will notify the recipient in writing of the disposition of the appeal.

¹²³ 44 C.F.R. § 206.440. *See also* Stafford Act Section 423, 42 U.S.C. § 5189a.

¹²⁴ *Id.*

- FEMA will provide its decision to the recipient in writing. If the decision is to grant the appeal, the RA will take the appropriate action.

CHAPTER 8
Environmental and Historic Preservation Laws
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Environmental and Historic Preservation Laws

I. Introduction

Several environmental and historic preservation (EHP) laws and regulations apply to FEMA activities and programs under the Stafford Act, such as temporary housing;¹ repair, restoration, and replacement of damaged facilities;² and hazard mitigation.³ Although some exemptions from these laws apply to FEMA emergency work and assistance, there is no blanket exemption for disaster assistance FEMA performs under the Stafford Act. As a result, FEMA employees should be aware of EHP laws that are applicable to FEMA's activities.

II. National Environmental Policy Act (NEPA)

A. Overview

The National Environmental Policy Act (NEPA)⁴ established an environmental policy based on encouraging harmony between people and the environment; preventing damage to the environment; protecting human health and welfare; and enriching our understanding of the Nation's ecological systems and natural resources.⁵ NEPA is a procedural law requiring that federal agencies consider the environmental impact of proposed actions, including adverse consequences and reasonable alternatives, prior to making decisions or taking actions that may "significantly affect the quality of the human environment."⁶

¹ Stafford Act § 408, 42 U.S.C. § 5174(c) (1) (B).

² *Id.* § 406, 42 U.S.C. § 5172.

³ *Id.* § 404, 42 U.S.C. § 5170c.

⁴ National Environmental Policy Act (NEPA), Pub. L. 91-190, 42 U.S.C. §§ 4321-4347.

⁵ *Id.* § 4321, *See also* Exec. Order. No. 11,991, 3 C.F.R., 1977 Comp., p. 123, 42 Fed. Reg. 26,967 (May 24, 1997).

⁶ *Id.* § 4331(2) (c).

“Significantly” as used in NEPA includes considerations of both context and intensity.⁷

NEPA does not prevent an agency from taking action that may negatively impact the environment. It does not dictate a specific outcome. NEPA requires that federal agencies incorporate environmental considerations in planning and decision-making and provide opportunity for public input in order to make fully informed decisions.⁸

NEPA created the Council on Environmental Quality (CEQ) to advise the President on the nation’s progress in achieving NEPA policy objectives; to review and evaluate federal programs and activities for compliance with those policies; and to conduct research, investigations, and studies relating to ecosystems and environmental quality.⁹ CEQ regulations create a framework for integrating the NEPA process early in project planning; encouraging interagency consultation and cooperation; and identifying significant environmental issues requiring further analysis.¹⁰ In addition to CEQ regulations, each federal agency adopts its own environmental review procedures tailored to its mission and areas of responsibility.¹¹

B. Disaster Assistance and NEPA

NEPA applies to the following types of actions:

- Direct actions FEMA conducts, such as construction of FEMA facilities, staging areas, etc.

⁷ 40 C.F.R. § 1508.27.

⁸ *Id.*

⁹ 42 U.S.C. § 4343; 40 C.F.R. §§ 1500-1508. *See also* Exec. Order No. 11,991, 3 C.F.R., 1977 Comp., p. 123 42 Fed. Reg. 26,967 (May 24, 1977).

¹⁰ CEQ regulations are located in 40 C.F.R. §§ 1500-1508. *See also* Executive Order 11,991, 3 C.F.R., 1977 Comp., p. 123, 42 Fed. Reg. 26,967 (May 24, 1977).

¹¹ 42 U.S.C. § 4332; 40 C.F.R. § 1507.3, FEMA Directive and Instruction on environmental planning and historic preservation requirements, 51 Fed. Reg. 58514 (August 22, 2016); <https://www.federalregister.gov/articles/2016/08/22/2016-19536/removal-of-environmental-considerations-regulations#h-8>.

- Indirect actions that are subject to FEMA control and responsibility, such as projects and programs that FEMA funds partially or entirely.
- Actions that require a federal permit or other regulatory decision to proceed (e.g., a permit from the U.S. Army Corps of Engineers [USACE] or the Environmental Protection Agency [EPA]).

FEMA integrates environmental policies into its mission of disaster response and recovery, mitigation, and preparedness.¹² FEMA provides guidance to local, state, and federal partners on environmental requirements and engages in a review process to ensure that FEMA-funded activities (e.g., selection of temporary housing sites, debris management, repair and construction of infrastructure, and hazard mitigation projects) comply with federal environmental laws, regulations, and executive orders; and to consider the effects of its actions on human health, safety, and the environment..¹³

C. Process

1. Levels of Review

There are four possible levels of NEPA review. If a proposed action applies for a statutory or a categorical exclusion, no NEPA review is required. For the remaining two categories, the degree of potential environmental impact determines the level of review and documentation required:

- Statutory Exclusion (“STATEX”) – Actions that have been excluded from NEPA review by statute.
- Categorical Exclusion (“CATEX”) – Classes of actions that an agency has excluded from detailed NEPA review.

¹² FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (8/22/16), at p. 11.

¹³ *Id.*

- Environmental Assessment (EA) – A concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an Environmental Impact Statement (EIS) or a finding of no significant impact (FONSI), aid an agency’s compliance with NEPA when no EIS is required, and facilitate preparation of an EIS when one is necessary.
- Environmental Impact Statement (EIS) – a document prepared to describe and analyze the effects of a proposed action that may have a significant impact on the environment.

2. Requirements for Environmental Review

At the outset of the NEPA review process, FEMA must determine the level of analysis required for the proposed action.¹⁴ FEMA first considers the following threshold questions:¹⁵

- a. Is the proposed action excluded from NEPA review by statute or regulation (i.e., does a STATEX or CATEX apply)? FEMA does not need to prepare either an EA or an EIS if a statute or regulation excludes the proposed action further from NEPA review. We list and discuss statutory and categorical exclusions in the next section.
- b. If there is no statute or regulation that excludes the action from further NEPA review, does the proposed action “normally require” an EIS? The following types of actions may require an EIS:¹⁶
 - Actions resulting in extensive change in land use or a commitment of a large amount of land;

¹⁴ FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (August 22, 2016), at p. 28. .

¹⁵ *Id.* § p.29-30.

¹⁶ *Id.*

- Action resulting in a land use change that is incompatible with the existing or planned land use of the surrounding area;
- Actions that may affect many people;
- Actions that may have controversial environmental impacts;
- Action that will affect wildlife populations or important natural resources;
- Actions that will result in major adverse impact on air or water quality;
- Actions that would adversely impact a property listed, or eligible to be listed, on the National Register of Historic Places;
- Action that is one of several cumulative impacts that are considered significant; and
- Actions that may pose a threat to the public.

If any of these criteria are present, FEMA may prepare an EA first in order to determine if a full EIS is necessary, or FEMA may proceed directly to preparing a full EIS.¹⁷

If FEMA determines that an EIS is not necessary, FEMA prepares the analysis and documentation for an EA.

3. Statutory Exclusion (STATEX)

The Stafford Act excludes many FEMA response and recovery activities from NEPA compliance.¹⁸ A statutory exclusion from NEPA (commonly called a STATEX) includes the following types of Stafford Act assistance:

¹⁷ *Id.* P. 5.

¹⁸ Stafford Act § 316, 42 U.S.C. § 5159; FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (8/22/16), at p. 5.

- General Federal Assistance¹⁹ and Essential Assistance²⁰ following a major disaster declaration;
- Emergency Assistance²¹ under an emergency declaration;
- Debris Removal²² under an emergency or major disaster declaration; and
- Repair, Restoration, and Replacement of Damaged Facilities (Permanent Work under the Public Assistance [PA] Program),²³ provided the repair or replacement has the effect of restoring the facility substantially as it existed before the disaster or emergency occurred.²⁴

Actions taken and assistance provided under these Stafford Act provisions are exempt from NEPA requirements.

An exemption under NEPA does not relieve FEMA of the responsibility to comply with other federal or state environmental laws and regulations. Applicable state laws may include a state endangered species act or state burial laws if human remains are unearthed. FEMA program staff should consult with the Office of Chief Counsel (OCC) regarding compliance with other federal and state environmental laws aside from NEPA. (The following text discusses other federal environmental laws that may apply to FEMA actions).

4. Categorical Exclusion (CATEX)

Federal agencies may exclude certain activities from the requirement to prepare an EA or an EIS based on their experience that these activities do not typically have a significant effect on the human environment. These activities will be categorically excluded from the NEPA requirements

¹⁹ *Id.* § 402, 42 U.S.C. § 5170a.

²⁰ *Id.* § 403, 42 U.S.C. § 5170b.

²¹ *Id.* § 502, 42 U.S.C. § 5192.

²² *Id.* § 407, 42 U.S.C. § 5173.

²³ *Id.* § 406, 42 U.S.C. § 5172.

²⁴ *Id.* § 316, 42 U.S.C. § 5159; 44 C.F.R. § 10.8(c) (2). Thus, alternate and improved PA projects are clearly not within the scope of the statutory exemption.

unless there are extraordinary circumstances present that may result in a significant environmental effect (*see* subsequent section on extraordinary circumstances).²⁵

FEMA's Categorical Exclusion Only actions in the list FEMA has codified in its regulations may be treated as a categorical exclusion, or CATEX. Each of the following is a FEMA CATEX.²⁶

- Administrative actions in support of operations (personnel, travel, and procurement of supplies);
- Preparation, revision, and adoption of regulations, directives, manuals, and other guidance documents related to actions that qualify for categorical exclusions;
- Studies that involve no commitment of resources other than manpower and associated funding;
- Inspection and monitoring activities and enforcement of codes and standards;
- Training activities and exercises at existing facilities;
- Procurement of goods and services for support of day-to-day and emergency operational activities and the temporary storage of goods other than hazardous materials, as long as it occurs on previously disturbed land or existing facilities;
- Acquisition of properties and the associated demolition and removal or relocation of structures;
- Acquisition or lease of existing facilities where planned uses conform to past use or local land use requirements;

²⁵ 40 C.F.R. § 1501.4(a) (2), and § 1508.4.

²⁶ Appendix A to the DHS Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA)(November 6, 2014).)

- Acquisition, installation, or operation of utility and communication systems that use existing distribution systems or facilities;
- Routine maintenance, repair, and grounds-keeping activities at FEMA facilities;
- Planting of indigenous vegetation;
- Demolition of structures and other improvements or disposal of uncontaminated structures and other improvements to permitted off-site locations;
- Physical relocation of individual structures where FEMA has no involvement in the relocation site selection or development;
- Granting of community-wide exceptions for flood-proofed residential basements meeting the requirements of the National Flood Insurance Program;
- Repair, reconstruction, restoration, elevation, retrofitting, upgrading to current codes and standards, or replacement of any facility in a manner that substantially conforms to the pre-existing design, function, and location;
- Improvements to existing facilities and the construction of small scale hazard mitigation measures in existing developed areas with substantially completed infrastructure;
- Actions conducted within enclosed facilities where all airborne emissions, waterborne effluent, external radiation levels, outdoor noise, and solid and bulk waste disposal practices comply with existing laws and regulations;
- Temporary housing under Stafford Section 408,²⁷ except placing multiple mobile homes or other readily fabricated

²⁷ *Id.* § 408, 42 U.S.C. § 5174.

dwellings on a site, other than a private residence, not previously used for such purposes;

- Disaster Unemployment Assistance; Disaster Legal Services; Crisis Counseling; emergency communications; emergency public transportation; Fire Management Assistance grants; and Community Disaster Loans.

a. Extraordinary Circumstances

Categorical exclusions do not apply when there are extraordinary circumstances present that may result in significant environmental impacts.²⁸ In such a case, FEMA prepares an EA, unless the potential impact can be mitigated below a level of concern. Extraordinary circumstances include:

- Greater scope or size than customary for the type of activity;
- A high level of public controversy;
- Potential for degradation of already environmentally compromised area;
- Use of new or unproven technology with unique or unknown environmental risks;
- Potentially significant effect on threatened or endangered species or critical habitat, or other protected resources (e.g., archeological, historical, cultural);
- Potentially significant effect on public health or safety;

²⁸ Appendix A to the DHS Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA) (November 6, 2014).) at p. V-6.

- Potential violation of law or regulation protecting the environment;
- Potential for significant cumulative impacts when combined with other past, present, and reasonably foreseeable future actions; and
- Potential to establish a precedent for future actions with significant effects²⁹

Example of Extraordinary Circumstances

The demolition of a building would normally fall within a categorical exclusion;³⁰ however, if that building is historic or located within a historic district, the demolition action would require an EA because of extraordinary circumstances. In another example, if the extraordinary circumstance is the presence of an endangered species, say, a bird that nests at the building, modifying the construction schedule to avoid the nesting period may mitigate the impact, removing the extraordinary circumstances so that the project, subject to the revised construction schedule, may be treated as a CATEX.

FEMA periodically reviews and revises the list of categorical exclusions based on agency experience with activities that do not have a significant impact on the human environment.

b. Documenting Categorical Exclusions

FEMA should prepare and maintain an administrative record supporting its determination that a proposed action meets the criteria for a categorical

²⁹ Department of Homeland Security Directive 023-01, Environmental Planning Program, at Appendix A, A-14 – A-15.

³⁰ DHS Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA)(11/6/14), Appendix A, at p. A-8

exclusion.³¹ It is critical that FEMA document its determination since the decision may be subject to a challenge in a later lawsuit.

When FEMA plans to take a number of similar actions or fund a number of similar projects that meet the criteria for a CATEX, it can streamline the documentation by preparing a “programmatic CATEX.” A programmatic CATEX describes the type of action or project covered and any conditions that might be required to ensure that the proposed actions do not have a significant effect on the environment.

For example, FEMA prepared a programmatic CATEX for elevation of residential structures in California. The elevation actions fit within a CATEX,³² and the programmatic CATEX was conditioned on the actions being substantially within the existing footprint, using accepted techniques for elevation and access, and no extraordinary circumstances could apply.

5. Environmental Assessments (EAs)

If a proposed action is not statutorily or categorically excluded from NEPA review (and an EIS is not required), FEMA must prepare an EA.³³ FEMA actions that typically require an EA include group housing sites, improved public assistance projects, and some hazard mitigation projects. An EA should include the following:³⁴

- The purpose and need for the proposed action;
- Description of the proposed action;
- Alternatives considered;

³¹ See *Citizens to Preserve Overton v. Volpe*, 401 U.S. 402 at 417-419 (1971); *Camp v Pitts*, 411 U.S. 138, 142 (1973).

³² DHS Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA)(11/6/14), Appendix A, at p. A-25

³³ FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (2016), at pgs. 28-29.

³⁴ 40 C.F.R. § 1508.9.

- Environmental impact of the proposed actions and the alternatives;
- Listing of agencies and persons consulted; and
- A conclusion whether or not to prepare an environmental impact statement.

a. Public Notice Requirements

FEMA regulations specify the general format and contents of an EA.³⁵ FEMA must involve the appropriate environmental resource agencies (such as U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the United States Army Corps of Engineers, and state historic preservation offices), applicants, and the public in the process of preparing an EA, to the extent practicable; regulations establish elements to consider in determining what “to the extent practical” means.³⁶

FEMA regulations do not require any specified length of time for public notice, nor do they prescribe the type of public notice vehicle that must be used. The regulations provide a list of possible vehicles for public notice (e.g., publication in local newspapers, direct mailing, other local media, etc.) and possible affected stakeholders (Indian tribes, community organizations, owners and occupants of affected properties, etc.) and require FEMA to utilize the following factors in determining which public notice vehicles should be utilized and which stakeholders should be notified: the scope and nature of the project, the number of affected agencies and individuals, the likelihood of public interest, the anticipated potential impact, the potential for controversy, etc.³⁷

These factors should also be utilized in determining the length of the comment period and whether to issue cumulative notices.

³⁵ FEMA Instruction Section 3.5(B)(2).

³⁶ FEMA Instruction Section 3.3.*I*

³⁷ FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (8/22/16), at p. 33.

DHS and FEMA regulations require that methods for publishing public notices regarding the environmental or historic preservation considerations posed by a proposed action must be “appropriate for reaching persons who or affected by the proposal.”³⁸

FEMA may use a variety of methods to notify the public about proposed actions with environmental or historic preservation effects, including but not limited to³⁹:

- Newspaper Postings
- Website postings
- Federal Register Notices
- Other media as appropriate

The notice should include:

- (1) a description of the proposed action, its purpose, and whether it will be located in, or affect, a floodplain or wetland;
- (2) a map of the area identifying any floodplains or wetlands located there;
- (3) a description of the type, extent and degree of hazard involved and the floodplain or wetland values present; and

³⁸ DHS Instruction Manual 023-01-001-0, *Implementation of the National Environmental Policy Act* (November 16, 2014) <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>; FEMA Directive and Instruction on Environmental Planning and Historic Preservation Requirements, 81 Fed. Reg. 56514 (August 22, 2016) <https://www.fema.gov/media-library/assets/documents/118323>

³⁹ *Id* at IV-6.

- (4) Identification of the responsible official or organization from whom further information can be obtained.⁴⁰

Under certain circumstances, FEMA might set an accelerated timeline to prepare an EA. For example, due to the pressing need to provide temporary housing after a disaster, FEMA might establish a 72-hour timeline to prepare an EA for that action.

FEMA's regulation⁴¹ implementing Executive Order 11988 on Floodplain Management and Executive Order 11990 on Protection of Wetlands requires public notice as well.⁴² One public notice can serve to satisfy both this part and the DHS and FEMA public notice requirements.⁴³

There are two possible conclusions to an EA:

- (a) FEMA may issue a finding of no significant impact (FONSI) if the agency determines that there is no significant impact on the quality of the human environment;⁴⁴ or
- (b) FEMA may determine that the proposed action is a major action that will have a significant impact and, therefore, a full EIS is required.⁴⁵

If a proposed action will have a significant impact, FEMA may incorporate environmental mitigation measures to lessen the impact so that the agency can issue a FONSI.⁴⁶ Such mitigation measures may include: minimizing the impacts to the environment by limiting the degree or magnitude of the action; rectifying the impact by repairing, rehabilitating, or restoring

⁴⁰ DHS Instruction Manual 023-01-001-0, *Implementation of the National Environmental Policy Act* (November 16, 2014) http://www.fema.gov/media-library-data/1470685189950-29a76af41e54d0d2a9436215a7800e98/DHS_Instruction_Manual_023-01-001-01_Rev01_508compliantversion.pdf; FEMA Directive and Instruction on Environmental Planning and Historic Preservation Requirements, 81 Fed. Reg. 56514 (August 22, 2016) ; <https://www.fema.gov/media-library/assets/documents/118323>

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 40 C.F.R. § 1508.20.

the affected environment; reducing or eliminating the impact over time; and/or compensating for the impact by replacing or providing substitute resources.⁴⁷ Revising the project scope or implementation plan to incorporate such mitigation measures can allow FEMA to proceed based on the EA rather than undertake the more extensive analysis and documentation of an EIS.

6. Environmental Impact Statements

NEPA requires an environmental impact statement (EIS) for major federal actions significantly affecting the quality of the human environment.⁴⁸ Actions consist of new and continuing activities, including projects and programs entirely or partly funded, conducted, assisted, or approved by federal agencies.⁴⁹ Most FEMA actions are appropriately addressed by a STATEX or CATEX, or an EA. As a result, an EIS is not often necessary.

Federal actions typically fall within one of the following categories:

- Approval of specific projects, such as construction activities in a defined geographical area, including actions approved by permit;
- FEMA funding for a project performed by a grantee (PA, Hazard Mitigation, and Individual Assistance) may require an EA or EIS unless a statute or regulation exempts the action from NEPA review;
- Adoption of formal plans that prescribe uses of federal resources upon which future agency actions will be based;
- Adoption of programs allocating agency resources to implement a specific statutory program or directive; and

⁴⁷ *Id.*

⁴⁸ 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18(a): FEMA regulations incorporate the CEQ definitions in 40 C.F.R. § 1508.

⁴⁹ 40 C.F.R. 1508.18(a).

- Adoption of official policy, rules, regulations, and interpretations.

NEPA requires that an EIS include:⁵⁰

- The purpose and need for the action;
- The affected environment;
- Alternatives to the proposed action;
- The environmental impact of the proposed action;
- Any adverse environmental effect which cannot be avoided if the proposal is implemented;
- The relationship between short-term and long-term effects; and
- Any irreversible and irretrievable commitment of resources that would be involved in the proposed action.

The lead federal agency⁵¹ prepares a draft EIS⁵² and solicits comments from other federal agencies with jurisdiction or expertise on the environmental issues, state and local environmental agencies, affected tribes, and the public. The draft EIS should disclose and discuss all major points of view on the environmental impacts of the proposed action and alternatives.

FEMA prepares the draft EIS concurrently and in coordination with any environmental impact analyses and related surveys and studies required by other environmental laws and executive orders.⁵³

The final EIS should respond to comments submitted on the draft EIS and indicate the agency's response to any issues raised concerning the draft

⁵⁰ 42 U.S.C. § 4331(C); 40 C.F.R. Part 1502.

⁵¹ 40 C.F.R. § 1508.16.

⁵² *Id.* § 1502.9(a).

⁵³ *Id.* § 1502.25.

EIS.⁵⁴ Agencies must prepare a Record of Decision, which is a concise public record stating their decision, the alternatives considered, and whether they adopted all practicable means to avoid or minimize environmental harm.⁵⁵

7. Emergencies and Alternative Arrangements

CEQ regulations provide that if emergency circumstances require federal agencies to take action that may have significant environmental impact without complying with NEPA regulations, the federal agency taking the action should consult with CEQ about “alternative arrangements.”⁵⁶ Alternative arrangements are only applicable to actions necessary to control the immediate impacts of an emergency; all other actions remain subject to NEPA review.

FEMA regulations provide that when Regional Administrators (RAs) must take immediate action with significant environmental impacts to address an emergency, they must notify the Environmental Officer (EO) of the emergency as soon as practicable so that the EO may consult with CEQ. In no event, however, shall the RA delay emergency action necessary to preserve human life in order to comply with CEQ regulations.⁵⁷

⁵⁴ DHS Instruction Manual 023-01-001-0, *Implementation of the National Environmental Policy Act (November 16, 2014)* <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>; FEMA Directive and Instruction on Environmental Planning and Historic Preservation Requirements, 81 Fed. Reg. 56514 (August 22, 2016) <https://www.federalregister.gov/articles/2016/08/22/2016-19536/removal-of-environmental-considerations-regulations>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (8/22/16), at p. 42.

Example of CEQ Alternative Arrangements

In 2005, Hurricane Katrina caused widespread devastation to the critical infrastructure in the New Orleans metropolitan area, including police and fire stations; schools; hospitals and health facilities; government and court administration buildings; and jails and detention centers. Department of Homeland Security (DHS), FEMA, and CEQ worked together to establish alternative arrangements under CEQ and FEMA regulations to enable timely action on PA grant applications in order to restore safe and healthful living conditions while still complying with NEPA requirements to the extent possible. The alternative arrangements covered only critical infrastructure projects essential in providing the basic life, health, and safety sustaining services within the New Orleans metropolitan area for infrastructure damaged as a result of Hurricane Katrina.⁵⁸

8. FEMA Roles and Responsibilities

FEMA RAs are primarily responsible for applying NEPA policy and procedures to agency activities within their regions, including: preparing EAs and EISs and submitting them to the EO and the OCC; preparing administrative records of all categorical exclusions (discussed later in this chapter); and preparing a concise public record of their decisions.⁵⁹ FEMA's Regional Environmental Officers (REOs) perform many of these functions for FEMA RAs. The heads of the office, directorates, and administrations of FEMA are responsible for ensuring compliance with NEPA policy and regulations with respect to proposed and ongoing programs within their respective organizational units.⁶⁰

The EO is responsible for providing assistance in the preparation of EAs and EISs; determining whether an EIS is required; reviewing EAs to determine whether to issue a FONSI; reviewing changes to FEMA's categorical exclusions; reviewing proposed draft and final EISs; publishing required notices in the Federal Register; providing FEMA's comments to

⁵⁸ See <http://www.fema.gov/new-orleans-metropolitan-area-infrastructure-projects-6>.

⁵⁹ FEMA Directive 108-1, Environmental Planning and Historic Preservation Responsibilities and Program Requirements, Section VI(C).

⁶⁰ *FEMA Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements* at pp. 7-8.

other agencies' EISs; and acting as liaison for environmental issues with CEQ and other federal, state, and local agencies.⁶¹

FEMA's OCC provides advice and assistance on complying with regulatory requirements; reviews all changes to FEMA's categorical exclusions; reviews all EAs and FONSI's; and reviews all proposed draft and final EISs.⁶²

When a disaster or emergency is declared, authority for carrying out NEPA activities, including EAs and EISs, is transferred to the Federal Coordinating Officer for that disaster.

Case Example

In *National Trust for Historic Preservation v. U.S. Dep't of Veterans Affairs*,⁶³ the National Trust for Historic Preservation (NTHP) challenged FEMA and the U.S. Department of Veterans Affairs (VA) under NEPA, alleging that FEMA and the VA failed to consider adverse effects of the proposed construction of two medical centers in New Orleans. Hurricane Katrina seriously damaged both Charity Hospital and the Veterans Affairs Medical Center in New Orleans in 2005. FEMA, the VA, the State of Louisiana, and the City of New Orleans decided to complete a joint, tiered⁶⁴ NEPA analysis consisting of a Programmatic Environmental Assessment (PEA) and a subsequent site-specific assessment. The first tier involved evaluating site selection, acquisition, and site preparation; and the second tier evaluated design, construction, and operation after the parties selected the respective sites. The VA and FEMA were co-lead agencies for conducting the PEA. The state and the city were designated cooperating agencies. Based on the first tier assessment, the mid-city location emerged as the preferred site for both facilities, and both FEMA and the VA issued FONSI's.⁶⁵

⁶¹ FEMA Directive Section VI(G)

⁶²FEMA Directive Section VI(K)

⁶³ 2010 U.S. Dist. LEXIS 32015 (E.D. La. March 31, 2010).

⁶⁴ 40 C.F.R. § 1508.28: "Tiering" refers to a multi-phase environmental review process in which general matters are addressed in a broad environmental impact statement followed by narrower later statements or analyses that address specific issues.

⁶⁵*National Trust for Historic Preservation v. U.S. Dep't of Veterans Affairs* 2010 U.S. Dist. LEXIS 32015 (E.D. La. March 31, 2010).

The NTHP challenged FEMA's EA, claiming that the PEA unlawfully segmented the project and did not consider connected actions (such as later stages of the project) in the same document, that the PEA's cumulative or indirect impact analysis was legally inadequate, that the tiering of the project was unlawful and arbitrary and capricious, and the reliance on generalized mitigation measures to avoid preparing an EIS was arbitrary and capricious.

The court found in FEMA's favor and stated that improper segmentation occurs only when an agency artificially segments a project to avoid compliance with NEPA on that project. Furthermore, the court found that FEMA's consideration of impacts was sufficient, that the tiering was lawful and appropriate, and that FEMA's reliance on mitigation measures to reduce the impacts of the project below the level of significance was not arbitrary and capricious.⁶⁶

III. Coastal Barrier Resources Act (CBRA)

A. Overview

The Coastal Barrier Resources Act (CBRA)⁶⁷ protects ecologically sensitive and geologically vulnerable barrier islands along the coasts of the United States, including the Atlantic Coast, the Gulf Coast, and Great Lakes. These areas make up the Coastal Barrier Resources System (CBRS) units and otherwise protected areas (OPAs).⁶⁸ CBRA protects coastal areas that serve as protective barriers against forces of wind and tidal action caused by coastal storms and as habitat for aquatic species.

CBRA prohibits federal flood/disaster insurance coverage in CBRA zones and prohibits new federal expenditures and financial assistance

⁶⁶ *Id.*

⁶⁷ 16 U.S.C. §§ 3501-3510 (CBRA).

⁶⁸ *Id.* at § 3503.

for development in CBRA zones. Its purpose is to prevent loss of life, protect natural resources, and prevent wasteful federal expenditures.⁶⁹

Any area that the law designates as part of the CBRS is:

- Disqualified for disaster assistance and federal flood insurance, except for certain aspects of individual and emergency assistance, such as rental assistance and debris removal; and
- Prohibited from receiving any new federal expenditures, including financial assistance for development (subject to certain exceptions).⁷⁰

B. CBRA Consistency Consultations

If an applicant proposes any disaster assistance-funded action on the Atlantic or Gulf Coasts or the Great Lakes, FEMA must first review the location to determine if the action is on or connected to the CBRS unit. FEMA flood insurance rate maps identify the CBRS units.⁷¹

FEMA program staff generally determines if the action is on or connected to a CBRS unit. If an action is determined to be on or connected to a unit of the CBRS, it is subject to consultation.⁷² The Department of Interior's U.S. Fish and Wildlife Service (USFWS) administers CBRA.⁷³ FEMA's Environmental and Historic Preservation (EHP) staff would then consult with USFWS on the proposed action.

As stated earlier, most new Federal expenditures and financial assistance are prohibited within the CBRS, unless those activities qualify for an exception under Section 6 of the CBRA.⁷⁴ The exceptions under Section 6 are divided into two groups. The first group only requires that the proposed funding is in fact a listed

⁶⁹ *Id.* at § 3501(b).

⁷⁰ These exceptions may be found at 16 U.S.C. § 3505.

⁷¹ 44 C.F.R. § 206.347(a)(1).

⁷² *Id.* § 206.347(a)(3).

⁷³ *Id.* at § 3503(b).

⁷⁴ *Id.* at § 3505.

exception.⁷⁵ The second group requires that the exception also meet the three purposes of the CBRA.⁷⁶ Those purposes are to minimize the loss of human life; wasteful expenditure of Federal revenues; and the damage to fish, wildlife, and other natural resources associated with coastal barriers.

Any project proposed in a CBRA area requires consultation with the USFWS even if one of the exceptions applies.⁷⁷ The federal agency that is proposing the expenditure is responsible for providing written evidence that it meets one of the exceptions in Section 6 of CBRA and, if applicable, providing evidence that the project is consistent with the purposes of CBRA. The USFWS response will provide technical information and an opinion as to whether the activity is allowed under CBRA's exceptions. If applicable, USFWS will also comment on the consistency of the proposed activity with the purposes of the CBRA.

C. CBRA and Disaster Assistance

There is an exception under Section 6 of CBRA⁷⁸ for emergency actions essential to the saving of lives and the protection of property and the public health and safety if those actions are consistent with the three purposes of CBRA.⁷⁹

1. Emergency Disaster Assistance

Federal assistance for most emergency actions in a presidentially declared disaster area that are essential to the saving of lives, the protection of property, and the public health and safety are allowed within the CBRS if those actions are consistent with the three purposes of CBRA.⁸⁰ The

⁷⁵ *Id.* at § 3505(a)(1)-(5).

⁷⁶ *Id.* at § 3505(a)(6).

⁷⁷ *Id.* at § 3505(a); *See also* 44 C.F.R. § 206.347(b).

⁷⁸ 16 U.S.C. § 3505(a)(6)(E).

⁷⁹ FEMA's regulations implementing CBRA as that statute applies to disaster relief can be found at 44 C.F.R. 206.340 through 206.349

⁸⁰ *Id.* at § 3505(a)(6)(E).

actions are limited to those that are necessary to alleviate the emergency, such as:

- Debris removal from public property.
- Emergency restoration of essential community services, such as electricity, water, and power.
- Provision of access to a private residence.
- Provision of emergency shelter by providing emergency repair of utilities, provision of heat in the season requiring heat, or provision of minimal cooking facilities.
- Relocation of individuals or property out of danger, such as moving a mobile home to an area outside of the CBRS.⁸¹

Since these activities must be accomplished immediately, FEMA has conducted advance consultations with the USFWS for the emergency work, and only an "after the fact" notification is provided.⁸² The USFWS will provide an opinion after these activities have been accomplished.

2. Recovery Assistance and CBRA

FEMA generally does not provide recovery assistance in CBRA areas;⁸³ however, certain types of publicly owned facilities may be eligible for permanent repair assistance (but not expansion) after consultation with USFWS:

- Replacement, reconstruction, or repair, but not the expansion of roads, structures, or facilities that are essential links in a larger network or system. An "essential link" means that portion of a road, utility, or other facility originating outside the

⁸¹ *Id.* at § 3505(a)(6)(E), 44 C.F.R. § 206.346(a).

⁸² 44 C.F.R. § 206.347(b)(1)-(2).

⁸³ 44 C.F.R. § 206.344.

system unit but providing access or service through the unit and for which no alternative route is reasonably available.⁸⁴

- Restoration of existing channel improvements and related structures, such as jetties.
- Repair of energy facilities that are functionally dependent on a coastal location.⁸⁵
- Other recovery related disaster assistance that may be available in CBRA areas after consultation with USFWS, and provided such assistance is consistent with the purposes of CBRA, includes:
 - Special purpose facilities, such as navigational aids and scientific research facilities;
 - Repair of facilities for the study, management, protection, and enhancement of fish and wildlife resources and habitats; and
 - Repair of nonstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.⁸⁶

D. Other Disaster Assistance and CBRA

FEMA cannot provide Hazard Mitigation Assistance (HMA) for the construction, reconstruction, or retrofit of any structure, appurtenance, facility, or related infrastructure. However, FEMA can provide such assistance under all HMA programs for acquisitions of structures in CBRS units and OPAs under one of the CBRA exceptions in Section 6,⁸⁷ as long as such acquisitions are consistent with the three purposes of CBRA⁸⁸.

⁸⁴ *Id.* § 206.342(b).

⁸⁵ *Id.* § 206.345(a).

⁸⁶ 44 C.F.R. § 206.345(b).

⁸⁷ 16 U.S.C. at § 3505(a)(6)(A).

⁸⁸ See 2015 HMA Unified Guidance.

FEMA's regulations allow for certain types of Individual Assistance (IA) in CBRA areas, such as home repairs to private owner-occupied primary residences to make them habitable, housing eligible families in existing resources in the CBRS, and mortgage and rental payment assistance⁸⁹, other Individual Assistance programs, such as direct housing assistance, Repair or Replacement assistance, and Permanent and Semi-Permanent construction for housing units in CBRS areas.⁹⁰

FEMA issued a policy in 1997 to specifically address the provision of IA in CBRA areas. The policy stated that FEMA will only provide emergency shelters under Section 403 of the Stafford Act, and assistance for necessary expenses and serious needs related to medical, dental, and funeral expenses, as well as limited transportation expenses. In addition, social service programs such as Crisis Counseling, disaster unemployment, and Disaster Legal Services would be available within CBRA areas.⁹¹

A fact sheet FEMA published in 2008, however, clarified the policy and states that rental assistance is also available to applicants in CBRA areas as long as they rent outside of the CBRS or OPAs. Further, the fact sheet specifies that assistance to repair or replace personal property may be awarded if applicants prove they have permanently relocated outside the CBRS or OPAs.⁹²

Example of FEMA Monitoring

In 1999, FEMA had a proposed project on North Topsail Beach, North Carolina, to replace 280 linear feet of water main and to repair several leaks elsewhere along the same water main. One problem was that FEMA did not know what North Topsail Beach planned to do with the directly connected water main repair/replacement in the adjacent CBRA zone (CBRS unit). FEMA was concerned that the county might use

⁸⁹ 16 U.S.C. at § 3505(a)(6)(A).

⁹⁰ FEMA Coastal Barrier Resources Act Fact Sheet, (November 2011), <https://www.fema.gov/media-library/assets/documents/17075>

⁹¹ Response and Recovery Directorate Policy No. 4430.150A, Human Services Disaster Assistance Programs: Limitations imposed by the Coastal Barrier Resources Act and amending legislation (June 16, 1997).

⁹² Disaster Assistance Directorate Fact Sheet, *Disaster Assistance in Coastal Barrier Resources Systems and Other Protected Areas* (Sept. 2008).

FEMA funds to directly or indirectly subsidize more development in CBRA zones. FEMA monitored to ensure that upgrades were not done with FEMA funds, and violations of CBRA were avoided.

IV. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)

A. Overview

The CERCLA⁹³ is more commonly known as the Superfund. It authorizes the federal government to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment and to address the Nation's abandoned hazardous waste sites. The name Superfund applies to both this federal environmental program and the fund established under the act.⁹⁴ Congress passed CERCLA in the wake of the discovery of toxic waste dumps such as Love Canal and Times Beach. It allows the EPA to clean up such sites and to compel responsible parties to perform cleanups or to reimburse the government for cleanups.⁹⁵

⁹³ 42 U.S.C. §§ 9601-9675.

⁹⁴U.S. EPA, Superfund, Basic Information <http://www.epa.gov/superfund/about.htm> (2011).

⁹⁵ *Id.*

1. **Definitions**

c. **Hazardous substances: any element, compound, mixture, solution, or substance which, when released into the environment, may present substantial danger to the public health or welfare or the environment.**⁹⁶

d. **Release: any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). The term does not include spills in the workplace, exhaust fumes from vehicles or aircraft, nuclear emissions, or the normal application of fertilizer.**⁹⁷

2. **Scope of Coverage**

CERCLA covers releases of hazardous substances, site investigation, and cleanup. Some examples include leaking underground storage tanks, mine tailings, old landfills, and drycleaners. More specifically, Superfund does the following:

- a. Establishes prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- b. Provides for liability of persons responsible for releases of hazardous waste at these sites⁹⁸; and

⁹⁶ 42 U.S.C. § 9601(14).

⁹⁷ *Id.* § 9601(22).

⁹⁸ Under CERCLA, such persons are known as “potentially responsible parties” and include: (a) owners and operators of the site; (b) past owners and operators of the site; (c) arrangers (those who arranged for the disposal of the waste at the site); and (d) transporters (those who transported waste to the site). *Id.* at § 9607.

- c. Establishes a trust fund for cleanup when the federal government cannot identify a responsible party.⁹⁹

CERCLA does not cover oil spills in navigable waters, which fall under the jurisdiction of the Oil Pollution Act of 1990.¹⁰⁰ This act imposes liability for removal costs and damages resulting from an incident in which facilities and vessels discharge oil into navigable waters or adjoining shorelines.¹⁰¹

B. Process

CERCLA authorizes the EPA to take response actions to actual and threatened releases of hazardous substances,¹⁰² and pollutants or contaminants¹⁰³ anywhere in the United States, unless such release or potential release is in a coastal zone, Great Lakes waters, ports, or harbors.¹⁰⁴

Response takes the form of two kinds of actions:

- a. Short-term removals, where the EPA authorizes actions to address releases or threatened releases requiring prompt response; and
- b. Long-term remedial response actions that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious but not immediately life threatening. The EPA conducts remedial response

⁹⁹ U.S. EPA, Superfund: Laws, Policy, and Guidance, CERCLA Overview (2011), [hereinafter CERCLA Overview] <https://www.epa.gov/superfund/superfund-cercla-overview>.

¹⁰⁰ 33 U.S.C. §§ 2701-2761.

¹⁰¹ See EPA Oil Pollution Act of 1990 Overview, <http://www.epa.gov/oem/content/lawsregs/opaover.htm>.

¹⁰² *Id.* § 9601(14).

¹⁰³ *Id.* § 9601(33).

¹⁰⁴ 42 U.S.C. § 9604(a) authorizes the President to take action pursuant to the CERCLA. Executive Order 12,580 §§ 2(f) and (g), 52 Fed. Reg. 2923 (Jan. 29, 1987), delegates CERCLA's Presidential authority to the EPA and the Coast Guard, depending on the location of a release or potential release; under § 2(d), response authority for releases and potential releases lies with the Department of Defense and the Department of Energy at their respective facilities.

actions only at sites listed on EPA's National Priorities List (NPL).¹⁰⁵

The NPL is a CERCLA-mandated list of national priorities among the sites of known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States.

If the EPA determines that an actual or threatened release of a hazardous substance, pollutant, or contaminant presents an "imminent or substantial endangerment to health or the environment,"¹⁰⁶ then the agency may issue an abatement order to the potentially responsible party (PRP) to compel removal or remedial measures.

Alternatively, the EPA may request a federal district court to issue such an order.¹⁰⁷ If the EPA issues an administrative abatement order against a PRP and it fails to obey, then the agency may sue or move to obtain injunctive relief against the PRP.¹⁰⁸

C. Disaster Assistance and CERCLA

CERCLA broadly defines removal as the "cleanup or removal of released hazardous substances from the environment," "the disposal of the removed material," as well as taking other necessary actions to "prevent, minimize, or mitigate damage to the public health or welfare ..."¹⁰⁹ The definition of removal thus may also include emergency assistance that may be provided under the Stafford Act.¹¹⁰

If a presidentially declared disaster occurs at or near a Superfund site, FEMA examines closely the potential for duplication of benefits. CERCLA specifically provides for Superfund cleanup and site remediation, and EPA has specific authority for this activity. However,

¹⁰⁵ See CERCLA Overview, Section III(A).

¹⁰⁶ 42 U.S.C. § 9606(a).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 9606(a) & (b)(1).

¹⁰⁹ 42 U.S.C. § 9601(23).

¹¹⁰ *Id.*

there may be emergency assistance that FEMA can provide to address immediate threats to life and safety.

Example of Duplication of Benefits

In the spring of 2008, a tornado virtually destroyed the town of Picher, Oklahoma, which sat atop the Tar Creek Superfund site. The President issued a disaster declaration for the area. EPA had initially placed Tar Creek on its National Priorities List (NPL) in 2003 after testing showed that dust from abandoned lead and zinc mining wastes caused elevated levels of lead in the blood of town residents, especially children. Recognizing the risks to human health involved, EPA, through its Superfund authority, had already tentatively offered buyout and relocation assistance to a number of Picher households before the tornado struck.

FEMA offered home repair and replacement assistance to eligible residents, including those who had received or accepted buyout offers from Superfund. The question was whether the repair/replacement assistance from FEMA would duplicate benefits from EPA for buyouts. FEMA determined that it would be a duplication of benefits prohibited under Section 312 of the Stafford Act.¹¹¹ Therefore, those who had received buyout payments, or for whom Congress had already appropriated funds for buyout payments, were ineligible for IA repair/replacement grants. Residents who had not yet received buyout payments or who did not participate in the buyout program were eligible for repair or replacement assistance under IA.

V. Endangered Species Act of 1973 (ESA)

A. Overview

The Endangered Species Act of 1973 (ESA)¹¹² protects endangered and threatened species and their critical habitats. Congress passed the ESA as a result of growing concern over the disappearance of species of birds, insects, fish, reptiles, mammals, crustaceans, flowers, grasses, and trees. The ESA applies to everyone, but there are different rules

¹¹¹ 42 U.S.C. § 5155.

¹¹² 16 U.S.C. §§ 1531-1544.

that govern a private individual or group's actions and the federal government's actions. Any "taking" of a listed species is forbidden, as is the import, export, and interstate or foreign commerce of such species. Federal agencies must ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any species listed or to result in the adverse modification or destruction of habitat designated critical. To accomplish this, agencies must consult with either the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, which has jurisdiction over species in the ocean, and/or the Department of the Interior's U.S. Fish and Wildlife Service, which has jurisdiction over all other species. Throughout this section, the term "Services" may refer to either Service or both.

1. Definitions

- a. **Species:** includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature.¹¹³
- b. **Fish or wildlife:** any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, non-migratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.¹¹⁴
- a. **Plant:** any member of the plant kingdom, including seeds, roots and other parts thereof.¹¹⁵
- b. **Endangered Species:** any species in danger of extinction throughout all or a significant portion of its range.¹¹⁶

¹¹³ *Id.* § 1532(16).

¹¹⁴ *Id.* § 1532(8).

¹¹⁵ *Id.* § 1532(14).

¹¹⁶ *Id.* § 1532(6).

- c. **Threatened Species:** any species likely to become endangered within the foreseeable future.¹¹⁷
- d. **Critical Habitat:** specific geographic areas (defined by legislation) inside or outside the area occupied by the species essential for the conservation and management of threatened and endangered species and which may require special management.¹¹⁸
- e. **Take:** to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.¹¹⁹

2. Requirements for General Public

It is unlawful for anyone to “take” an endangered species.¹²⁰ Any person whose action might fall within the definition of “take” should obtain a permit from the appropriate Service. If the Services discover action within the meaning of “take” and the party responsible has not obtained a permit, penalties can include fines and imprisonment.¹²¹ In order to obtain a permit, an applicant must develop a conservation plan that specifies what impact the proposed action will likely have on the species and what steps the applicant will take to mitigate and minimize those impacts.¹²² The Services may then grant an “incidental take” permit.¹²³

3. Requirements for Federal Government

The ESA¹²⁴ requires all federal agencies to consider the effects of their actions on listed species and their critical habitats. Federal agencies must consult with the Services to ensure that any action funded, authorized, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the

¹¹⁷ *Id.* § 1532(20).

¹¹⁸ *Id.* § 1532(5)(A).

¹¹⁹ *Id.* § 1532(19).

¹²⁰ *Id.* § 1538(a)(1).

¹²¹ *Id.* §§ 1540(a) and (b).

¹²² *Id.* § 1539(a)(2)(A).

¹²³ *Id.* § 1539(a)(2)(B).

¹²⁴ ESA § 7, 16 U.S.C. § 1536.

destruction or adverse modification of habitat.¹²⁵ FEMA must determine if its actions have the potential to affect listed species. There are three possible determinations FEMA could make after analyzing an action's potential to impact species.

- No effect;
- May affect, not likely to adversely affect; or
- May affect, likely to adversely affect.

Agencies can make *no effect* determinations without coordination with the Services. An agency could make a *no effect* determination if there were no species or habitat in the affected area or if an action is not of the type that could impact species (for example, the purchase of flashlights). All other determinations require consultation with the Services.

If an action is determined by the Services or by FEMA to be likely to adversely affect species, FEMA must prepare a Biological Assessment (BA). A BA describes in detail the proposed action's potential to affect species and any mitigating measures FEMA plans to take.¹²⁶ FEMA submits the BA to the Services, which then prepare a more detailed analysis called a Biological Opinion (BO).

If a BO concludes that there will be jeopardy to the species, it will include Reasonable and Prudent Alternatives as alternative methods of project implementation that would avoid the likelihood of jeopardy to the species or adverse modification of critical habitat.¹²⁷ During a consultation, FEMA may not make any irreversible or irretrievable commitments of resources that would have the effect of foreclosing the formulation or implementation of Reasonable and Prudent Alternatives.¹²⁸

FEMA's REOs and the EHP staff review FEMA's actions to determine whether consultation with the Services is required. If an action has the potential to affect species, the EHP staff may either call the Services for an

¹²⁵ *Id.* § 1536(a)(2).

¹²⁶ *Id.* § 1536(c).

¹²⁷ 50 C.F.R. § 402.14(h).

¹²⁸ 16 U.S.C. § 1536(d).

informal consultation or send a coordination letter. The letter would describe the proposed action and FEMA's analysis of its potential effects and ask for the Services' opinion or concurrence.

If the Services concur with FEMA's determination that an action is not likely to adversely affect species, then the consultation is complete. The Services could also concur with conditions. For example, they might determine that the action would not be likely to adversely affect species if FEMA takes the action during certain months or maintains certain vegetation at the project site.

If the Services do not concur with FEMA's finding that an action is not likely to adversely affect species, consultation continues, and FEMA must also complete a BA. If FEMA determines through this BA that its action is likely to adversely affect a listed species, it will submit a request for formal consultation.

During formal consultation, FEMA and the Services will share information about the proposed action and the species likely to be affected. Once formal consultation is complete, the Services will issue a BO on whether or not the proposed action will jeopardize the continued existence of endangered and threatened species.

B. Designation of Non-Federal Representative

A federal agency can designate a non-federal representative to conduct informal consultation with the Services or to prepare a BA. If a grant applicant prepares a BA for FEMA, the FEMA must independently review and evaluate it and ensure that it meets all applicable requirements since FEMA bears the ultimate responsibility for compliance with Section 7 of the ESA.¹²⁹

¹²⁹ 50 C.F.R. § 402.08.

C. Disaster Assistance and ESA

1. In General

FEMA is required to consult with the Services for any disaster assistance action that has the potential to affect endangered or threatened species. Consultation may be formal or informal. One exception is for emergency actions. For immediate measures taken to protect life and property in a declared emergency or major disaster, FEMA must notify the Services, but consultation may take place after FEMA takes the action or after the emergency is over.¹³⁰ The Services may prescribe conditions or conservation measures to mitigate the effects of the action.¹³¹

Case Example

In *Virgin Island Tree Boa v. Witt*,¹³² plaintiffs sued FEMA under the ESA over temporary housing constructed on the island of St. Thomas, Virgin Islands, for survivors of Hurricane Marilyn in 1995. The plaintiffs sought to prevent the continued construction of temporary housing at Estate Nazareth on St. Thomas, claiming that such construction would harm the endangered Virgin Islands tree boa. FEMA had prepared an EA pursuant to NEPA requirements. In doing so, it had consulted with the USFWS. The Service identified the tree boa as being an endangered species that might be present at the project site. FEMA's consultation with the Service consisted of telephone discussions and an exchange of correspondence; together, FEMA and the Service devised measures to mitigate any potential effects of the project so that the effects would be below the level of significance. The Service determined that no further consultation was necessary. The court held in FEMA's favor and found that the consultation met the requirements of the ESA and that the mitigation measures were adequate.

¹³⁰ *Id.* § 1536(p).

¹³¹ ESA web sites for the Services are found at <http://www.nmfs.noaa.gov/pr/>

¹³² 918 F. Supp. 879 (D.V.I. 1996).

VI. National Historic Preservation Act (NHPA)

A. Overview

The National Historic Preservation Act¹³³ (NHPA) established a national policy for preserving the Nation's historic and prehistoric resources, and created the Advisory Council on Historic Preservation (Advisory Council) to advise the President, Congress, government agencies at all levels, and the public on historic preservation issues. The NHPA also created the National Register of Historic Places (National Register), a list maintained by the Department of the Interior of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.¹³⁴

1. Definitions

Undertaking: a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license, or approval.¹³⁵

Historic property: any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This includes artifacts, records, and remains that are related to and located within such properties. The term also includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.¹³⁶

Area of Potential Effects (APE): the geographic area or areas within which an undertaking may directly or indirectly cause alteration in the character or use of historic properties.¹³⁷

¹³³ 16 U.S.C. §§ 470-470a-2.

¹³⁴ 16 U.S.C. § 470a(a)(1)(A).

¹³⁵ 36 C.F.R. § 800.16(y).

¹³⁶ *Id.* § 800.16(l)(1).

¹³⁷ *Id.* § 800.16(d).

2. Requirements for Federal Agencies

Two sections of NHPA create responsibilities for federal agencies.

a. One section requires that federal agencies:

- i.) Consider the effects of proposed federally funded actions or undertakings on historic properties prior to approving or expending federal funds; and
- ii.) Provide the Advisory Council the opportunity to comment on the proposed actions.¹³⁸

This section sets forth a process. It requires FEMA to consider ways to avoid, minimize, or mitigate potential adverse effects to a historic resource, but it does not require preservation or restoration of a resource.

b. Another section requires integration of historic preservation into agency processes:

This section requires federal agencies to integrate historic preservation into the agency programs¹³⁹ and to consult with federal, state, and local agencies, tribes, Native Hawaiian organizations, the private sector, and interested members of the public on historic preservation-related activities.¹⁴⁰

NHPA also provided for the creation of state historic preservation programs and the designation of state historic preservation officers (SHPOs) and tribal historic preservation officers (THPOs) to maintain inventories of historic properties and operate historic preservation programs within their jurisdictions.¹⁴¹ The SHPO or THPO is FEMA's primary contact for historic preservation issues at a disaster.

¹³⁸ NHPA § 106, 16 U.S.C. § 470f; 36 C.F.R. § 800.16(d).

¹³⁹ *Id.* § 470h-2(a).

¹⁴⁰ *Id.* § 470h-(2)(a)(2)(D)-(E).

¹⁴¹ *Id.* § 470a(b).

B. Disaster Assistance and the NHPA

Many of FEMA's disaster assistance activities are undertakings under Section 106. For example, any assistance FEMA provides for projects that include construction, renovation, relocation, repair, or demolition would be undertakings. Some programs that trigger Section 106 review include, but are not limited to, PA, the Hazard Mitigation Grant Program, temporary housing under the Individuals and Households Assistance Program, and Fire Management Assistance Grants.

C. Process

FEMA's EHP staff coordinates historic preservation reviews with its other environmental reviews pursuant to NEPA.¹⁴² A project found not to have significant environmental effects under NEPA could still have adverse effects under NHPA Section 106. If applicants for FEMA assistance take actions affecting properties that are subject to environmental and historic reviews prior to completion of those reviews, FEMA may deny disaster assistance funds for those properties.

FEMA must consult with several different parties in making findings and determinations during the Section 106 process: the SHPO; the THPO if a tribe has assumed Section 106 responsibility for tribal lands; a tribe or Native Hawaiian organization that attaches religious and cultural significance to affected historic properties; local governments in the affected area; the applicant for FEMA assistance; and individuals or organizations with a particular interest in the undertaking.¹⁴³

The Advisory Council may choose to participate in the process as well. The Advisory Council has established criteria for its involvement in

¹⁴² *Id.* § 800.2(a)(4) and § 800.8.

¹⁴³ Consulting parties are defined in 36 C.F.R. § 800.2(c).

individual undertakings.¹⁴⁴ If it appears that one or more of the criteria exist, FEMA should notify the Advisory Council of the undertaking.

FEMA must also solicit and consider the views of the public regarding the undertaking.¹⁴⁵

1. Steps in the Section 106 process:

a. Initiate the review process/Define an undertaking.

FEMA must determine:

- i.) whether the proposed federal action is an undertaking, and
- ii.) whether it is the type of activity that has the potential to cause effects¹⁴⁶ on historic properties.

If FEMA has not signed a Programmatic Agreement with the state where the project is located, then FEMA must conduct the review in accordance with the Advisory Council's regulations.¹⁴⁷ If FEMA has signed a Programmatic Agreement with the affected state, the review will follow the stipulations outlined in that agreement.¹⁴⁸

Early in the process, FEMA should identify the appropriate SHPO, THPO, and/or all other consulting and interested parties.¹⁴⁹

2. Identify Historic Properties

FEMA, in consultation with the SHPO or THPO, determines the "area of potential effects"¹⁵⁰ and gathers information on historic properties in the area through background research, oral history interviews, and field

¹⁴⁴ 36 C.F.R. 800, Appendix A. *See also* 36 C.F.R. § 800.2(b).

¹⁴⁵ 36 C.F.R. § 800.2(d).

¹⁴⁶ *Effect* means an alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register. *Id.* § 800.16(i).

¹⁴⁷ *See* 36 C.F.R. §§ 800.3 to 800.7.

¹⁴⁸ *Id.* § 800.3(a)(2).

¹⁴⁹ *Id.* § 800.3.

¹⁵⁰ *Id.* § 800.16(d).

investigations and surveys.¹⁵¹ After the identification and evaluation process, FEMA will make one of two findings:

- a. *Finding that no historic properties are present or will be affected by the undertaking.* FEMA must provide documentation of the finding to the SHPO or THPO, notify all consulting parties, and make the documentation available to the public before approving the undertaking. If the SHPO or THPO does not object to the finding within 30 days, FEMA has fulfilled its Section 106 responsibilities and may proceed with the undertaking. If the SHPO or THPO objects to the finding, there will be further consultations.¹⁵²
- b. *Finding that there are historic properties that may be affected.* FEMA must notify all consulting parties and begin the process to determine whether the undertaking may result in any adverse effects to the identified historic properties.¹⁵³

3. Assess Adverse Effects

FEMA coordinates with the SHPO, THPO, and any tribe or Native Hawaiian organization that attaches religious or cultural significance to the identified properties to assess whether the undertaking has the potential to create adverse effects.¹⁵⁴ Generally, there would be an adverse effect when the undertaking may alter any of the characteristics that qualify a historic property for inclusion in the National Register. Examples include:¹⁵⁵

- Physical destruction to part or all of the property;
- Alteration of the property, including repair, restoration, stabilization, hazardous material remediation, and provision of

¹⁵¹ *Id.* § 800.4(b); § 800.16(d).

¹⁵² *Id.* § 800.4(d)(1).

¹⁵³ *Id.* § 800.4(d)(2).

¹⁵⁴ *Id.* § 800.5(a).

¹⁵⁵ *Id.* § 800.5(a)(2).

handicapped access that is not consistent with standards for treatment of historic properties;¹⁵⁶

- Removal of the property from its historic location; and
- Change in the character of the property's use or physical features within the property's setting that contribute to its historic significance.

a. Finding of no adverse effect

FEMA may propose a finding of “no adverse effect” when it determines that an undertaking will not adversely affect the historic characteristics of a property, or the undertaking is modified to avoid adverse effects. FEMA must notify all consulting parties of the proposed finding and provide them with the supporting documentation. If the SHPO, THPO, or any consulting party has not objected within 30 days, FEMA may proceed with the undertaking.¹⁵⁷

If the SHPO, THPO, or a consulting party objects to the finding, FEMA will consult with the objecting party to resolve the disagreement or request that the Advisory Council review the findings. If the Advisory Council objects to the finding of no adverse effect, FEMA must consider the Advisory Council's objection in making its final determination regarding the undertaking. However, after FEMA has considered, and documented its consideration of, the Advisory Council's objection, FEMA may proceed with the undertaking.¹⁵⁸

b. Finding of adverse effect

If FEMA finds that an undertaking will have an adverse effect on a historic property, the agency must continue consultations with the SHPO or THPO and consulting parties to develop and evaluate alternatives or

¹⁵⁶ See 36 C.F.R. Part 68.

¹⁵⁷ 36 C.F.R. § 800.5(b).

¹⁵⁸ *Id.* § 800.5(d). See 36 C.F.R. § 800.11(e) for required documentation.

modifications to the undertaking that may avoid, minimize, or mitigate the adverse effect.¹⁵⁹

c. Resolve adverse effect(s)

Following the required consultations, FEMA will sign a Memorandum of Agreement (MOA) governing the undertaking and ensure that the undertaking is carried out in accordance with its provisions.¹⁶⁰ This MOA will contain treatment measures to minimize or mitigate the potential impacts of FEMA's action. The SHPO or THPO will also sign the MOA if in agreement with the resolution; if the SHPO or THPO does not agree to the proposed resolution, FEMA must invite the Advisory Council to join the consultation. The Advisory Council may sign the MOA.¹⁶¹

4. Programmatic Agreements

Federal agencies may establish an alternative Section 106 review process in a Programmatic Agreements signed by the agency, the Advisory Council, and the affected state or tribal government.¹⁶² Programmatic Agreements create expedited review processes in advance of a disaster that are applicable to all individual undertakings covered by the agreement.¹⁶³

FEMA uses Programmatic Agreements to integrate Section 106 considerations into agency programs and to expedite the review by establishing key processes prior to a disaster. Some examples of such Programmatic Agreements include the following:

¹⁵⁹ *Id.* § 800.6(a).

¹⁶⁰ *Id.* § 800.6(c).

¹⁶¹ *Id.* § 800.6(c)(1)(iii).

¹⁶² 16 U.S.C. § 470h(2)(I); 36 C.F.R. § 800.14(a).

¹⁶³ http://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf; See also Public Assistance Policy and Program Guide pp. 43-45, 82-90, FEMA Policy 9560.3, Programmatic Agreement - Historic Review (May 2002), https://www.fema.gov/media-library-data/1504204645497-be8ec7f6e01800da60de435c34b48211/FEMA_Public_Assistance_9500_Series_Policies_1998-2015_8-31-2017_Update.pdf

- Establishing coordination and scoping activities at the beginning of disaster response;
- Defining and excluding routine activities from the review process;
- Shortening time frames for various review activities;
- Addressing tribal and state needs; and
- Delegating some review functions to the SHPO or THPO.

5. Exemption for Certain Emergency Activities

Advisory Council regulations encourage agencies to develop procedures for taking historic properties into account during operations that respond to disasters or emergencies or other immediate threats to life or property.¹⁶⁴ In addition, FEMA may expedite the Section 106 review of certain other emergency activities.

Certain emergency activities are exempt from compliance with Section 106 in the event of a major natural disaster or imminent threat to national security, including immediate rescue and salvage operations.¹⁶⁵ Most assistance to individuals and households under Stafford Act Section 408 is exempt from the provisions of Section 106, including funding for home repair and replacement; content replacement; personal property; and transportation and healthcare expenses. This exemption does not apply to ground disturbing activities and construction related to temporary housing,¹⁶⁶ replacement housing,¹⁶⁷ and permanent housing construction.¹⁶⁸

¹⁶⁴ 36 C.F.R. § 800.12(a).

¹⁶⁵ 16 U.S.C. § 470h-2(j). 36 C.F.R. § 800.12.

¹⁶⁶ 44 C.F.R. § 206.117(b)(1)(ii).

¹⁶⁷ *Id.* § 206.117(b)(3).

¹⁶⁸ *Id.* § 206.117(b)(4).

VII. Unified Federal Environmental and Historic Review Process

In January 2013, the Sandy Recovery Improvement Act of 2013 (SRIA) amended the Stafford Act by directing FEMA to “establish an expedited and unified interagency review process to ensure compliance with environmental and historic requirements under federal law relating to disaster recovery projects, in order to expedite the recovery process, consistent with applicable law.”¹⁶⁹ This unified process aims to coordinate and streamline the EHP reviews to expedite planning and decision-making for disaster recovery projects.¹⁷⁰

In September 2015, FEMA published the Unified Federal Environmental and Historic Preservation Review Guide for Federal Disaster Recovery Assistance Applicants (Applicant Guide) to assist applicants (e.g., state, local, and tribal governments, small businesses, and individuals) in complying with EHP requirements where multiple agencies may be involved in funding or permitting a disaster recovery project. The Applicant Guide may be found at:

<https://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters>

¹⁶⁹ Stafford Act § 429, 42 U.S.C. § 5189(g), SRIA, P.L. 113-2, (2013).

¹⁷⁰ See <https://www.fema.gov/environmental-historic-preservation/resources-applicants>.

Case Example

In *Friends of St. Frances Xavier Cabrini Church v. FEMA* (“Cabrini”),¹⁷¹ a historic preservation group in New Orleans challenged FEMA’s actions in the Section 106 review process for a PA project following Hurricane Katrina. Holy Cross College (“Holy Cross”) in the Lower Ninth Ward of New Orleans sustained severe damage from Hurricanes Katrina and Rita. Holy Cross applied for PA funds to construct a new campus several miles away on the site of Cabrini Church and the St. Frances Xavier Cabrini and Redeemer School (“school”) in the Gentilly neighborhood of New Orleans, which also suffered serious hurricane damage. Cabrini Church was eligible for listing in the National Register of Historic Places and would have to be demolished in order to build a new Holy Cross school campus at that site.

A Programmatic Agreement was in effect among FEMA, the SHPO, the Louisiana Office of Homeland Security and Emergency Preparedness, and the Advisory Council on Historic Preservation (ACHP) covering FEMA funded undertakings in the State of Louisiana. The agreement required FEMA to follow a four-step process. FEMA conducted the review and determined that the undertaking would have an adverse effect on Cabrini Church because it would result in its demolition.

The Friends of St. Francis Xavier Cabrini Church (Friends of Cabrini) and the ACHP urged FEMA to include the Ninth Ward location of the existing Holy Cross campus within the APE of the undertaking because of the “reasonably foreseeable” effects to the existing school and the surrounding community. FEMA and the SHPO, however, defined the APE to include only the Gentilly site of the Cabrini Church and school, excluding the Holy Cross campus in the Lower Ninth Ward. They did this because it was uncertain at the time what FEMA funded work an applicant might propose for the Ninth Ward site.

FEMA planned to conduct the appropriate review when Holy Cross submitted proposed project plans for the Ninth Ward site. Section 106 allows for such “phased identification and evaluation” where alternatives under consideration consist of large land areas or if the agency official provides for it in the MOA.¹⁷² FEMA later did a Section 106 review for the Holy Cross site when Holy Cross informed FEMA of its plans for the site.

Friends of Cabrini brought suit, claiming that FEMA violated Section 106 by improperly defining the undertaking and the APE. They

claimed that FEMA should have considered both the sites together as part of a single Section 106 process. They further claimed that FEMA did not consult with the public and various interest groups prior to making funding determinations in violation of NHPA. The court reviewed the record of extensive meetings and consultations involving FEMA, the SHPO, the Advisory Council, and various consulting parties, as well as extensive and overwhelmingly supportive public comment on the issue. The court held in FEMA's favor and determined that FEMA had complied with Section 106.

¹⁷¹ 728 F. Supp. 2d 820 (E.D. La. 2010).

¹⁷² 36 C.F.R. § 800.4(b)(2).

CHAPTER 9
Information Management
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Information Management

I. Introduction

Effective emergency management operations are dependent on data collection and assessment in all life cycle phases. This may include hazard assessments, contingency planning, location of evacuees, personal information of applicants, damage assessments, proprietary information in acquisition matters, and multimillion-dollar grant determinations. A responsibility incumbent on any emergency manager is the collection and proper maintenance of information relating to individuals receiving disaster assistance.

Parties inside and outside the federal government often seek sensitive information regarding survivors' identity, location, receipt of benefits, and other data held by FEMA. These parties could be other agencies, states, the local sheriff, the individual's attorney or insurance company, the media, politicians, or other individuals. They may request information through the release of agency records and/or testimony from agency personnel.

FEMA has the responsibility to collect and preserve sensitive information in a proper manner. This means FEMA must control access to and release of it. Section I of this chapter discusses FEMA's responsibility with respect to sensitive information and reviews what types of document and/or testimony requests FEMA may receive. Section II briefly explains FEMA's duty to manage records. Sections III, IV, and V examine the requirements under the Paperwork Reduction Act, Privacy Act, and Freedom of Information Act, respectively. Section VI covers requests for records in litigation, specifically subpoenas, *Touhy* requests, and service of process. Section VII concludes this chapter by detailing how to preserve records for litigation.

II. Records Management

The Federal Records Act of 1950, as amended,¹ establishes the framework for records management programs in federal agencies. The Federal Records Act requires every federal agency to establish a records management program, designate a records officer, schedule records, and conduct training. The primary agency for records management oversight is the National Archives and Records Administration (NARA),² which administers federal law defining federal records³ and record management policies;⁴ and regulates and approves the disposition of federal records.⁵

A. Definitions of a Federal Record

A record may be anything created or received in the course of agency business.

1. Records or Federal Records

44 U.S.C. § 3301 defines “records” as follows:

[A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them.⁶

¹ Federal Records Act of 1950, Pub. L. 81-754 (1950), as amended, codified at 44 U.S.C. chapters 29, 31, and 33.

² See 44 U.S.C. Chapter 21.

³ 44 U.S.C. § 3301.

⁴ 44 U.S.C. § 3102.

⁵ 44 U.S.C. §§ 3106, 3302, and 3308.

⁶ 44 U.S.C. § 3301. See also, 36 C.F.R. § 1222.10 for an explanation of the definition.

Federal records are categorized based on function and use. There are two types of federal records: (1) Administrative records, defined as those relating to the internal administration or housekeeping activities of the office;⁷ and (2) Program records, defined as those documenting FEMA mission activities.⁸

2. Documentary Materials

“Documentary materials” is a collective term that refers to recorded information, regardless of the medium or the method or circumstances of recording.⁹

3. Non-Records

Not all documents are considered records. For example, extra copies of documents maintained solely for convenience or reference would not be considered records. Other examples of non-records include library references or stocks of agency publications. Another example is an individual’s personal papers. Personal papers are limited to materials belonging to an individual that are not used to conduct agency business and are solely for an individual’s own affairs—or used exclusively for that individual’s convenience. These files should be clearly designated as personal papers and kept separate from agency records.

B. Record Keeping Responsibilities

Federal records belong to the United States, not to individuals. Given this fact, all FEMA employees and contractors, regardless of their position, are responsible for records management.¹⁰ This includes responsibility for identifying records and applying the appropriate records schedule, following FEMA’s retention instructions contained

⁷ NARA Bulletin 99-04, Attachment A, available at <http://www.archives.gov/records-mgmt/bulletins/1999/99-04-a.html#records>.

⁸ *Id.*

⁹ *Id. See also*, 36 C.F.R. § 1220.18.

¹⁰ 36 C.F.R. § Part 1220; NARA Bulletin 99-04.

in the records schedule, and ensuring the safekeeping of federal records until the designated destruction period.¹¹

C. Destruction, Disposition and Retention of Federal Records

Federal records have a proscribed life cycle depending on the applicable laws, rules, regulations, and business needs.¹² That life cycle includes:

1. **Creation:** When the record is made or received by FEMA.
2. **Maintenance and use:** The storage, retrieval, and handling of federal records.
3. **Disposition:** Final action taken regarding records dictated by FEMA's record schedule.

Federal records may not be destroyed except in accordance with the procedures described in Title 44, Chapter 33, of the United States Code.¹³ These procedures allow for records destruction only under the authority of a records disposition schedule approved by the Archivist of the United States.¹⁴ The NARA issues a General Records Schedule that gives descriptions of records that are common to most federal agencies and authorizes disposals for temporary records.¹⁵

FEMA is responsible for developing its own record schedule, with the Archivist's approval, for agency-specific records. FEMA's Records Disposition Schedule¹⁶ is a mandatory¹⁷ instruction of what to do with records (and non-record materials) no longer needed for current

¹¹ *Id.*

¹² See C.F.R. Parts 1223-1227; NARA Bulletin 99-04.

¹³ 44 U.S.C. § 3301, *et seq.*

¹⁴ *Id.*

¹⁵ 44 U.S.C. § 3303a(d); 36 C.F.R. Parts 1220; 1227. See also <http://www.archives.gov/records-mgmt/grs>; FEMA Manual 5400.2,

¹⁶ FEMA Manual 5400.2 located at: <https://internal.fema.net/collab/R6MSD/Contracting/Regional/Shared%20Documents/Forms/AllItems.aspx?RootFolder=%2fcollab%2fR6MSD%2fContracting%2fRegional%2fShared%20Documents%2fFEMA%20Manual%205400%2e2&FolderCTID=0x012000D2E2725F346F744683A6CEF3C37F60FE>

¹⁷ See 36 C.F.R. subpart C, § 1222.34b for what constitutes unlawful destruction.

government business. Like other records schedules, it indicates how long a document must be kept before it is transferred to a Federal Records Center, destroyed, or transferred to NARA for permanent preservation.

Records may not be removed from the legal custody of federal agencies or destroyed¹⁸ without regard to the provisions of FEMA's records schedule. Any unauthorized destruction, alienation, or mutilation of records should be reported to Headquarters (HQ) and/or FEMA's Agency Records Officer.

III. The Paperwork Reduction Act

A. Overview

The stated purpose of the Paperwork Reduction Act (PRA)¹⁹ is to reduce the paperwork burden federal agencies²⁰ impose on individuals and entities. The PRA requires agencies like FEMA to 1) seek public comment on proposed information collections²¹ and 2) submit information collection proposals (such as proposed forms) to the Office of Management and Budget (OMB) for review and approval²² before collecting information from 10 or more persons within a 12-month period.²³

- OMB defines information as “any statement or estimate of fact or opinion, regardless of form or format, whether in

¹⁸ Criminal Penalties for Unlawful Disposal of Records: The maximum penalty for the willful and unlawful destruction, damage, or alienation of federal records is a \$2,000 fine, three years in prison, or both. 18 U.S.C. § 2071.

¹⁹ Paperwork Reduction Act, Pub. L. 94-13 (1995), codified at 44 U.S.C. chapter 35; see 5 C.F.R. Part 1320.

²⁰ With some exceptions, the PRA applies to “any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.” 44 U.S.C. § 3502(1).

²¹ 44 U.S.C. § 3506(c)(2)(A).

²² 5 C.F.R. § 1320.5(a).

²³ The term “person” means an individual, partnership, association, corporation, business trust, or legal representative; an organized group of individuals; a state, territorial, tribal, or local government or branch thereof; or a political subdivision of a state, territory, tribal, or local government or a branch of a political subdivision, see 44 U.S.C. § 3502(10).

numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic, or other media.”²⁴ OMB evaluates whether the proposed collection:

- is necessary for the agency to perform its functions;
- has practical utility; and
- minimizes the federal information collection burden.²⁵
- When OMB approves an information collection, it assigns an OMB control number that the agency must display on the information collection.²⁶

B. FEMA Disaster Related Collections

OMB has approved certain collections associated with FEMA’s disaster operations. FEMA’s information collections most relevant to disaster operations are:

- ***Federal Assistance to Individuals and Households Program (IHP)***, OMB No.1660-0061. This collection, related to 1660-0002, enables FEMA to collect information from late applicants, those seeking continued assistance, and those appealing IHP decisions. It also includes the collection of information necessary to provide states, territories, and tribes the opportunity to administer IHP’s “Other Needs” provision.
- ***Request for Federal Assistance - How to Process Mission Assignments in Federal Disaster Operations***, OMB No.1660-0047. This collection covers the forms states, territories, and tribes fill out when seeking direct federal disaster assistance that is beyond their response capabilities. From this information, FEMA

²⁴ 5 C.F.R. § 1320.3(h).

²⁵ 44 USC 3508 and 44 USC 3501(1).

²⁶ 5 C.F.R. § 1320.5(b)(1). OMB assigns numbers in the following fashion, ‘OMB No.16600-XXXX.’ The initials I-C-R” stand for “Information Collection Review.”

determines whether the damage causing the requested assistance results from a disaster and what response activity is appropriate.

FEMA has other information collections associated with disaster operations.²⁷ Some proposed collections may be implemented relatively quickly, such as qualitative feedback surveys²⁸ or matters necessitating expedited review.²⁹ Some collected items are not considered “information” under the PRA, and FEMA may collect it without OMB review and approval.³⁰

The most common examples are general solicitation questions, forms that only collect basic contact information (such as names and addresses) in the context of a sworn statement or acknowledgement, and follow-up questions from answers to approved information collections.³¹ Some information collections do not require OMB approval, most notably those connected to investigations³² and collections of information from federal employees acting in their official capacities.³³

FEMA regional and field offices should be cognizant of all information collections associated with their respective disaster programs and should not collect information without consulting FEMA Records Management, Office of Chief Counsel Information Law Branch, and

²⁷ See <http://www.reginfo.gov/public/do/PRAMain>.

²⁸ These are considered “generic clearances” where an agency can receive OMB approval for conducting more than one information collection using very similar methods when: 1) the need for and the overall practical utility of the data collection can be evaluated in advance, but 2) the agency cannot determine the details of the specific individual collections until a later time. Most generic clearances cover collections that are voluntary, low-burden (based on a consideration of total burden, total respondents, or burden per respondent), and uncontroversial. See OMB Memorandum, “Paperwork Reduction Act – Generic Clearances,” May 28, 2010.

http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.

²⁹ See 5 C.F.R. §§ 1320.13(a)(2), (c), (d); and 44 U.S.C. § 3507(j).

³⁰ See 5 C.F.R. §§ 1320.3(h)(1-10).

³¹ *Id.* at 1320.3(h)(1)(4) and (9); and OMB Memorandum, “Information Collection under the Paperwork Reduction Act,” April 7, 2010.

http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf.

³² 44 U.S.C. § 3518(c).

³³ *Id.* at § 3502(3)(A).

their respective HQ program offices. In collaboration with the FEMA Privacy Office, the FEMA Records Management Office utilizes the Privacy Threshold Analysis form to evaluate whether a FEMA program's proposed form (or other collection instrument) triggers PRA requirements.³⁴

- ***Disaster Assistance Registration***, OMB No.1660-0002.³⁵ This collection accounts for the forms individuals fill out in order to apply for FEMA's Individuals and Households Program (IHP).³⁶ It also includes standard follow-up information request letters, housing receipt and licensing forms,³⁷ and declaration/release forms.³⁸
- ***Public Assistance (PA)***, OMB No.1660-0017.³⁹ This collection accounts for the application and reporting forms that state, territorial, and tribal governments, and private nonprofit organizations, fill out in order to obtain, administer, and report on PA projects.⁴⁰
- ***Declaration Process***, OMB No.1660-0009. This includes the form that state and tribal governments fill out when seeking declarations, along with the data states gather in support of a Presidential declaration. This data includes data compiled for Preliminary Damage Assessments (PDAs).
- ***Request for the Site Inspection, Landowners Authorization/Ingress/Egress Agreement***, OMB No.1660-0030. This collection involves information from Individual Assistance

³⁴ FEMA Privacy Office uses the Privacy Threshold Analysis to determine whether the proposed form or collection instrument collects personally identifiable information (PII) and whether it triggers other laws like the Privacy Act of 1974, 5 U.S.C. § 552a, and Section 208 of the E-Government Act of 2002, 44 U.S.C Ch. 36. See M-03-22, "OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002," September 26, 2003.

³⁵ http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201309-1660-005.

³⁶ [FEMA Forms 009-0-1, 009-0-2, 009-0-1T, 009-0-1Int, 009-0-2Int, 009-0-1s, 009-0-2s](#).

³⁷ FEMA Forms 009-0-5 and 009-6.

³⁸ FEMA Forms 009-03 and 009-0-4.

³⁹ http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201402-1660-005.

³³ *Id.*

(IA) applicants who receive temporary housing assistance under 44 C.F.R. § 206.117, in order to determine the feasibility of the site for placement of temporary housing and to authorize FEMA to place the temporary housing unit and retrieve it at the end of the use.

- ***Hazard Mitigation Grant Program (HMGP) Application and Reporting***, OMB No.1660-0076. This collection accounts for the application and reporting forms that states, territories, and tribal governments fill out in order to obtain, administer, and report on HMGP projects.

IV. The Privacy Act

A. Overview

The Privacy Act of 1974⁴¹ and supporting regulations⁴² control the collection, maintenance, use, and dissemination of individually or personally identifiable information (PII) by federal agencies.⁴³ The Privacy Act requirements apply to the PII of FEMA applicants, National Flood Insurance Program (NFIP) policyholders, employees (including contractor employees), and vendors.

Department of Homeland Security (DHS) Management Directive 0470.2 requires that all agency personnel who have access to PII in the course of their duties be knowledgeable about the provisions and requirements of the Privacy Act and privacy provisions of the Homeland Security Act.⁴⁴ The Privacy Act provides that no agency

⁴¹ Pub. L. 93-579 (1974), 5 U.S.C. § 552a, as amended.

⁴² 6 C.F.R. § 5.20, *et seq.* These regulations apply to all DHS components, including FEMA. FEMA also has regulations implementing the Privacy Act at 44 C.F.R. Part 6.

⁴³ DHS defines PII “...as any information that permits the identity of an individual to be directly or indirectly inferred, including any information which is linked or linkable to that individual regardless of whether the individual is a U.S. citizen, lawful permanent resident, visitor to the U.S., or employee or contractor to the Department.” Department of Homeland Security, Handbook for Safeguarding Sensitive Personally Identifiable Information, 4 (2008). PII includes information such as name, address, phone number, and social security number.

⁴⁴ Department of Homeland Security Management Directive 0470.2, *Privacy Act Compliance*, (2005).

shall disclose⁴⁵ any agency record⁴⁶ which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure is pursuant to one of several enumerated exceptions.⁴⁷

Examples of PII include:

- Names;
- Social security numbers; and
- Home addresses.

Prior to collecting any PII that will be entered into a system of records, federal agencies are required to provide a Privacy Act Statement.⁴⁸ The statement must provide why the information is being collected and how the information will be used.

Once this information is collected, FEMA may only release PII from its systems of records either with the consent of the individual or if there is an exception in the law⁴⁹ or regulation.⁵⁰ The statute also requires that each agency that maintains a system of records collect only such information about an individual that is relevant and necessary to accomplish the purpose.⁵¹ Whenever possible, agencies are required to collect information directly from an individual when the

⁴⁵ “Disclose” includes by any means: written, oral, electronic, or mechanical. Privacy Act, 5 U.S.C. § 552a(b), as amended.

⁴⁶ A “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. 5 U.S.C. § 552a(a)(4).

⁴⁷ 5 U.S.C. § 552a(b).

⁴⁸ *Id.* § 552a(e)(3).

⁴⁹ *Id.* § 552a(b)(1-12).

⁵⁰ 6 C.F.R. § 5.20 (e). This regulation allows each agency in DHS to retain its prior exempted authorities as an interim solution. The FEMA regulatory exemptions are found at 5 C.F.R. § 6.86 and 6.87.

⁵¹ 5 U.S.C. § 552a(e)(2).

information will be used to determine eligibility for a federal benefit.⁵²

B. Exceptions

There are exceptions in both the statute and regulations that override the basic premise of the law, which is no disclosure without consent of the individual to whom the information pertains. Exceptions in the statute authorize access to PII by FEMA employees⁵³ and contractors⁵⁴ who have the “need to know” the information in order to perform their jobs. These exceptions apply to the PII of FEMA employees, disaster assistance applicants, and NFIP policy holders, for example. Another statutory exception allows agencies to share information compiled for the purpose of determining suitability or eligibility for employment.⁵⁵

Another exception is the “routine use” exception, which allows agencies to create “routine uses” through publication in instances where the sharing of the information is permitted routinely as part of the agency’s mission. These are customized to the specific records maintained by the agency.⁵⁶

In addition, statutes other than the Privacy Act may mandate that agencies release PII under certain situations. Guidance issued by the OMB after Congress enacted the Privacy Act make clear that agencies should not interpret or apply the Privacy Act in a manner that frustrates a statutory mandate to disclose PII.⁵⁷ The guidance notes that “the conditions of disclosure language” in the Privacy Act make “no specific provision for disclosures expressly required by law,” and

⁵² *Id.* at 552a(e)(2).

⁵³ *Id.* at 552a(b)(1). The regulations allow access to all DHS employees, not just those working for FEMA. This is because intra-agency sharing is allowed for those with a need to know. *See* 5 U.S.C. § 552a(b)(1).

⁵⁴ *Id.* at 552a (m).

⁵⁵ *Id.* at 552a(k)(5).

⁵⁶ *Id.* at 552a(b)(3).

⁵⁷ 40 *Fed. Reg.* 28,948, 28,954 (July 9, 1975).

describes such disclosures as “congressionally-mandated ‘routine uses.’”⁵⁸

The OMB guidance directs agencies, nonetheless, to establish these types of routine uses pursuant to subsections (e)(11) and (e)(4)(D) of the Privacy Act,⁵⁹ for the apparent purpose of notifying members of the public how agencies would use their PII, consistent with the statute’s purpose.

The term “routine use” means the disclosure of a record that is compatible with the purpose for which it is collected.⁶⁰ Each agency that maintains a system of records must publish a System of Records Notice in the *Federal Register* describing the character and type of each system of records and listing the routine uses or circumstances under which the agency may disclose the information without the prior written consent of the individual to whom the record pertains.⁶¹ This system allows for significant flexibility, as FEMA can modify the routine uses without the need for a full regulatory process.

FEMA maintains many systems of records,⁶² including:

- Disaster Recovery Assistance (IHP assistance) files;
- National Emergency Family Registry and Locator System files; and
- NFIP files.

The most frequent requests for information arise in connection to applicant information from FEMA’s Disaster Recovery IHP assistance files. This typically involves state access to PII in FEMA Disaster Recovery Assistance Files.

⁵⁸ *Id.* at 28,954.

⁵⁹ *Id.*

⁶⁰ *Id.* at § 552a(a)(7).

⁶¹ *Id.* at 552a(e)(4).

⁶² For a list of FEMA SORNs see: <https://www.dhs.gov/system-records-notices-sorns>.

SORN Revision Alert

In 2013, FEMA revised the SORN for the Disaster Assistance Application Files,⁶³ and has streamlined its procedures for providing access to states as authorized by the Stafford Act. Please consult with Office of Chief Counsel (OCC) if you have any questions regarding the SORN and procedures for disclosure of records from this system of records.

FEMA's routine uses also permit limited disclosure of applicant information under certain circumstances to certain other specific outside entities for limited purposes, including addressing an applicant's "unmet needs" and preventing the duplication of benefits to the applicants by the federal government and other entities.

All requests for applicant information require legal review and concurrence by OCC before disclosure.⁶⁴ In addition, prior to releasing PII to a non-FEMA entity, IA personnel must check the information to ensure that it does not contain metadata.⁶⁵

The IA website contains templates for request letters under several different routine uses that the agency may provide as an example of a proper request. The website also contains sample response letters from FEMA to requesters. FEMA may also memorialize information sharing through Information Sharing Access Agreements. Please consult with OCC before using any of the sample letters or Information Sharing Access Agreement templates to ensure you are using the most updated forms.

⁶³ *Disaster Assistance Recovery Files System of Records*, 78 *Fed. Reg.* 28,252 (April 30, 2013). <http://www.gpo.gov/fdsys/pkg/FR-2013-04-30/pdf/2013-10173.pdf>

⁶⁴ *Id.*

⁶⁵ System information (i.e., detailed logs automatically created by a computer detailing who is doing what and when on the computer, commonly referred to as metadata).

The Privacy Act requires that FEMA maintain an accounting of information it discloses under routine uses.⁶⁶ There are potentially significant penalties for the unauthorized release of information.⁶⁷

C. Legally Sufficient Consent by the Individual to Whom the Record Pertains

In addition to the statutory and regulatory exception that permits disclosure, PII can be released upon receipt of consent by an individual to whom the record pertains. A legally sufficient consent to disclose Privacy Act protected information must be obtained in writing and must describe the record sought in enough detail to enable agency personnel to locate the records. Individuals seeking their own records or authorizing the release of their records to a third party must verify their identity by providing:⁶⁸

- their full name;
- current address; and
- date and place of birth.

The individual must sign and notarize the request⁶⁹ or submit it pursuant to federal statute⁷⁰ permitting statements made under penalty of perjury as a substitute for notarization. FEMA does not require a specific consent form as long as the necessary elements are present. When the applicant authorizes the release of information to a third party, such as a nonprofit agency providing additional disaster relief, the applicant must identify what records may be released and to whom.⁷¹ A sample statement is provided here.

⁶⁶ 5 U.S.C. § 552a(g)(i).

⁶⁷ See Section H, *infra*.

⁶⁸ See DHS Privacy Act Regulations at 6 C.F.R. Part 5, subpart B.

⁶⁹ 6 C.F.R. § 5.21(d).

⁷⁰ 28 U.S.C. § 1746.

⁷¹ 6 C.F.R. § 5.21(f).

Sample Release Statement

I, Jane Jones, born on April 1, 1948, in Brooklyn, New York, and [previously or currently] residing at 111 Elm Street, Tupelo, Mississippi, 43456, consent to have the contents of my FEMA disaster application file number xxxxxxxx disclosed to Sam Smith, Esq., 123 Lake Drive, Las Vegas, Nevada 12345. I declare and affirm *under penalty of perjury* that the statements made herein are true and correct to the best of my knowledge, information, and belief.

D. Consent Form Distinguished from Declaration and Release Form

The Privacy Act requires that FEMA inform disaster assistance applicants about the law's requirements.⁷² FEMA provides this information as part of the application process. Applicants must sign a Declaration and Release form, FEMA Form (FF) 009-0-3,⁷³ acknowledging that as a condition of accepting their application, FEMA may share their information in accordance with the Privacy Act, and FEMA may obtain information about them from other sources, such as banks, financial institutions, and insurance companies.

Some applicants or FEMA field staff may think that this Declaration and Release is also the applicant's legal consent authorizing FEMA to disclose their information to a third party; it is not. The Declaration and Release form is not the same thing as an applicant's consent to release his or her information; it is FEMA's required notice to the applicant about how FEMA may use the person's personal information, and it acknowledges and signifies that the applicant is aware that FEMA will use the information from the application in such fashion.

⁷² 5 U.S.C. § 552a(e)(3).

⁷³ See http://www.reginfo.gov/public/do/PRAViewLC?ref_nbr=201404-1660-002&icID=178884. The Spanish language form is FF 009-0-4.

E. State Access to PII in FEMA Disaster Recovery Assistance Files

The Stafford Act mandates in Section 408 the disclosure of information about persons receiving IHP assistance to state governments:

1. Access to records

In providing assistance to individuals and households under this section, the President shall provide for the substantial and ongoing involvement of the states in which the individuals and households are located, including by providing the States access to the electronic records of individuals and households receiving assistance under this section in order for the states to make available any additional state and local assistance to the individuals and households.⁷⁴

The Stafford Act requires that FEMA provide access to information about “individuals and households receiving assistance” under IHP to states. Although the statute does not affirmatively require direct disclosure to local governments, the statutory intent is for states to use FEMA’s information “to make available any additional...local assistance to individuals and households.”⁷⁵

Congress contemplated that the states would share and coordinate the information with local government programs. Indeed, the statute appears to mandate the sharing of PII with states with only two restrictions: (1) the purpose must be to make available additional state and local assistance and (2) the information pertains only to individuals located in the requesting state.⁷⁶

The Stafford Act provides for a congressionally mandated routine use⁷⁷ for disclosure of IHP information to states in order for the states to provide additional state and local assistance to survivors and also to avoid a

⁷⁴ Stafford Act § 408(f)(2), 42 U.S.C. § 5174(f)(2). *See also* 44 C.F.R. § 206.110(j)(2) for FEMA’s implementing regulations.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 40 *Fed. Reg.* 28,948, 28,954 (July 9, 1975).

duplication of benefits.⁷⁸ States must protect any applicant information they receive from FEMA as required in the Privacy Act, and the state shall not further disclose the information.⁷⁹ FEMA may grant the state access to its electronic records or, electronic “excerpts” of applicant records, and/or databases drawn from the National Emergency Management Information System.

The FEMA-State Agreement contains a specific requirement that the state protect any PII provided to it⁸⁰ and that the state will indemnify the federal government for any unauthorized disclosure.

Non-applicability of a State Open Records Act for Shared PII

PII given to the state does not become a “state record” for the purpose of a state open records act. During Hurricane Katrina, names and addresses of Louisiana applicants who were living outside of the state were provided to the Louisiana Secretary of State. Under the appropriate routine use, the Louisiana Secretary of State had requested the information so that flyers regarding absentee voting could be mailed to those citizens. After the information was in the possession of the Louisiana Secretary of State, an open records request was received from a local politician who wanted to mail campaign literature. A Louisiana trial court ruled that even though the records were in the possession of the Louisiana Secretary of State, due to the restrictions of the Privacy Act and as noted by FEMA when the information was tendered, the records were not subject to the State Open Records Act.⁸¹

⁷⁸ Stafford Act §§ 408(f)(2) and 312, 42 U.S.C. §§ 5174(f) and 5155.

⁷⁹ 44 C.F.R. §206.110(j).

⁸⁰ For example, paragraph 3 of the FEMA-State Agreement for FEMA-4031-DR-NY reads in part: “Under Section 408, the State may obtain disaster applicant information to provide applicants with other State and local assistance. The applicant information is protected under the federal Privacy Act, 5 U.S.C. §552a. A state receiving disaster applicant information is receiving “personally identifiable information” and must protect it in the same manner that the Privacy Act requires FEMA to protect it.”

⁸¹ *Marchand and Richmond v. Foti*, Docket No 540,093, Sec. 23, Civil District Court, Orleans Parish, La (2005). (This is an unpublished Louisiana case. We are not aware of similar cases in any other states.)

F. Applicant Access to Records

One purpose of the Privacy Act is to give individuals access to records about themselves that the government maintains in a system of records.⁸² This includes both IA applicants and federal employees. Specifically, any agency must allow an individual to review and copy records pertaining to the individual.⁸³ The agency must also provide a process by which an individual may submit an amendment to the record.⁸⁴

However, the Privacy Act also authorizes agencies to exempt certain types of records (law enforcement) from such disclosure, even to the subject of the records.⁸⁵ Under DHS regulations, FEMA may deny access to employee investigative files (especially witness statements and/or affidavits) to avoid anyone impeding the investigation, tampering with witnesses or evidence, or avoiding detection or apprehension.⁸⁶ Any FEMA field office that receives a request for access to investigative records involving employee disciplinary action should consult with FEMA OCC.

G. Additional PII Considerations in the Field

DHS provides extensive guidance on safeguarding PII.⁸⁷ FEMA employees should be familiar with the records in their paper files and computers and keep only what is essential. Agency staff should protect information by locking files, not storing electronic PII on a common

⁸² 5 U.S.C. § 552a(d); 6 C.F.R. § 5.21.

⁸³ 5 U.S.C. § 552a(d)(1).

⁸⁴ *Id.* at 552a(d)(2).

⁸⁵ *Id.* at §§ 552a (j), (k).

⁸⁶ See DHS/ALL-018 - Department of Homeland Security Grievances, Appeals, and Disciplinary Action Records System of Records, 73 *Fed. Reg.* 61882 (2008); 74 *Fed. Reg.* 4256 (August 24, 2009); 6 C.F.R. Part 5, subpart B, and Appendix C. www.gpo.gov/fdsys/pkg/FR-2008-10-17/html/E8-24741.htm.

⁸⁷ See DHS Privacy Incident Handling Guidance (PIHG).

http://www.dhs.gov/xlibrary/assets/privacy/privacy_guide_pihg.pdf

drive, and shredding or deleting paper and electronic files containing PII that they no longer need.⁸⁸

A Privacy Act cover sheet should be used when any document containing PII is transferred or is placed where it could be viewed by an unauthorized person. Special care must be given when maps that provide the location of FEMA IA applicants are created to insure that the map is not specific to the point where an individual residence could be identified. In addition to disaster assistance applicant information, FEMA must also protect employee and contractor PII at FEMA field offices.

H. Security Breaches and Penalties

Access to PII by FEMA employees carries significant responsibilities to protect against a breach or unauthorized disclosure. A breach is “the loss of control, compromise, unauthorized disclosure, unauthorized acquisition, unauthorized access” to PII, whether physical or electronic.⁸⁹

Examples of security breaches include:⁹⁰

- A FEMA employee laptop containing PII about FEMA employees is misplaced, lost, or stolen;
- A FEMA contractor releases the home addresses of individuals insured under the NFIP to an unauthorized third party outside of FEMA;
- An Excel spreadsheet document containing confidential and sensitive information regarding Equal Employment Opportunity charges that employees have filed is placed on a widely accessible computer drive;

⁸⁸ FEMA Directive 262-2, *Information Transmitted via Email* (2010), provides specific safeguards for protecting PII and sensitive PII transmitted via email.

⁸⁹ OMB Memorandum: *Safeguarding Against and Responding to the Breach of Personally Identifiable Information* (2007).

⁹⁰ For additional examples, see *PIHG*, Version 2.1 (2007), Appendix A, 4.

- A FEMA contractor prepares envelopes to FEMA reservist employees with recipient addresses and social security numbers on the outside of the envelopes.

The statute also provides for civil penalties, as well as criminal penalties, and a fine of up to \$5,000 per occurrence for a willful disclosure.⁹¹

FEMA has incurred significant costs in prior disasters to remedy security breaches involving the release of PII at FEMA's Joint Field Offices (JFOs) during disasters. For example, an employee of a state contractor placed 30,000 names and addresses on the Internet. FEMA, in order to mitigate the breach, sent letters to each affected individual and paid for identity theft protection because of the unauthorized release of PII.

As a result of this incident, FEMA amended the FEMA-State Agreement to clarify that if a state, or its agents or contractors, releases PII in an unauthorized manner, the state would be responsible for paying for any mitigation measures FEMA takes as a result.

1. Reporting a Breach or Unauthorized Release of PII

All FEMA employees have a duty to report any potential or confirmed breach in the proper handling of Privacy Act protected information to their supervisor immediately on learning of the potential breach. The DHS Privacy Incident Handling Guidance (PIHG)⁹² establishes strict time-

⁹¹ 5 U.S.C. § 552a(i).

⁹² See *PIHG*, Version 2.1, Appendix A, 4 (2007).

sensitive procedures that DHS personnel must follow upon the detection or discovery of a suspected or confirmed incident involving PII.⁹³

The PIHG applies to all DHS personnel and to all federally held information in an unclassified environment such as a JFO, including “information in both electronic and paper format, personal and personally identifiable information, and information maintained in a system of records as defined by the Privacy Act.”⁹⁴

2. Summary of PIHG Reporting Requirements

a. First Stage – Discovery and Notification

Upon discovering that PII or any equipment containing PII has been or may have been exposed, misplaced, mishandled, or stolen, the employee must immediately notify:

- His or her immediate Program Manager/Supervisor;
- The IT Helpdesk (if the loss involves IT equipment or matters of cybersecurity); and
- The FEMA Privacy Office at FEMA-Privacy@fema.dhs.gov or 202-212-5100.⁹⁵

DHS/FEMA employee and contractor must immediately report any suspected or confirmed breach of privacy data.

⁹³ OMB requires agencies to report all privacy incidents to the United States Computer Emergency Readiness Team (US-CERT) within one hour of discovering the incident, as mandated by OMB Memorandum 06-19, *Reporting Incidents Involving Personally Identifiable Information and Incorporating the Cost for Security in Agency Information Technology Investments*, July 12, 2006, (M-06-19), and OMB Memorandum M-07-16, *Safeguarding Against and Responding to the Breach of Personally Identifiable Information*, OMB M-07-16, (2007); See also Appendix B for the *Privacy Incident Report Template*. The one-hour time requirement commences when the DHS Chief Information Security Officer is notified of the incident. *PIHG*, at 6.

⁹⁴ *PIHG* at 7.

⁹⁵ *Id.*

b. Second Stage – Reporting and Investigating

The program office should gather the following from the individual who discovered the potential incident and provide an initial incident report and/or written statement describing what occurred, including:

- The name of the FEMA office where the incident occurred;
- Name, phone number, and email address of the employee/contractor who discovered the incident and/or who is responsible for the incident;
- Date and time of the incident and brief description of the circumstances surrounding the potential loss of PII;
- Summary of the type of PII potentially at risk (e.g., full names, social security numbers, account numbers, etc.). NOTE: Only provide the data element categories. (Do not disclose the specific PII data in the report.);
- Number of people potentially affected and the estimate or actual number of records exposed;
- Whether the exposure was internal (within DHS) or external;
- If the data was subject to external exposure, a statement about whether it was disclosed to the federal government or the public;
- In certain cases, a police report.

c. Third Stage – Initial Response

- The program office must designate a point of contact (POC) to coordinate with the FEMA Privacy Office throughout the life cycle of the incident;

- The FEMA Privacy Office and the OCC will develop an incident-specific remediation plan, including, for example, immediately shutting down access to a system, removing a file from a computer network, or turning off a fax or copy machine;
- The FEMA Privacy Office will provide guidance to the program POC throughout the incident life cycle;
- The program office is responsible for implementation of the remediation actions.

d. Fourth Stage – Remediation

Remediation of an incident may include the following actions:

- **Notification to affected individuals:** In most cases, incidents warrant notification to the affected individuals. DHS guidance recommends notification by telephone call and certified mail. In these cases, the FEMA Privacy Office will provide the program office POC with an approved notification letter and call script template. The program office must personalize each letter and follow through with notification in a timely manner.
- **Credit Monitoring:** When sensitive PII has been compromised, FEMA Privacy Office will provide the program office with a Statement of Work template and a Blanket Purchase Agreement to procure identity theft protection/credit monitoring services. The program office must follow through with this action in a timely manner, as the affected individuals may want to enroll in these services immediately.⁹⁶
- **Training:** As a result of most PII incidents, the FEMA Privacy Office will recommend Privacy Awareness/Safeguarding PII training for the involved employee or contractor. Please contact the FEMA Privacy Office to schedule such training.

⁹⁶ See *PIHG*.

I. Key Contacts

You can reach the FEMA Privacy Office at FEMA-Privacy@fema.dhs.gov, or by telephone at 202-212-5100.

V. Freedom of Information Act (FOIA)

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in the Freedom of Information Act (FOIA) and to usher in a new era of open government. The presumption of disclosure should be applied to all decisions involving FOIA.

— President’s Memorandum on Freedom of Information Act, January 21, 2009.⁹⁷

A. Overview

Enacted in 1966, the Freedom of Information Act is a federal law that establishes the public’s legally enforceable right to access information from federal agencies. It has undergone several significant amendments since that time.⁹⁸ “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁹⁹ The government bears the burden of proof to justify withholding information from release.¹⁰⁰

One way FOIA helps ensure an informed citizenry is to require federal agencies to make certain information available to the public without a specific request.¹⁰¹ These disclosures are referred to as “proactive

⁹⁷ 74 *Fed. Reg.* 4683 (2009).

⁹⁸ 5 U.S.C. § 552, amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. (2007), and by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.”

⁹⁹ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

¹⁰⁰ 5 U.S.C. § 552(a)(3)(A) and (a)(4)(B). See Memorandum for Heads of Executives of Executive Departments and Agencies, from the Attorney General, *The Freedom of Information Act* (2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

¹⁰¹ 5 U.S.C. § 552(a)(2) requires that federal agencies proactively make available final opinions; statements of policy and agency interpretations; administrative staff manuals and instructions to staff that affect the public; and copies of records released in response to a request under the FOIA when that information is likely to be requested again.

disclosures.”¹⁰² In order to comply with this FOIA requirement, DHS has created an electronic “reading room,” or “FOIA Library,” for public access to these proactive disclosure records.¹⁰³ FEMA is currently in the process of providing proactive disclosures in a FEMA FOIA Library. In addition, federal agencies must disclose specific government records upon receiving a written request unless the documents fall within one of nine stated exemptions in the law.¹⁰⁴

Any “person,” including non-U.S. citizens,¹⁰⁵ may make a written request for agency records under FOIA, except fugitives from justice.¹⁰⁶ The term “agency records” means virtually any record created or received in the course of agency business regardless of form (paper, electronic, or other format) and may include photographs, recordings, and emails.¹⁰⁷

As a result of the 1996 amendments, records are defined in FOIA as “any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format.”¹⁰⁸ Agency records have been defined by the Supreme Court

¹⁰² 5 U.S.C. § 552(a)(2) provides for four categories of records agencies must routinely make “available for public inspection and copying.” They are: 1) final opinions and orders rendered in adjudication of administrative cases; 2) specific agency policy statements; 3) certain administrative staff manuals; and 4) records disclosed since March 31, 1997, in response to a FOIA request where “the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records, or that have been requested 3 or more times.”

¹⁰³ http://www.dhs.gov/xfoia/editorial_0579.shtm.

¹⁰⁴ 5 U.S.C. § 552(b)(1)-(b)(9).

¹⁰⁵ See, *Arevalo-Franco v. INS*, 889 F.2d 589, 591 (5th Cir. 1989).

¹⁰⁶ See, *Ortega-Rodriguez v. U.S.*, 507 U.S. 234 (U.S. 1993).

¹⁰⁷ 5 U.S.C. § 552(f)(2).

¹⁰⁸ *U.S. Department of Justice Guide to the Freedom of Information Act* (2013), *Procedural Requirements* at p. 10, available at <http://www.justice.gov/oip/foia-guide.html> (hereinafter DOJ FOIA Guide, 5 U.S.C. § 552(f)(2)(A)).

as “records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.”¹⁰⁹

Agency control is the predominant consideration in determining whether records generated or maintained by a government contractor are “agency records” for the purpose of the statute. This definition is broad enough to include records that are in the physical possession of FEMA contractors. Agency records do not include private material brought into the agency for an employee’s reference.¹¹⁰

FOIA guidelines were issued by Attorney General Eric H. Holder, Jr. on March 19, 2009. Federal agencies are encouraged to make discretionary releases where possible, or partial releases when necessary. Attorney General Holder “established a ‘foreseeable harm’ standard for defending agency decision to withhold information.”¹¹¹

Under the foreseeable harm standard, “the Department of Justice will defend an agency’s denial of a FOIA request ‘only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.’”¹¹²

The Department of Justice has created a very useful resource for FOIA issues entitled the *United States Department of Justice Guide to the Freedom of Information Act* available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>. Formerly known as the “Yellow Book,” the 2009 edition (with a

¹⁰⁹ DOJ FOIA Guide, *Procedural Requirements* at p. 10, citing *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records); *See also Callaway v. Dep’t of Treasury*, No. 04-1506, 2012 U.S. Dist. LEXIS 141034, at *14 (D.D.C. Sept. 30, 2012), holding that FOIA “only obligates [Customs] to provide access to those [records] which it in fact has created and retained,” and, “need not produce records maintained by another federal government agency or obtain records from any other sources” (quoting *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 153 (1980)).

¹¹⁰ *See, United States DOJ v. Tax Analysts*, 492 U.S. 136 (U.S. 1989).

¹¹¹ DOJ FOIA Guide, *President Obama’s FOIA Memorandum* and Attorney General Holder’s *FOIA Guidelines* at p.2. Congress codified the foreseeable harm standard under the FOIA Improvement Act of 2016, Pub. L. 114-185 (2016), *codified* at 5 U.S.C. 552(a)(8)(A).

¹¹² *Id.*

yellow cover) was the last edition to be printed. The Department of Justice (DOJ) Guide is now only available online.

B. Procedural Requirements

FOIA places substantial procedural requirements on each federal agency. FOIA requires an agency to provide non-exempt records within 20 working days of receipt of a written request for records.¹¹³ While an agency need not provide documents to the requester within the 20 working days requirement, it “must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents.”¹¹⁴

The 20 working days requirement may be extended in “unusual circumstances,” but the agency is required to provide a written notice to the requester “setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.”¹¹⁵ The extension may be for 10 days, otherwise the

¹¹³ 5 U.S.C. §552(a)(6)(A).

¹¹⁴ *DOJ FOIA Guide*, Procedural Requirements at p. 32 citing *CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013) (finding that if agency does not adhere to FOIA's explicit timelines, "penalty" is that agency cannot rely on administrative exhaustion requirement because statute: requires that agency immediately notify requester of determination of and reasons for whether to comply with request; requires that agency immediately notify requester of right to appeal to the head of the agency any adverse determination; creates unusual circumstances safety valve that permits agency to extend 20 working day period for response by up to 10 additional working days; and provides that, once in court, agency may further extend its response time by means of exceptional circumstances safety valve). But see *Dennis v. CIA*, Nos. 12 CV 4207(JG), 12 CV 4208(JG), 12 CV 5334(JC), 2012 WL 5493377, at *2 (E.D.N.Y. Nov. 13, 2012) (holding that "interim response informing [plaintiff] that [agency] is in the process of addressing [plaintiff's] inquiry is sufficient to satisfy the requirement that [agency] reply within the statutory time period); *Carson v. U.S. Merit Sys. Protect. Bd.* 11-399, 2012 WL 2562370, *2 (E.D. Tenn., June 29, 2012) (dismissing complaint contending that agency failed to respond to request in timely manner because plaintiff submitted no evidence to suggest that agency was not acting in good faith and agency answered request prior to commencement of litigation).

¹¹⁵ 5 U.S.C. § 552 (a)(6)(B)(i); See also DOJ FOIA Guide, *Procedural Requirements* at p. 33. The definition for “unusual circumstances” may be found at 5 U.S.C. § 552 (a)(6)(B)(iii).

requester must be permitted an opportunity to modify the request or arrange for an alternative time frame.¹¹⁶

An agency is permitted to charge fees for a request depending on the category of requester for records that reflect the time for locating and copying the records, but may not assess certain fees if the agency fails to comply with any time limit absent an “exceptional circumstance.”¹¹⁷ If a request is not satisfied within the 20 working day time frame, generally it is ripe for administrative appeal and/or for litigation.¹¹⁸

Additionally, each agency is required to submit an annual report of FOIA activity to the Department of Justice.¹¹⁹

C. FEMA's FOIA Process

The Disclosure Branch (DB) of FEMA's Records Management Division processes all requests for information made to FEMA under FOIA. The DB Branch Chief is the FOIA Officer for FEMA. FOIA requests may be submitted online, by mail, or by email at FEMA-FOIA@fema.dhs.gov.¹²⁰ A FEMA JFO receiving a request for information during an active disaster should immediately forward the request to the electronic mailbox FEMA-FOIA@fema.dhs.gov for centralized tracking and processing. OCC attorneys, specifically with the Information Law Branch, review FOIA responses that are partially or fully denied (where appeal rights are given) prior to release, as mandated by FEMA Directive 112-5.¹²¹

With the presumption of disclosure, subject to the exemptions discussed in the following text, it is important to draft all written

¹¹⁶ 5 U.S.C. § 552 (a)(6)(B)(ii); 5 U.S.C. § 552 (a)(3)(A); 5 U.S.C. § 552 (a)(4)(viii); DOJ FOIA Guide, *Procedural Requirements* at p. 36; *see generally* DOJ

¹¹⁷ FOIA Guide, *Fees and Fee Waivers*.

¹¹⁸ 5 U.S.C. § 552 (a)(6)(C)(i); DOJ FOIA Guide, *Procedural Requirements* at p. 35.

¹¹⁹ *See* <http://www.dhs.gov/xlibrary/assets/privacy/privacy-foia-annual-report-fy-2011-dhs.pdf> and 5 U.S.C. § 552(e)(1).

¹²⁰ FEMA-FOIA@fema.dhs.gov

¹²¹ FEMA Directive FD-112-5, *Obtaining Legal Review and Assistance*, http://on.fema.net/employee_tools/forms/FEMA%20DirectivesNew/FD112-5.pdf.

communication and records in a professional manner, including electronic communications.

D. FOIA Exemptions

Not every agency record (or all of the information in an agency record) subject to disclosure must be released in full. The statute contains nine specific exemptions which protect agency records from release. In addition, the statute provides that when a record contains some information that may be exempt, the entire record is not necessarily exempt.

Instead, FOIA specifically provides that any reasonably segregable portion of the record must be provided to the requester after removal of the exempted portions of the record.¹²² This process is referred to as redacting. This is an important requirement because it prevents an agency from withholding an entire document simply because some of the material is exempt. The exemptions are construed narrowly by courts,¹²³ with the burden on the agency to prove that a particular document falls under one of the exemptions.¹²⁴

There are POCs for FOIA in each program area and the field offices. These offices may be tasked to “perform a search” for records responsive to a FOIA request. In responding to a request from the DB to perform a search, FOIA POCs should indicate what portions of the records they believe should be redacted and the reasons (exemptions) for those redactions (i.e., what “harm” the release of the information would cause). The DB makes the final determination, subject to the legal review by Information Law Branch, of what portions of the records should be redacted under which exemption.

¹²² 5 U.S.C. § 552(b); DOJ FOIA Guide, *Procedural Requirements* at p. 55.

¹²³ *Church of Scientology of Cal. v. Dep’t of Army*, 611 F. 2d. 738, 742 (9th Cir. 1979).

¹²⁴ 5 U.S.C § 552(a)(4)(B); *Kamman v. IRS*, 56 F. 3d 46, 48 (9th Cir 1995).

1. Exemption 1: National Defense or Foreign Policy Information Properly Classified Pursuant to an Executive Order¹²⁵

This exemption permits the withholding of records that have been classified under a system established by the President. Beginning with Harry Truman, each president has established a uniform policy for the executive branch concerning the protection of national security information through an executive order.¹²⁶ Early court cases interpreting this exemption upheld withholding documents based solely on an agency's assertion that this exemption applied. Congress amended FOIA in 1974 to expressly provide for *in camera* review of documents, including classified documents.¹²⁷

As practical matter, this exemption is not relevant to FEMA field operations.

2. Exemption 2: Documents Related Solely to the Internal Personnel Rules and Practices of an Agency

Exemption 2 of FOIA exempts from mandatory disclosure records that are related solely to the internal personnel rules and practices of an agency. For years, courts differentiated between what was referred to as “Low 2,” which are matters of a trivial nature, and “High 2,” which are more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement.¹²⁸

In 2011, the Supreme Court abolished Low 2 and High 2 concepts, holding that Exemption 2 relates solely to the internal personnel rules and practices of an agency.¹²⁹ The decision sets forth a three-part test, significantly narrowing the scope of Exemption 2: 1) The information must relate to the agency's personnel rules and practices; 2) The information must relate solely to those personnel rules and practices; and

¹²⁵ 5 U.S.C. §552(b)(1); see DOJ FOIA Guide, *Exemption 1 at 1*.

¹²⁶ DOJ FOIA Guide, *Exemption 1 at p. 1*.

¹²⁷ See Pub. L. No. 93-502, 88 Stat.1561 (1974); Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

¹²⁸ DOJ FOIA Guide, *Exemption 2 at pp. 2-7*.

¹²⁹ *Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011).

3) The information must be internal, meaning that the agency must typically keep the records to itself for its own use.¹³⁰ In general, however, the DOJ does not defend Exemption 2 cases, and FEMA has not had any recent litigation on it.

3. Exemption 3: Documents Where Disclosure is Specifically Prohibited by Federal Statute¹³¹

Exemption 3 incorporates certain federal nondisclosure statutes into the FOIA. Records, or portions thereof, are exempt from disclosure under FOIA Exemption 3, where there is a federal nondisclosure statute that

(A)(1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.¹³²

A good example is found in the Homeland Security Act of 2002, which created the Department of Homeland Security. The Homeland Security Act specifically provides that critical structure information that is voluntarily submitted to a covered federal agency is exempt from disclosure under FOIA.¹³³ To be covered by this exemption, it must contain an express statement such as, “This information is voluntarily submitted to the federal government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002.”¹³⁴

Bid proposals for federal procurements are withheld in their entirety under Exemption 3 based on 41 U.S.C. § 253b(m), which prohibits the release of any competitive proposal under the FOIA, except for those portions of the proposal set forth or incorporated by reference in a

¹³⁰ *Id.* at 126-45 and fn. 4; *See also* DOJ FOIA Guide, *Exemption 2* at pp. 12-13.

¹³¹ 5 U.S.C. § 552(b)(3); *See also* DOJ FOIA Guide, *Exemption 3*.

¹³² 5 U.S.C. § 552(b)(3).

¹³³ 6 U.S.C. § 133(a)(1)(A)

¹³⁴ 6 U.S.C. § 133(a)(2)(A).

government contract. Because the statute leaves the agency with no discretion, all sections of the contractor proposal that were required to be submitted, and that were not incorporated into the contract, must be withheld under subsection (b)(3) of the FOIA.

There are numerous other statutes that contain non-disclosure provisions; for instance, tax returns and return information are statutorily protected from disclosure.¹³⁵

4. Exemption 4: Documents that Would Reveal Trade Secrets and Commercial or Financial Information Obtained from a Person and Privileged or Confidential ¹³⁶

This exemption protects the interests of both the government and submitters of information by encouraging submitters to furnish voluntarily useful commercial or financial information to the government, while safeguarding against the competitive disadvantages that could result from disclosure. There is a substantial body of case law interpreting this exemption.¹³⁷

FEMA often receives propriety information from third parties that is covered by this exemption. This information may be found in project worksheets or contracts. If information that may be exempt under Exemption 4 is located in a record responsive to the FOIA request, FEMA's DB notifies the submitter and the submitter is given an opportunity to provide specific reasons why FEMA should withhold the information from disclosure.¹³⁸ This prevents release of confidential information to a competitor.

This exemption may also be applicable to some PA projects. In one recent disaster, an applicant submitted a confidentiality agreement to FEMA.¹³⁹ While FEMA could not sign any agreement pertaining to confidentiality, FEMA did agree to mark the documents as "Confidential" so that the

¹³⁵ 26 U.S.C. § 6103(a).

¹³⁶ 5 U.S.C. § 552(b)(4); *See also* DOJ FOIA Guide, *Exemption 4*.

¹³⁷ *See* DOJ FOIA Guide, *Exemption 4*.

¹³⁸ Executive Order 12600, Pre-disclosure notification procedures for confidential commercial information, 52 F.R. 23781 (1987).

¹³⁹ Disaster Declaration DR-4020-NY, Hurricane Irene (2011).

applicant would have the opportunity to provide input should the documents be subject to a FOIA request. FEMA also agreed to retain only the documents that were absolutely necessary for our records.

5. Exemption 5: Inter-Agency and Intra-Agency Documents That Would be privileged in Civil Litigation¹⁴⁰

There are two components to this exemption. First, the documents must be either inter-agency or intra-agency.¹⁴¹ Secondly, the documents would normally be protected from disclosure in civil litigation, including pre-decisional documents and documents subject to civil discovery privileges.¹⁴²

Exemption 5 incorporates civil discovery rules (such as the Federal Rules of Civil Procedure)¹⁴³ and encompasses both statutory privileges and privileges commonly recognized by case law. The three most asserted privileges under Exemption 5 are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

With regard to protecting documents that are pre-decisional and part of the deliberative process, the purpose of Exemption 5 is to enhance the quality of agency decision-making by encouraging full and frank discussions of policy proposals and to “prevent injury to the quality of

¹⁴⁰ 5 U.S.C. § 552(b)(5); see DOJ FOIA Guide, *Exemption 5*.

¹⁴¹ *Dep’t of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1 (2001). For a detailed discussion of the inter-agency or intra-agency requirement, see DOJ FOIA Guide, *Exemption 5*.

¹⁴² *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987); *Zander v. DOJ*, 885 F. Supp. 2d 1, 15 (D.D.C. 2012) (holding that attorney-client privilege should be given “same meaning” in “both the discovery and FOIA contexts” to ensure that “FOIA may not be used as a supplement to civil discovery – as it could be if the attorney-client privilege were less protective under FOIA”); *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 281 (S.D.N.Y. 2009) (recognizing incorporation of various civil discovery privileges).

¹⁴³ <http://www.law.cornell.edu/rules/frcp>.

agency decisions.”¹⁴⁴ The exemption protects documents that are both pre-decisional and deliberative.¹⁴⁵ Even if a document is pre-decisional, some courts have upheld a distinction between materials reflecting policy-making process and purely factual, investigative matters. Factual information is, therefore, released.

Federal agencies generally apply this exemption to pre-decisional internal agency memoranda; records that are part of the deliberative process prior to a decision; and records that would be covered by attorney-client privilege or considered attorney work product. Examples include memos reflecting the FEMA disaster declaration process, the agency’s recommendations to the President, and discussions between FEMA officials about a state declaration request.

A record may not be withheld (in whole or in part) simply because it is a draft or is pre-decisional. Additional inquiry must be made as to whether there would be any harm resulting from the release of that record.

The other two commonly asserted privileges are the attorney work-product privilege and the attorney-client privilege. The purpose of exempting documents subject to the attorney-client privilege is to encourage frank discussions between government attorneys and their agencies. The attorney work-product privilege protects information

¹⁴⁴ See *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984); See also *Burka v. HHS*, 87 F.3d 508, 516 (D.C. Cir. 1996) (noting that FOIA “incorporates . . . generally recognized civil discovery protections”); *Martin*, 819 F.2d at 1185; See also *Badhwar v. U.S. Dep’t of the Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987) (“Exemption 5 requires the application of existing rules regarding discovery.”). Unlike in the civil discovery context, where a party may show relevance or need to overcome a privilege, the standard in the FOIA context “is whether the documents would ‘routinely be disclosed’ in civil litigation.” See DOJ FOIA Guide, *Exemption 5* at p. 2.

¹⁴⁵ *Trentadue v. Integrity Comm.*, 501 F. 3d 1215, 1226 (10th Cir. 2007); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The deliberative process privilege is meant “(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action.” DOJ FOIA Guide, *Exemption 5* at p. 13.

prepared, written, or communicated by an attorney in anticipation of litigation.¹⁴⁶

The protection extends but is not limited to such things as records for trial preparation, trial strategy, legal interpretations, witness interview notes, and mental impressions and opinions of the attorney.¹⁴⁷ For example, Exemption 5 may be invoked to withhold a memorandum written by OCC providing a legal opinion on the merits of a plaintiff's lawsuit, or of a threatened lawsuit.

Unlike the attorney work-product privilege, the attorney-client privilege is not limited to instances where litigation is anticipated.¹⁴⁸ The attorney-client privilege protects confidential communications between attorneys and their clients relating to matters where the client is seeking legal advice.¹⁴⁹ For example, Exemption 5 may be invoked to withhold from release an email chain between a program office and OCC when the program office is asking the attorney a legal question and/or the attorney is providing the legal opinion.

Exemption 5 also may “incorporate virtually all civil discovery privileges.”¹⁵⁰ Examples of civil discovery privileges include, but are not limited to, spousal testimonial privilege, settlement negotiation privilege, and ombudsman privilege.¹⁵¹ It should also be determined what harm there would be in release of that information.

In June 2016, Congress passed the FOIA Improvement Act of 2016,¹⁵² which specifically limits the FOIA exemption for privileged agency communications withheld by agencies under deliberative process privilege, to allow the disclosure of agency records created 25 years or more before the date of a FOIA request. However, this sunset provision does not apply to privileged communications withheld under other

¹⁴⁶ DOJ FOIA Guide, *Exemption 5* at p. 44.

¹⁴⁷ DOJ FOIA Guide, *Exemption 5* at p. 56.

¹⁴⁸ *Id.* at fn. 198.

¹⁴⁹ DOJ FOIA Guide, *Exemption 5* at p. 56.

¹⁵⁰ DOJ FOIA Guide, *Exemption 5* at p. 60.

¹⁵¹ *Id.* at p. 61 and fn 272.

¹⁵² S. 337 (June 13, 2016).

grounds covered by Exemption 5, such as the attorney-client or attorney work product privileges.¹⁵³

6. Exemption 6: Personal Information Contained in “Personnel and Medical Files and Similar Files”¹⁵⁴

This exemption protects the privacy interests of individuals by allowing an agency to withhold personal data kept in government files—specifically, personal information contained in “personnel and medical files and similar files.”¹⁵⁵ While the purpose of the FOIA is to illustrate the functioning of the federal government, courts will not require disclosure of PII without balancing the public’s right to know against the privacy interest of the individual. An example of where FOIA Exemption 6 would be invoked would be homeowners’ PII contained in FEMA’s HMGP applications or NFIP applications. This information includes names and addresses of the homeowners.

a. Case Example

In *News-Press v. Dep’t of Homeland Sec.* (News-Press),¹⁵⁶ the Court of Appeals for the 11th Circuit addressed the tension inherent in the competing interests protected by the Privacy Act¹⁵⁷ (the right to privacy) and FOIA (the public’s right to information).¹⁵⁸ Two Florida news organizations (News-Press and Sun Sentinel) sought the release of names and addresses of FEMA IHP recipients, and the addresses of properties that were the subject of NFIP claims following the unprecedented 2004 hurricane season when four hurricanes hit the State of Florida in six weeks. As a result of these storms, FEMA disbursed a total of \$1.2 billion in individual assistance to more than 600,000 state residents and paid out

¹⁵³ <https://www.congress.gov/bill/114th-congress/senate-bill/337>.

¹⁵⁴ 5 U.S.C. § 552(b)(6), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹⁵⁵ *Id.*

¹⁵⁶ *News-Press v. Dep’t of Homeland Sec.* (News-Press) 489 F.3d 1173 (11th Cir. 2007).

¹⁵⁷ 5 U.S.C. § 552(a)

¹⁵⁸ 5 U.S.C. § 552(b)(6), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

claims to tens of thousands of individuals whose structures were insured under the NFIP.

The media began to raise questions concerning fraud, waste, and abuse in FEMA's IHP payments in Miami-Dade County following Hurricane Frances. In January 2005, both the DHS Office of Inspector General (OIG) and the U.S. Senate Committee on Homeland Security and Government Affairs announced investigations into FEMA's disaster response in Florida. In March 2005, the U.S. Attorney in Miami announced indictments of 14 individuals on charges of fraudulent claims for disaster relief. Both the OIG audit and the Senate Committee reports found serious shortcomings at various stages of the disaster relief efforts.¹⁵⁹

Against this backdrop, several Florida newspapers submitted requests under FOIA for comprehensive information on recipients of IHP disaster assistance and on payments made under the NFIP for all four 2004 hurricanes. One newspaper requested the IHP information for an additional 27 disasters dating back some 10 years.

FEMA provided voluminous data in response to the FOIA requests but redacted individual names and addresses on the grounds that the Privacy Act and Exemption 6 of FOIA prevented the release of the names and addresses.¹⁶⁰ Two news organizations sued FEMA in separate courts in different parts of the state seeking disclosure of the names and addresses. The two lower courts came to opposite conclusions in the two lawsuits.

Because of inconsistent decisions in the lower courts, the losing party in each case appealed the decision. The Court of Appeals for the 11th Circuit resolved the conflict by ruling that the strong public interest in knowing

¹⁵⁹ See Department of Homeland Security, Office of Inspector General, Audit of FEMA's Individuals and Households Program in Miami-Dade County, Florida, for Hurricane Frances, OIG-05-20 (May 2005); Press Release, Senate Committee on Homeland Security and Governmental Affairs, Senators Collins & Lieberman Release Findings & Recommendations to Improve Safeguards in FEMA's Disaster Relief Program (2005); the Committee Report for Senate hearing 109-161 is available at <https://www.gpo.gov/fdsys/browse/committeecong.action?collection=CHRG&committee=homeland&chamber=senate&congressplus=109&ycord=0>.

¹⁶⁰ Exemption 6 exempts "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

whether there was widespread waste, fraud, and abuse of taxpayer money in disaster assistance programs following the Florida hurricanes went to the core purpose of FOIA and required the release of IHP and NFIP recipients' addresses only. But the court ruled that release of the recipient names would constitute an unwarranted invasion of privacy so FEMA did not have to release the names. FEMA considers this decision limited to the unique facts of this particular case, where there were clear indicia of fraud.¹⁶¹

In 2013, FEMA's withholding of NFIP applicant PII was upheld in *Ehlmann v. U.S. Dep't of Homeland Sec.*¹⁶² The court granted summary judgment in FEMA's favor, holding that FEMA properly withheld PII for NFIP policyholders when responding to a FOIA request by plaintiff Steve Ehlmann, County Executive for St. Charles County, Missouri.

Plaintiff sought information concerning severe repetitive-loss properties or structures in St. Charles County. FEMA provided two spreadsheets containing the information requested but redacted the names of the property owners, insureds and claimants, certain address information, and other property identification information pursuant to FOIA Exemption 6.

The *Ehlmann* court agreed with FEMA's application of FOIA Exemption 6, holding that "[t]he owners' names and addresses of NIFP [sic] insured structures fall within the protected privacy interest of Exemption 6."¹⁶³ The *Ehlmann* court rejected plaintiff's reliance on *News-Press*, and his argument that NFIP policyholders' PII should be released.¹⁶⁴ The court held, agreeing with FEMA, that "[t]he facts of this case are more analogous to the facts in [the] Tenth Circuit's *Forest Guardians* case than they are to the Eleventh Circuit's *News-Press* case."¹⁶⁵

¹⁶¹ *News-Press v. U.S. Dept. of Homeland Security*, 489 F.3d 1173 (11th Cir. 2007).

¹⁶² *Ehlmann v. U.S. Dep't of Homeland Sec.*, 2013 U.S. Dist. LEXIS 98203 (E.D. Mo. July 15, 2013).

¹⁶³ *Id.* at *9 (citing *Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1218 (10th Cir. 2005) (holding that names and addresses of NFIP policyholders are exempt from disclosure pursuant to FOIA Exemption 6)).

¹⁶⁴ *Id.* at *12-13.

¹⁶⁵ *Id.* at *12-13.

The court also agreed with FEMA that the information provided to plaintiff was enough to enable him “to discuss publically the actual payments made under the NFIP and the property values of NFIP insured properties in St. Charles County” and that “disclosure of the names and addresses would be an unwarranted invasion of the insureds’ privacy.”¹⁶⁶

FEMA releases all work information (e.g., name, title, office and work mobile phone numbers, work email addresses, etc.) on its employees (except for law enforcement personnel).¹⁶⁷ Otherwise, names of high-level¹⁶⁸ individuals in the public and private sector are released, but individual contact information is redacted. Low-level non-FEMA individuals’ names and information are protected. FEMA also releases the main phone and fax numbers and websites of non-FEMA government employees and contractors (to include state employees).

For congressional and elected officials and their staff members (to include state officials), FEMA releases the name and work information (not private or personal contact information) of those individuals. FEMA protects the name and contact information of private individuals acting in a personal capacity but does release the names of FOIA requesters (but not requesters under the Privacy Act). For businesses acting in a business capacity, FEMA releases the company name, names of principals (President, Vice President, etc.), employee titles, main phone and fax numbers, websites, office addresses, and reporters and names of their organizations.

Other commonly redacted information under Exemption 6 includes marital status, legitimacy of children, welfare payments, family fights and reputation, medical conditions, date of birth, religious affiliation, citizenship, social security numbers, criminal history records, and financial status.

¹⁶⁶ *Id.* at * 12-13.

¹⁶⁷ 5 C.F.R. § 293.311.

¹⁶⁸ High-level non-FEMA government employees and contractors would be at the Director level or higher. This would apply to DHS employees, employees of other federal agencies, state and/or local government employees, and other government contractors.

7. Exemption 7: Documents Compiled for Law Enforcement Purposes¹⁶⁹

The purpose of this exemption is to allow agencies to withhold law enforcement records in order to protect the law enforcement process from undue interference. However, not all documents compiled by law enforcement are automatically exempt.¹⁷⁰

“Law enforcement purposes” is not limited to criminal investigations or prosecutions but includes civil and administrative proceedings, provided those proceedings meet the requirements of the exemption. Without this exemption, the subject of an investigation could impede or obstruct the inquiry. FEMA’s Office of the Chief Security Officer is considered law enforcement for purposes of exerting this exemption. This exception may also apply to background investigation releases. FEMA also withholds certain information found in Homeland Security grant applications, such as proposed locations of security measures or discussions of security weaknesses.

8. Exemption 8: Information Related to Financial Institutions¹⁷¹

This exemption protects information related to the examination or condition prepared by or for a banking regulatory agency. The purpose is to prevent a run on a bank.

9. Exemption 9: Documents Which Would Reveal Oil Well Data¹⁷²

This exemption has rarely been invoked or interpreted.¹⁷³

¹⁶⁹ 5 U.S.C. § 552(b)(7); *See also* DOJ FOIA Guide, *Exemption 7*.

¹⁷⁰ *Phillips v. I.C.E.*, 385 F. Supp. 2d 296 (S.D.N.Y. 2005).

¹⁷¹ 5 U.S.C. § 552(b)(8); *See also* DOJ FOIA Guide, *Exemption 8*.

¹⁷² 5 U.S.C. § 552(b)(9).

¹⁷³ *See*, DOJ FOIA Guide, *Exemption 9* at p. 1

VI. Requests for Records in Litigation

This section provides guidance where a FEMA employee is served with a subpoena or other request for information or a summons and complaint, but it first addresses what an employee should do if he or she receives a subpoena. Next, this section gives a brief description of *Touhy* regulations, which cover release of information to a third party by an employee. This section finishes by offering guidance on what to do when served with process.

A. Subpoenas

Occasionally, attorneys deployed to a JFO will receive notification from security that the JFO has received a subpoena. Regardless of where the subpoena originates,¹⁷⁴ the attorney should immediately notify the Federal Coordinating Officer. It may be appropriate for the attorney to recommend that all solicited hard copy and media records be segregated.

The attorney may also want to advise named parties to seek private counsel, especially if they are coming to the attorney seeking advice and guidance. Last, the attorney should apprise HQ OCC, Field Counsel, and/or Regional Counsel.

Receiving a subpoena may cause concern regarding the procedures for complying on the part of JFO staff, the department from which the information is being requested, or the individual being called upon to testify. The JFO attorney will serve as the on-scene legal expert and reach back to Regional Counsel or to HQ OCC. These lines of communication are essential. Responding to a subpoena may require a

¹⁷⁴ The subpoena may originate from Congress, the United States Attorney, a private party, as a *Touhy* request, or from another agency. In matters involving congressional subpoenas, protocol is to accept service and notify OCC immediately. See 44 C.F.R. § 5.83. If it comes from another agency, it is an administrative subpoena; most federal agencies have authority to issue these. Although agencies cannot enforce compliance directly, they can request the Attorney General's assistance or simply seek enforcement in the judiciary. For more information on administrative subpoenas, see the Department of Justice's "Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities," available at https://www.justice.gov/archive/olp/rpt_to_congress.htm.

significant amount of resources, depending on what information the subpoena solicits.

Subpoenas typically come in two forms, depending on what information it solicits. A subpoena *duces tecum* solicits the production of documents, while a subpoena *testificandum* requires witness testimony. The form will also determine the nature of the response. All responses must be timely, even if the response is merely to inform the moving party of the need for more time to respond.

B. Touhy Requests

One particular type of subpoena FEMA may encounter is a “*Touhy* (TOO-ee) request.” This is a request made to the agency for documents or testimony from a third party whose request is not part of a lawsuit in which FEMA, DHS, or the United States is a party. This is a relatively non-adversarial request made to an agency. This type of request is reviewed by the OCC. Broadly speaking, the Chief Counsel may provide the documents and/or testimony sought, provide a portion of the requested material, or provide none of the requested material.

FEMA and DHS *Touhy* regulations guide the Chief Counsel in deciding what to release.¹⁷⁵ However, if the request is for PII, additional steps may be needed prior to release of the information, such as an applicant’s consent for the information or for a court order balancing the privacy interest with the need for the public to know the requested information.¹⁷⁶

By statute, “the head of an Executive department ... may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers and property.”¹⁷⁷ Such regulations are valid and have the force of federal law.¹⁷⁸

¹⁷⁵ 44 C.F.R. §§ 5.80-89; 6 C.F.R. §§ 5.41-49.

¹⁷⁶ See 44 C.F.R. §§ 6.20-21.

¹⁷⁷ 5 U.S.C. § 301.

¹⁷⁸ *Touhy v. Ragen*, 340 U.S. 462 (1951); *Boske v. Comingore*, 177 U.S. 459. (1900).

Pursuant to the foregoing authorities, both DHS and FEMA have promulgated regulations (*Touhy* regulations) addressing matters such as employees providing testimony in litigation, their responding to subpoenas *duces tecum*, and other legal demands of agency employees.¹⁷⁹ DHS regulations control where FEMA regulations are silent.¹⁸⁰

FEMA's *Touhy* regulations require it to remain neutral in private litigation. Indeed, “[i]t is FEMA's policy and responsibility to preserve its human resources for performance of the official functions of the Agency and to maintain strict impartiality with respect to private litigants. Participation by FEMA employees in private litigation in their official capacities is generally contrary to this policy.”¹⁸¹

FEMA has promulgated regulations addressing subpoenas for testimony in private litigation. These regulations state the following:

No FEMA employee shall testify in response to a subpoena or other demand in private litigation as to any information relating to material contained in the files of the agency, or any information acquired as part of the performance of that person's official duties or because of that person's official status, including the meaning of agency documents.¹⁸²

The prohibitions may, however, be waived where “necessary to promote a significant interest of the Agency or for other good cause.”¹⁸³

For complete instructions on handling subpoenas, please view the SOP for Handling *Touhy* Requests & Subpoenas, located [here](#).

¹⁷⁹ See 6 C.F.R. § 5.41, *et seq.* and 44 C.F.R. § 5.80, *et seq.*, respectively; see, specifically, 6 C.F.R. § 5.41(b) and 44 C.F.R. § 5.80(d).

¹⁸⁰ *Id.*

¹⁸¹ See 44 C.F.R. § 5.81(b).

¹⁸² See 44 C.F.R. § 5.87(a).

¹⁸³ See 44 C.F.R. § 5.89.

C. Service of Process

Service of process is a procedure to provide legal notice to a person of a court or administrative body's jurisdiction over that person and to provide the person an opportunity to respond to a proceeding before that court or administrative body. Like subpoenas, service of process is encountered frequently at the JFO, Regional Office, and HQ levels.

When the attorney is alerted that a process server has arrived, he or she should consider: What type of action is it? Does it involve the agency or an individual FEMA employee? If it involves an employee, does the action relate to that employee's personal capacity or representative capacity?

When served with process, a person will receive two documents—a summons and a complaint. When FEMA is the intended party, the recipient should refuse service and instead refer these to OCC at FEMA HQ.¹⁸⁴

FEMA cannot accept service of process for an individual employee acting in his or her personal capacity. When employees are served at work by an official process server (i.e., a sheriff or U. S. Marshall), OCC will notify the employee, who can elect to accept or decline service at work.¹⁸⁵

Where the server is a private individual, he or she is subject to the provisions regarding access to federal facilities and typically will be denied entrance.¹⁸⁶

Where a process server arrives at a field operation, FEMA will direct him or her to serve the applicable Regional Administrator's office or HQ.¹⁸⁷ Whether HQ or the Regional Administrator is appropriate depends upon whether the subpoena seeks documents or testimony of

¹⁸⁴ 44 C.F.R. § 5.83. If the documents or the employee from whom testimony is sought is located at the Regional Office, the Regional Administrator is to be served. *Id.*

¹⁸⁵ 44 C.F.R. § 5.80(c).

¹⁸⁶ 41 C.F.R. § 102-74.375.

¹⁸⁷ 44 C.F.R. § 5.51, 5.83

employees located at HQ or documents or employee testimony from regional offices or JFOs.

Regardless of whether the individual or records are at a field office, the process server is limited to serving only the Regional Office or HQ. It is incumbent on FEMA personnel to notify Field Counsel, Regional Counsel, or OCC in HQ of the likelihood of being served and the name(s) of the parties. The attorney may notify the process server that the agency has not yet been adequately served, and any notes the attorney or other staff take down are strictly for informational purposes.

D. Requests for FEMA Employee Personnel Information

Sometimes, FEMA will receive requests to disclose employee personnel information in connection with private litigation matters, such as employment litigation or child support enforcement actions. Although many details of an employee's personnel information will be protected from disclosure by the Privacy Act, 5 U.S.C. 552 § 552a, federal regulations allow FEMA to disclose certain information to the public in response to FOIA, inquiries from Congress, inquiries from state and federal agencies and law enforcement authorities, and through subpoenas in litigation matters.

Under 5 C.F.R. § 293. 311, FEMA may disclose the following personnel information about most current and former federal employees to the public:

- Name;
- Present and past position titles and occupational series;
- Present and past grades;
- Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials); and

- Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places of employment).

Subpoenas and FOIA requests are not required to obtain the public personnel information listed. Typically, the FEMA Office of Chief Human Capital Officer handles such requests.

VII. Litigation Holds: Preservation of Agency Records

In matters where litigation becomes reasonably likely, FEMA personnel may have a duty to preserve and produce potentially relevant information. This duty has become increasingly important as electronically stored information (ESI) has become prevalent in virtually all organizations, including FEMA. Changes in the Federal Rules of Civil Procedure and recent court decisions¹⁸⁸ have re-emphasized attorneys' roles in meeting discovery obligations and complying with preservation orders.

This is a broad overview of the requirements for information¹⁸⁹ preservation in litigation and how these issues may impact field operations within FEMA. It is not intended to be, and should not be interpreted as, an independent source of rights of, or obligations to, parties in litigation with FEMA or any other individuals or entities. The specific guidelines for document preservation in individual cases will vary and will be generally outlined by OCC.

¹⁸⁸ To understand the attorneys' role in meeting discovery obligations and complying with preservation orders, *See* Fed. R. Civ. Pro. 26. *See generally Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

¹⁸⁹ The term "information" refers to traditional "hard copy" paper information and ESI that pertain to a matter under litigation or for which litigation is reasonably likely to ensue.

A. General Duties and Obligations

FEMA has a duty to preserve and produce information relevant to any litigation to which it is a party.¹⁹⁰ It also has a duty to preserve potentially relevant information “[o]nce a party reasonably anticipates litigation.”¹⁹¹ The mere fact that litigation is a general possibility is ordinarily not enough to trigger preservation obligations. There must be some specific set of facts and circumstances that would lead to a conclusion that litigation is probable or should otherwise be expected.

When FEMA has a duty to preserve information because of pending or reasonably anticipated litigation, an attorney for the OCC will issue a FEMA OCC Litigation Hold Notice, which will direct potential witnesses, record/data custodians, and other key individuals to preserve any information relevant to the matter.

B. Type of Information

The Litigation Hold Notice should define the scope of the information relevant to the litigation; it may include “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which information can be obtained.”¹⁹² It may also include all relevant electronic documents and data. This may include but is not limited to:

- Electronic correspondence (e.g., email messages, voicemail messages, and instant messaging dialogs);

¹⁹⁰ The duty to produce is necessarily derivative of FEMA’s responsibilities to produce information pursuant to discovery requirements. *See* Fed. R. Civ. Pro. 26. *See also* ABA Civil Discovery Standards, as amended through August 2004. Similar duties arise when FEMA receives or otherwise becomes aware of a subpoena *duces tecum* in a proceeding in which it is not a party.

¹⁹¹ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); *Silverstri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (stating that “[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”).

¹⁹² Federal Rule of Civil Procedure, Rule 34(a), Fed. R. Civ. P. 34(a).

- Electronic business documents (e.g., word processing documents, spreadsheets, personal and shared calendars, and FEMA policies and procedures);
- Computer databases information (e.g., financial and human resources databases); and
- System information (i.e., detailed logs automatically created by a computer detailing who is doing what and when on the computer, commonly referred to as metadata).

C. Impact of Litigation Holds

Litigation holds will vary, depending on the nature and/or scope of the litigation and the location, nature, and quantity of potentially relevant information. FEMA has a duty to preserve all information that may be potentially relevant to the litigation, which means that routine record/information destruction schedules are suspended.

Procedures must be developed to ensure that routine destruction processes do not delete or destroy relevant information before it is captured and preserved for litigation. This duty to preserve does not supersede or replace other pre-existing obligations to maintain or preserve documents, and it does not authorize the destruction of documents when any other law, regulation, or procedure requires their preservation.¹⁹³

The attorneys within the OCC have a professional responsibility to work with their clients, potential witnesses, record/data custodians, and other key individuals to take the necessary steps to identify, preserve, and produce relevant information, and to make it available in a proper format.¹⁹⁴ ESI, for example, should be preserved in its

¹⁹³ General record keeping requirements are set forth in FEMA Manual 141-1-1b, Records Management, File Maintenance and Records Disposition, and FEMA Directive 181-1, FEMA Records Management Program. DHS has also issued a Records Management Directive and a Records Management Handbook, both of which are applicable to FEMA employees.

¹⁹⁴ See ABA Model Rules of Professional Conduct (Model Rules) Rule 3.4 (2002).

originally created or “native” format and should include any related metadata to ensure the integrity of the information.

OCC attorneys assigned to locations where relevant evidence exists (i.e., Deployable Field Counsel, Regional Counsel, and Reservists from the Field Attorney Cadre) may identify a need to preserve evidence, or may be asked to assist with the preservation effort. The assigned attorney will arrange for the capture and preservation of relevant information and work with the record custodians and managers in the affected divisions to ensure that routine destruction procedures (including the routine deletion of electronic information) do not lead to the inadvertent loss of such information.

If an employee will remain in possession of the information, counsel will work to develop steps to ensure the preservation of data. Such an employee may be required to contact counsel if he or she transfers positions, is released from a deployment, or leaves FEMA, to ensure that relevant documents and ESI are preserved.

Counsel may wish to utilize the template *Notice to Preserve Documents and Electronically Saved Information*¹⁹⁵ and *Litigation Hold Compliance Checklist*¹⁹⁶ and should refer to the FEMA OCC E-Discovery Protocol.¹⁹⁷ In addition, counsel should coordinate with the Office of the Chief Information Officer, who will be able to assist in identifying, gathering, and storing ESI.

When the need for a litigation hold no longer exists, the assigned litigation attorney should consult with managers of the affected

¹⁹⁵ <https://esw.fema.net/esw/OCC/RRLD/Shared%20Documents/Litigation%20Hold%20Letter%20Final%206-16-12.pdf>.

¹⁹⁶ <https://esw.fema.net/esw/OCC/RRLD/Shared%20Documents/Draft%20Litigation%20Hold%20Checklist%2006-17-12.pdf>.

¹⁹⁷ FEMA OCC E-Discovery Protocol, [https://intranet.fema.net/org/occ/collab/_layouts/WordViewer.aspx?id=/org/occ/collab/Lists/MSLD%20Tasker/Attachments/161/FEMA%20E-discovery%20protocol%20\(8%20Dec%202011%20final\).docx&Source=https%3A%2F%2Fintranet%2Efema%2Enet%2Forg%2Focc%2Fcollab%2FLists%2FMSLD%2520Tasker%2FDispForm%2Easpx%3FID%3D161&DefaultItemOpen=1](https://intranet.fema.net/org/occ/collab/_layouts/WordViewer.aspx?id=/org/occ/collab/Lists/MSLD%20Tasker/Attachments/161/FEMA%20E-discovery%20protocol%20(8%20Dec%202011%20final).docx&Source=https%3A%2F%2Fintranet%2Efema%2Enet%2Forg%2Focc%2Fcollab%2FLists%2FMSLD%2520Tasker%2FDispForm%2Easpx%3FID%3D161&DefaultItemOpen=1).

organizations on the necessary procedures to remove the litigation hold

Questions or comments about this protocol may be directed to Mr. Joshua Stanton, Associate Chief Counsel for Mission Support, OCC, at (202) 646-3961.

CHAPTER 10
Human Capital
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Human Capital

I. Introduction

One of FEMA's greatest resources and strength is its employees. FEMA employees are dedicated to the mission and are called upon to work after hours, on weekends, and on holidays on disaster operations. They may be deployed with little notice for extended periods of time to disaster sites both within the continental United States (CONUS) and outside the continental United States (OCONUS) in sometimes austere circumstances.

FEMA's hiring authorities allow it to surge its workforce for disaster related purposes dramatically with Cadre of On-Call Response/Recovery Employees (COREs), Reservists, and Local Hire employees,¹ in addition to its limited term and permanent full-time (PFT) staff, who are hired under the authority of Title 5, United States Code (U.S.C.). FEMA may also call upon volunteers across the executive branch to assist as part of a surge capacity force.² This allows FEMA to scale its workforce as necessary and allows it to staff multiple operations with minimal notice.

During the pre-event phase, FEMA may primarily depend on its Headquarters' and Regional PFTs and COREs. FEMA may also deploy its nationally based Incident Management COREs (IM COREs) and Reservist Cadres as it readies for and begins to engage in the response phase and may deploy personnel who work for FEMA pursuant to an interagency agreement between FEMA and Corporation for National and Community Service (CNCS). These personnel are known as "FEMA Corps" personnel. They are not federal employees. As it sets up its disaster operations, such as its Initial Staging Bases, Joint Field

¹ Stafford Act § 306(b)(1), 42 U.S.C. 5149(b)(1) provides FEMA with the authority to appoint temporary personnel to perform Stafford Act services.

² Post Katrina Emergency Reform Act (PKEMRA) §624, 6 U.S.C. §711.

Offices (JFOs), and Disaster Recovery Centers, FEMA will also seek to hire locally in the affected communities.

As the recovery phase ramps up, the PFTs and many COREs return to their headquarters and regional offices while a dedicated staff of Reservists and Local Hires focus on the disaster specific operations with regional support. Long-term recovery operations may result in hiring field office COREs to replace Reservists and Local Hires. Closeout operations then fold back to the regions and regional PFTs and COREs.

This chapter will address the various matters that may arise in the JFO workplace that impact employees. The issues addressed range from basic employment matters to more complex employee rights issues.

II. Terms of Employment, General

A. Employee Classifications and Job Categories

1. Employee Classifications

Federal Emergency Management Agency (FEMA) employees are divided into two basic categories: Title 5 Employees and Stafford Act Employees (SAEs). SAEs are further subdivided into 3 groups: COREs, Reservists and Local Hires.³

- a. Title 5 Employees: Permanent Full-Time Employees (PFTs) and Temporary Full-Time Employees (TFTs)

Title 5 employees are appointed to positions in the “competitive service” or “excepted service” under the statutes and implementing Office of Personnel Management (OPM) regulations covering federal agencies and employees.⁴ Appointees perform a variety of disaster and non-disaster-related functions consistent with the all-hazards mission of the agency.

³ See, *supra*, fn. 1.

⁴ Title 5 of the United States Code (U.S.C.) and the Code of Federal Regulations (C.F.R.) are the main statutes and regulations that address the personnel life cycle of employees hired under its authority.

Title 5 employees are entitled to the full range of benefits, including health and life insurance, retirement, Thrift Savings Plan, the Federal Long-Term Care Insurance Program, and the Flexible Spending Account. Title 5 employees are also entitled to accrue and use annual and sick leave. Different hiring procedures apply, depending on whether the employee is appointed to a competitive service or an excepted service position.

b. Stafford Act Employees – SAEs

i) COREs – Cadre of On-Call Response/Recovery Employees

COREs are hired to directly support the response and recovery operations related to disasters as well as perform some disaster readiness activities.⁵ CORE appointments are generally for two-year terms. Work schedules are typically full time. CORE appointments may be terminated at any time it is determined that the program or the work to be performed is eliminated. COREs receive the full range of benefits allowed for Title 5 employees. Employees assigned to a regular work schedule earn annual and sick leave.

ii) Reservists

Reservists are the next generation of FEMA’s intermittent employee workforce, formerly known as Disaster Assistance Employees (DAE). The DAE program was reconstituted as the Reservist Program in June 2012, and the DAE program formally ended on December 31, 2012. Guidance for the Reservist Program can be found in FEMA Directive 010-6, FEMA Reservist Program, which, as of the date of this publication, is under revision. FEMA provides Reservists with time-limited intermittent appointments in the excepted service.

Like other SAEs, the appointment does not confer federal competitive status on the appointee. Reservists’ appointments do not exceed 24 months and expire biennially on the last day of the sixth pay period of each even-numbered year (the “NTE date”).⁶

⁵ See FEMA Manual 252-11-1, (2017); *Cadre of On-Call Response/Recovery Employees (CORE) Program*.

⁶ FEMA Directive 010-6, (2017) at Chapter IX.B.1.

FEMA pays Reservists only for those periods when they are activated by the Workforce Management Division and work or are in a travel or training status. At all other times, Reservists remain FEMA employees in a non-pay status during the period of their appointment. Reservists are paid only for those hours that they work unless authorized by applicable agency directives. Reservists are not entitled to night shift differential payment and do not receive severance pay.⁷

Reservists are not entitled to civil service retirement by virtue of their employment as Reservists.⁸ Of the enumerated benefits listed for PFTs and COREs, by FEMA policy, Reservists only earn sick leave⁹ and are entitled to holiday pay and administrative leave.¹⁰ Further, as of December 2012, Reservists are eligible to receive health benefits (*see* subsequent discussion). Reservists are protected by federal antidiscrimination laws mentioned in the Stafford Act Employees section that follows, including entitlement to reasonable accommodations,¹¹ and Reservists who sustain injuries or illnesses while in the performance of duty may be eligible for benefits under the Federal Employees Compensation Act (FECA).¹²

In December 2012, the OPM approved FEMA's request to provide Federal Employees Health Benefits to its Reservists.¹³ Reservists become eligible to enroll in the Federal Employees Health Benefits Program (FEHBP) to obtain coverage for themselves and their eligible family members when they deploy to a disaster *and* FEMA has the expectation that they will work at least 130 hours in a calendar month. If they wish to enroll in FEHBP, they must do so within 60 days of entering pay status.

⁷ *Id.* at Chapter VIII.A.1.

⁸ *Id.* at Chapter VIII.B.1.

⁹ On July 31, 2009, FEMA Administrator Fugate issued an interim policy authorizing sick leave for actively deployed Disaster Reservists. *See* 2009 Disaster Reservist Sick Leave Pay Policy, <http://xa.yimg.com/kq/groups/16279885/607894126/name/Memo+-+Disaster+Reservist+Sick+Leave+Pay.pdf>.

¹⁰ FEMA Directive 253-4, April 7, 2010; FEMA Manual 253-4-1 (2010).

¹¹ Section 501 of the Rehabilitation Act of 1973 and in accordance with FEMA Manual 1430.1.

¹² FEMA Directive 010-6 Revision Number: 01 at Chapter VIII.B.2.

¹³ FEMA Deputy Administrator's Memorandum Regarding Federal Employees Health Benefits Program (FEHBP) dated December 17, 2012.

Each time a Reservist who has enrolled in FEHBP demobilizes and enters into non-pay status, he or she will be given an opportunity to continue his or her health benefits. These health benefits will terminate the last day of the pay period in which the Reservist reaches the 366th day of non-pay status, or when the Reservist separates from the agency.¹⁴

iii) Local Hires

Local hires are hired under the authority of Section 306 of the Stafford Act and provided 120-day renewable appointments.¹⁵ Local hires are not specifically addressed in the new FEMA Reservist Program Guidance, FEMA Directive 010-6. New guidance regarding Local Hires is under development. If you have specific questions regarding Local Hires, contact Headquarters (HQ) OCC.

B. Job Categories and Status

There are two categories of jobs in the federal government: 1) competitive service and 2) excepted service.¹

1. Competitive Service Jobs

Competitive service jobs fall under OPM's jurisdiction and are subject to the civil service laws passed by Congress to ensure that applicants and employees receive fair and equal treatment in the hiring process.¹⁶ Competitive service jobs are filled according to a merit system based on an application and interview process.¹⁷ The competitive service has to follow OPM hiring rules, pay scales, and so on. Veterans' preferences apply to competitive service hiring.¹⁸

¹⁴ Refer to FEMA's FEHBP Health Care guidance for additional information and updates at <https://www.fema.gov/reservist-program-frequently-asked-questions>

¹⁵ 42 U.S.C. § 5149(b)(1).

¹⁶ 5 U.S.C. § 2102; 5 C.F.R. Part 212.

¹⁷ Each agency is responsible for writing its own merit promotion plan in accordance with 5 C.F.R. Part 335. FEMA's merit promotion plan can be found on the agency's website within FEMA Manual 253-11-1.

¹⁸ See 5 C.F.R. Part 211 for veterans' preferences in federal hiring.

2. Excepted Service Jobs

Excepted service jobs consist of all positions in the executive branch specifically exempted from the competitive service or the senior executive service (SES). Excepted service is a special authority used by the federal government that allows agencies to use a streamlined hiring process rather than hiring through the traditional competitive process.¹⁹ This authority allows agencies to help meet an unusual or special hiring need.

3. Competitive Status

Competitive status is a person's basic eligibility for assignment (by transfer, promotion, reassignment, demotion, or reinstatement) to a position in the competitive service without having to compete with members of the general public in an open competitive examination.²⁰ When a vacancy indicates that status candidates are eligible to apply, preference eligibles, career employees, and career-conditional employees who have completed their probationary period may apply.²¹

Subject to limited exceptions, appointments in the excepted service do not enable the employee to earn competitive status.²² Stafford Act employees do not have competitive status (unless they qualify for it through some other exception, such as being a preference-eligible).

4. Career Conditional Status

A competitive service employee will obtain career tenure after three years of continuous creditable service. Prior to that, the employee is in a "career conditional" status, during which the employee can apply for federal jobs under merit promotion procedures.²³ A career conditional employee who leaves the federal government prior to attaining career tenure is eligible to

¹⁹ 5 U.S.C. § 2103.

²⁰ 5 U.S.C. § 3302; 5 C.F.R. § 1.3(c); 5 C.F.R. § 212.301.

²¹ For three years prior to gaining career tenure, a competitive service employee is considered a career conditional employee. 5 C.F.R. § 315.302.

²² 5 C.F.R. § 315.201; 5 C.F.R. § 315.301.

²³ 5 C.F.R. § 315.201(a).

apply for another federal position under merit promotion procedures for three years from the separation date.²⁴

As a general rule, after three years, the person is ineligible to apply under merit promotion procedures and must apply through delegated examining procedures open to all U.S. citizens, as if the person never worked for the federal government in a permanent full-time position.²⁵

C. Stafford Act Employees (SAEs)

Stafford Act Employees (SAEs) are appointed to federal employment under the authority of Section 306(b)(1) of the Stafford Act: “In performing any services under this act, any federal agency is authorized to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service.”²⁶

SAEs are considered to be “excepted service” employees. However, the personnel rules (for example, the hiring regulations) promulgated by OPM for Title 5 excepted service employees do not apply.²⁷ For example, veterans’ preference rules under the Veterans Employment Opportunities Act are not applicable to hiring of SAEs.²⁸ As noted previously, they do not, as SAEs, have competitive status when applying for Title 5 competitive service positions. Their pay and benefits are set by FEMA as a matter of policy, which the Federal Circuit upheld in *Thiess v. Witt*.²⁹

[T]he plain text of § 5149(b) (1) excludes the statutory obligations of title 5 for appointments in the competitive service. In implementation of the national purpose of

²⁴ 5 C.F.R. Part 315, subpart D; 5 C.F.R. § 315.401 (b).

²⁵ *Id.*

²⁶ 42 U.S.C. § 5121, *et seq.*

²⁷ *Id.*

²⁸ *See Broughton v. DHS*, 2005 MSPB LEXIS 3558 (2005).

²⁹ *Thiess v. Witt*, 100 F. 3d 915 (Fed. Cir. 1996) (holding that the Stafford Act gave FEMA the authority to set the compensation of SAEs and upholding FEMA’s decision to preclude DAEs from accruing annual leave, sick leave, and holiday pay).

facilitating the hiring of short-term, temporary personnel in emergency situations, **§ 5149(b)(1) authorizes the agency to appoint temporary personnel and fix their compensation, and specifically exempts the agency from the provisions of title 5 that apply to appointments in the competitive service.** These provisions include the general schedule pay terms, classification requirements, leave and holiday provisions, and other aspects of title 5, all directed to permanent appointments. An example of the legislative history confirms that the purpose was to authorize the agency to ‘temporarily employ additional personnel without regard to civil service laws’ Conf. Rep. No. 91-1752, 91st Cong., 2d Sess., reprinted in 1970 USCCAN 5498, 5500.³⁰

The Disaster Relief Act is specific to authorizing and facilitating governmental action in response to emergencies and disasters. Thus, the statutory provision authorizing the agency to fix compensation for temporary disaster relief employees would take precedence over the Leave Act,³¹ as the statute states.³² By policy, FEMA has applied many Title 5 regulations to SAEs.

FEMA’s SAE hirings are subject to federal laws prohibiting discrimination in hiring on the basis of a protected class, such as race, color, sex, disability, religion, national origin, and veteran status.³³ These include: the Uniformed Services Employment and Reemployment Rights Act of 1994 (prohibiting discrimination against

³⁰ *Id.*

³¹ Leave Act, 5 U.S.C. § 6301, *et seq.*

³² *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, (1932) (“Specific terms prevail over the general in the same or another statute which otherwise might be controlling.”); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). It is a standard rule of construction that “a specific statute controls over a general one ‘without regard to priority of enactment.’” *Bulova Watch Co. v. United States*, 365 U.S. 753, (1961) (*quoting Townsend v. Little*, 109 U.S. 504, 512, (1883)).”

³³ 42 U.S.C. § 2000ff, *et seq.* (prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, disability, or information); *See also* 29 C.F.R. § 1614.101.

veterans);³⁴ Title VII of the Civil Rights Act (Title VII);³⁵ the Age Discrimination in Employment Act;³⁶ the Equal Pay Act;³⁷ the Rehabilitation Act;³⁸ and the Genetic Information Nondiscrimination Act.³⁹ In addition, discrimination on the basis of sexual orientation is prohibited by executive order.⁴⁰

FEMA SAEs may also be eligible for unpaid leave under Title 1 of the Family and Medical Leave Act⁴¹ and pay protections provided under the Fair Labor Standards Act.⁴²

D. Re-employed Annuitants and Federal Annuitant Waivers⁴³

An “annuitant” is “a current or former civilian employee who is receiving, or meets the legal requirements and is applying or has announced intention to apply for, an annuity under subchapter III of chapter 83 or chapter 84 of Title 5, United States Code, based on his or her service.”⁴⁴

Annuitants under the Federal Employees’ Retirement System (FERS) and under the Civil Service Retirement System (CSRS) are generally subject to termination of their annuity or an annuity offset on re-employment into federal service if they serve in an appointive or elective position.⁴⁵ If the re-employed annuitant’s pay is reduced, it is

³⁴ See 38 U.S.C. § 4311.

³⁵ 42 U.S.C. § 2000e, *et seq.*

³⁶ 29 U.S.C. § 621, *et seq.*

³⁷ 29 U.S.C. § 206(d).

³⁸ 29 U.S.C. § 791, *et seq.*

³⁹ 42 U.S.C. § 2000ff, *et seq.* (prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information).

⁴⁰ Executive Order 11478 (1969), 3 C.F.R., 1966-1970 Comp., p. 803, 34 12985 (August 8, 1969), as amended by Exec. Order No. 13087, 3 C.F.R. § 1998 Comp., p. 191, Fed. Reg. 30097 (May 28, 1998).

⁴¹ See 29 U.S.C., Chapter 28 and 5 C.F.R. Part 825.

⁴² See 29 U.S.C., Chapter 29 and 5 C.F.R. Part 551.

⁴³ 5 U.S.C., Part 553.

⁴⁴ 5 C.F.R. § 553.102(b).

⁴⁵ See 5 U.S.C. § 8344 (for CSRS annuitants); 5 U.S.C. § 8468 (for FERS annuitants).

reduced in “an amount equal to the annuity allocable to the period of actual employment.”⁴⁶

FEMA and other agencies may, at that agency’s discretion, request OPM approval for an exception from the re-employed annuity provisions of 5 U.S.C. §§ 8344 and 8468, or request a delegation of authority from OPM to grant an exception.⁴⁷ Specifically, an agency head may:

- On a case-by-case basis, request OPM approval for an individual annuitant’s re-employment without reduction or termination of the individual’s annuity to meet temporary needs based on an emergency or other unusual circumstance or when the agency has encountered exceptional difficulty in recruiting or retaining a qualified candidate for a particular position;⁴⁸ or
- Request OPM to delegate to the agency the authority to approve individual exceptions on a case-by-case basis in situations resulting from emergencies posing immediate and direct threat to life or property or from other specific circumstances.⁴⁹

“In deciding whether to request an exception or grant an exception under delegated authority, each agency is expected to weigh fiscal responsibility and employee equity and should consider such factors as availability of funds” and other criteria set out in 5 C.F.R. Part 553.⁵⁰

On January 11, 1995, FEMA received a delegation from OPM to issue annuitant waivers, limited to the first 120 days of a presidentially declared disaster,⁵¹ requiring issuance on an individual, case-by-case

⁴⁶ *Id.*

⁴⁷ 5 U.S.C. §§ 8344(i) and 8468(f); 5 C.F.R. Part 553.

⁴⁸ 5 C.F.R. §§ 553.201(a), (c), (d), (e) and (f).

⁴⁹ 5 C.F.R. § 553.202(a).

⁵⁰ 5 C.F.R. § 553.103(a).

⁵¹ “Where an annuitant works under a single disaster for the 120-day period, the annuitant must complete a second waiver in order to work under a different disaster for another 120 days.

basis and requiring a statement from the individual indicating that he or she will not accept the job without the waiver.⁵²

Exceptions to the salary offset provisions authorized by OPM or by an agency by delegation under Part 553 apply only to the particular individual for whom it was authorized and only while that individual continues to serve in the same or a successor position.⁵³ The exception terminates upon the individual's assignment to a different position unless a new Part 553 exception is authorized.⁵⁴

Annuitants re-employed with full salary and annuity under an exception granted in accordance with 5 C.F.R. Part 553 are not considered employees for purposes of 5 U.S.C., chapter 83, subchapter III or 5 U.S.C., chapter 84 (Federal Employees' Retirement System); may not elect to have retirement contributions withheld from their pay; may not use any employment for which an exception is granted as a basis for a supplemental or recomputed annuity; and may not participate in the Thrift Savings Plan.⁵⁵

In addition to delegated authority described, the FEMA Administrator may issue waivers to annuitants appointed to temporary appointments of one year or less if the Administrator determines that the annuitant's employment is necessary to:

- Fulfill functions critical to the mission of the agency or any component of that agency;
- Assist in the implementation or oversight of the American Recovery and Reinvestment Act of 2009⁵⁶, or the Troubled Asset Relief Program under Title I of the Emergency Economic Stabilization Act of 2008⁵⁷;

⁵² OPM Delegation Letter, January 11, 1995; *See OCC Memoranda re Annuitant Waivers* at: OPM Delegation Letter, January 11, 1995.

⁵³ 5 C.F.R. § 553.103(b).

⁵⁴ *Id.*

⁵⁵ 5 C.F.R. § 553.203.

⁵⁶ American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. 111-5 (2009).

⁵⁷ Emergency Economic Stabilization Act of 2008, Pub. L. 110-343 (2008).

- Assist in the development, management, or oversight of agency procurement actions;
- Assist the Inspector General for that agency in the performance of the mission of that Inspector General;
- Promote appropriate training or mentoring programs of employees;
- Assist in the recruitment or retention of employees; or respond to an emergency involving a direct threat to life or property or other unusual circumstances.⁵⁸

This authority also has significant hour limitations. Waiver of the annuitant offset may not exceed 520 hours of service performed by that annuitant during the period ending six months following the individual's annuity commencement date; 1,040 hours of service performed by that annuitant during any 12-month period; or a total of 3,120 hours of service performed by that annuitant.⁵⁹

Finally, the total number of annuitants granted a waiver under this authority may not exceed 2.5% of the total number of full-time employees of that agency; if the total number of annuitants granted a waiver exceeds 1%, congressional reporting is required.⁶⁰

E. The FEMA Qualification System

The FEMA Qualification System (FQS)⁶¹ establishes the system for qualification and certification for the FEMA incident workforce through experience, training, and demonstrated performance, as required pursuant to the Homeland Security Act of 2002.⁶² FQS

⁵⁸ 5 U.S.C. § 8344(l)(2) and 8468(i)(2), as amended by the October 28, 2009, National Defense Authorizations Act. Subsections A, C, E, F, and G are most relevant to FEMA employees.

⁵⁹ 5 U.S.C. §§ 8344 (l)(3) and 8468(i)(3).

⁶⁰ 5 U.S.C. §§ 8344(l)(4) and 8468(i)(4)

⁶¹ <http://www.fema.gov/fema-qualification-system>; see FEMA Qualification System (FQS) Guide (2015), <http://www.fema.gov/media-library/assets/documents/112338>.

⁶² Homeland Security Act of 2002 § 510; Pub. L. 109-295, § 624 (2006), 6 U.S.C. §§ 320 and 711.

requires FEMA employees who work in incident management and support positions to be formally certified for these positions. Qualification and certification processes provide consistent standards for every field position at FEMA while also professionalizing the entire emergency management workforce.

By establishing qualification standards that are consistent across the agency, FQS helps ensure that FEMA employees have the knowledge, skills, and experience to perform in their incident management and incident support positions. FQS also helps employees by providing a pathway for career development and goal achievement.

FQS requirements apply to all FEMA employees who work on disasters and emergencies in incident management and incident support positions. These include COREs and Reservists (formerly known as Disaster Assistance Employees) appointed under the Stafford Act; employees who are part of the Incident Management Assistance Teams (IMATs), the Mobile Emergency Response Support, and the Federal Coordinating Officers (FCOs); and other permanent full-time (Title 5) and temporary full-time (TFT) employees covered under the provisions of Title 5, U.S.C., who are required or volunteer to work in incident management and incident support activities during disasters and emergencies.

F. FEMA Corps

FEMA Corps was created in 2012 through a partnership between FEMA and the CNCS as a FEMA-devoted unit of service members within AmeriCorps National Civilian Community Corps dedicated to assisting with disaster operations.⁶³ It is a full-time, team-based, residential national service program for men and women between the ages of 18 and 24.

⁶³ Interagency Agreement between the Corporation for National and Community Service (CNCS) and the Federal Emergency Management Agency (Mar. 2, 2012). The initial term of agreement between FEMA and CNCS runs through February 15, 2017, and the parties have the option to extend the agreement. *Id.* at 2.0(B). *See also* <http://www.nationalservice.gov/programs/americorps/fema-corps>.

FEMA funds the program through the Disaster Relief Fund (DRF). Because of this, FEMA Corps' primary mission is assisting with response and recovery efforts for disasters or emergencies declared under the Stafford Act. When deployed to work on declared disasters or emergencies, teams may engage in any direct assistance activities that FEMA performs and charges to the DRF.

This can include working directly with disaster survivors and supporting Disaster Recovery Centers. It would not, however, include activities that FEMA charges to a non-DRF appropriation (i.e., Fund 90 work), nor would it include activities that FEMA does not perform (i.e., work performed by a contractor or another federal agency).

Absent a declaration, the Stafford Act authorizes certain preparedness activities in which FEMA Corps may engage. When performing preparedness activities, however, members may not provide the kinds of direct assistance that FEMA could otherwise provide under a declaration. As a result, FEMA Corps' preparedness projects could include working with partners like the American Red Cross to enhance community preparedness and resiliency through non-direct activities. Such non-direct activities may include training, exercises, recruitment, assessments, surveys, evaluations, research, outreach, planning, presentations, educating, messaging, communications, and dissemination of information.⁶⁴

FEMA Corps members are NOT FEMA employees.⁶⁵ Members are directly supervised by their FEMA Corps Team Leader, who usually oversees a team of 8–12 members. While members do not report to FEMA employees, the team's point of contact (usually a FEMA manager) may provide technical direction and feedback related to

⁶⁴ The combined authorities of 42 U.S.C. §§ 5131(a)(1)-(7), 5196, and 5196f authorize these activities. For more information, see Federal Emergency Management Agency, *FEMA Corps Whole Community Preparedness Partnership Guide: A guide for utilizing FEMA Corps teams to enhance Individual and Community Preparedness efforts* (2015-2016).

⁶⁵ Members are not federal employees. They may, however, be treated as federal employees only for purposes of the Federal Tort Claims Act and Federal Employees Compensation Act. Interagency Agreement between the Corporation for National and Community Service and the Federal Emergency Management Agency (Mar. 2, 2012) at 14.0(B).

members' duties to ensure they carry out their service assignments safely.

The training, experience, and educational opportunities provided to members improve their knowledge, skills, and abilities for future careers in emergency management and related fields. Members are given FQS Position Task Books, and serve in one of the following FQS positions:

- External Affairs
- Private Sector Specialist
- Reports Specialist
- Media Relations Specialist
- Congressional Affairs Specialist
- Planning
- Planning Specialist
- Geospatial Information Systems Specialist
- Logistics
- Logistics Specialist
- Individual Assistance
- Disaster Survivor Assistance Specialist
- IA Applicant Services Program Specialist
- Public Assistance
- PA Project Specialist

In addition, members may also serve as a FEMA Corps Team Leader or as support to a Team Leader.

As mission needs dictate, FEMA Corps teams deploy via the Deployment Tracking System. FEMA Corps members deploy after IM COREs, but before Reservists, FTE employees other than IM COREs, and Department of Homeland Security (DHS) Surge Capacity Force volunteers.⁶⁶ Each member is issued a smart phone and a laptop and given access to the FEMA network.

G. Employment – Monitoring Performance

1. Reservists

The performance of Reservists is managed by their temporary duty supervisors who refer recommendations for adverse personnel actions against Reservists, to include discipline or termination, to the HQ based supervisor of record for review and coordination with OCC, Office of the Chief Component Human Capital Officer (OCCHCO) Labor and Employee Relations (LER). Temporary duty supervisors must ensure that any observed poor performance is documented and referred to the supervisor of record for review and coordination with LER.⁶⁷

FEMA's Administrative Grievance Manual 256-3-1 does not cover SAEs,⁶⁸ so Reservists generally may not grieve their performance rating. Reservists may look to the Equal Employment Opportunity (EEO) process if they believe that the evaluation was the result of illegal discrimination.

⁶⁶ FEMA Directive (FD) 010-8, *FEMA Incident Workforce Deployment*, C.3.i, "Selection of Personnel to Deploy" (Oct. 16, 2014).

⁶⁷ FD 010-6 Revision Number: 01 at Chapter VII.M.5.

⁶⁸ FEMA Manual 256-3-1, *Administrative Grievance System* § 1-2.A, .(2014)

2. Title 5 Employees and COREs

Most Title 5 employees and COREs are covered by the FEMA Employee Performance Management Program (EPMP).⁶⁹

a. Performance Appraisal Cycle

The EPMP performance appraisal cycle is a calendar year cycle, January 1 to December 31.⁷⁰

b. Performance Plans

Performance planning is the critical first step in a successful performance management process and is an essential factor to achieving and sustaining a high performance culture. At the beginning of the performance cycle, a written performance plan is developed identifying the specific performance expectations for which the employee will be held accountable. The performance plan contains pre-established DHS-wide core competencies as well individual performance goals. Ratings officials are expected to involve employees in the development of their performance plans insofar as practical, and all employees are required to develop Individual Development Plans. Rating officials will develop and submit performance plans to employees within 30 days after the beginning of the performance cycle.

c. Performance Monitoring and Summary Ratings

Rating officials must monitor employee performance continuously throughout the performance cycle and conduct quarterly progress reviews with employees. At any time during the appraisal period, if a rating official determines that an employee is performing poorly in one or more critical elements, appropriate action must be taken to address the

⁶⁹ The substantive content in this section is drawn from FEMA Manual 255-1-1, FEMA Employee Performance Management Program (EPMP). See § 1-2 for Title 5 employees excluded from the program. COREs are covered by the EPMP by FEMA Manual 252-11-1, *CORE Program*, (2015) with the exception of CORE IMATs, whose performance is governed by FEMA Directive 010-7.

⁷⁰ FEMA Manual 255-1-1, *Employee Management Performance Program*, § 2.1 (2013).

performance deficiencies. In such cases, the supervisor must consult with an OCCHCO LER Specialist for advice and guidance. Ratings officials must complete ratings of record within 30 days after the end of the performance cycle, subject to exceptions noted in the EPMP manual.

III. The Privacy Act

As discussed in Chapter 9, *Information Management*, the Privacy Act⁷¹ regulates the collection, maintenance, use, and dissemination of personally identifiable information (PII)⁷² about individuals by federal executive branch agencies. The Privacy Act strives to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy by:

- Restricting the disclosure of individually identifiable records maintained by agencies;
- Granting individuals the right to access agency records maintained on that individual;
- Granting individuals the right to seek amendment of agency records maintained on that individual, if the records are inaccurate; and
- Establishing norms for agencies to comply with in the collection, maintenance, and dissemination of records.
- The Privacy Act requires federal agencies to publish in the *Federal Register* a notice of the existence and character of each system of records the agencies maintain that contain information about individuals and from which information is retrieved by

⁷¹ 5 U.S.C. § 552(a), as amended.

⁷² Examples of PII are name, home address, home and personal cell phone numbers, disaster registration/case number, credit card number, social security number, or any identifying symbol or particular that is assigned to the individual, such as a photo or thumb print. *Department of Homeland Security Privacy Incident Handling Guidance* (DHS PIHG), Version 3.0, January 26, 2012 § 1.4.9, https://www.dhs.gov/xlibrary/assets/privacy/privacy_guide_pi hg.pdf.

name or other personal identifier. With respect to personnel records, see the listing of Privacy Act System of Records Notices covering FEMA employees and contractors in Chapter 9, *Information Management*.

IV. Employment-Related Statutes

A. Equal Rights Policies

Federal discrimination laws cover all FEMA personnel, including applicants for employment. FEMA subscribes to and implements to the fullest the requirements of Title VII of the Civil Rights Act of 1964;⁷³ the Rehabilitation Act of 1973;⁷⁴ the Genetic Information Nondiscrimination Act of 2008;⁷⁵ the Age Discrimination in Employment Act of 1967;⁷⁶ and Executive Order 13087 (prohibiting discrimination based on sexual orientation in the federal workforce).⁷⁷

Employees who believe they have had their equal rights violated should report it to any level of management or the Office of Equal Rights (OER).⁷⁸ Employees must treat each other fairly and equitably regardless of role or position and, where complaints of discrimination arise, it is expected that managers and employees will work together

⁷³ 42 U.S.C. § 2000e, *et seq.*

⁷⁴ 29 U.S.C. § 701, *et seq.*

⁷⁵ Pub. L. 110 – 233 (2008), 29 U.S.C. § 1182(b).

⁷⁶ 29 U.S.C. § 621, *et seq.*

⁷⁷ Title VII of the Civil Rights Act of 1964 provides protection from discrimination on the basis of race, color, national origin, sex (including sexual harassment), religion, and retaliation; § 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, added individuals with disabilities to this list; the Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233 protects genetic information; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 634, prohibits age discrimination in federal employment; and Exec. Order No. 13087 (1998), 3 C.F.R. 1998 § Comp., p. 191, 63 Fed. Reg. 6067 (May 28, 1998), and Exec. Order No. 13152, (2000), 3 C.F.R. § 2000 Comp. p. 264, Fed. Reg. 30097 (May 2, 2000), which prohibit discrimination based on sexual orientation in the federal workforce.

⁷⁸ Contact must be made with the Office of Equal Rights (OER) within 45 days of occurrence of the alleged discriminatory action.

to resolve the issues at the earliest possible stage. FEMA provides annual online EEO training for each employee.

B. Equal Opportunity and Affirmative Employment

It is DHS and FEMA policy to provide equal opportunity in employment for all employees and applicants and to prohibit discrimination in every aspect of personnel policies, practices, and working conditions.⁷⁹ FEMA fully supports and is committed to EEO and the implementation of a solid and effective affirmative employment program without regard to race, sex, religion, color, national origin, age or disability, sexual orientation, parental status, or genetic information. FEMA is committed to EEO goals that will aggressively pursue a program to recruit, retain, and advance a qualified workforce that reflects our Nation and provides an environment free of all discriminatory practices.⁸⁰

C. Harassment

DHS and FEMA are committed to maintaining a work environment that is free from harassment and sexual harassment, and employees are responsible for creating and maintaining that environment. FEMA has a zero-tolerance policy regarding harassment and sexual harassment that applies to all FEMA employees, as well as to all

⁷⁹ “It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.” Executive Order 11478, August 8, 1969; amended by Exec. Order No. 13087 (1998), 3 C.F.R. § 1998 Comp., p. 191, 63 Fed. Reg. 6067 (May 28, 1998), Exec. Order No. 13152, (2000), Exec. Order No. 13152, (2000), 3 C.F.R. § 2000 Comp. p. 264, 65 Fed. Reg., 26115 (May 2, 2000); and 2011-OER-01 FEMA EEO Statement.

⁸⁰ Office of the Under Secretary, FEMA, Policy No. 7-03, dated September 2, 2003. https://www.fema.gov/media-library-data/20130726-1823-25045-5821/no._3_03_harassment_and_retaliation_9_2_03.pdf.

contractors, students, visitors, and guests engaging in business at any FEMA facility.⁸¹

Harassment is any unwelcome verbal or physical conduct based on one of the bases protected under Title VII of the Civil Rights Act⁸² (race, color, religion, sex, national origin, age [over 40], disability, and reprisal) that is so objectively offensive as to alter the conditions of one's employment where the conduct culminates in a tangible employment action or is sufficiently severe or pervasive so as to create a hostile work environment.⁸³ Examples of prohibited harassment include but are not limited to:

- Making inappropriate comments or remarks regarding an individual because of his or her religion or national origin;
- Continually scrutinizing, criticizing, or requiring tasks of an individual because of a protected basis while not treating a similarly situated employee in the same manner; and
- Making derogatory or intimidating references to an individual's mental or physical impairment.
- Sexual Harassment⁸⁴ is unwelcome sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when: Submission to such conduct is made a term or condition of an individual's employment;
- Submission to or rejection of such conduct forms the basis of an employment decision affecting such individual; or

⁸¹ FD 256-4 and 256-5.

⁸² 42 U.S.C. § 2000e, *et seq.*

⁸³ FD 256-4, 265-5; 29 C.F.R. § 1604.11; *see* Office of the Under Secretary, FEMA, Policy No. 3-03, dated September 2, 2003, https://www.fema.gov/media-library-data/20130726-1823-25045-5821/no_3_03_harassment_and_retaliation_9_2_03.pdf.

⁸⁴ 42 U.S.C. § 2000e-3(a); FD 256-5.

- Such conduct has the purpose or effect of interfering with work performance or creates an intimidating, hostile, or offensive work environment.

FEMA has a duty to promptly investigate allegations of harassment.⁸⁵ Courts have found “prompt” to mean almost immediate upon learning of the harassment allegations. When allegations are raised, managers should contact OER and follow the procedures set forth in FEMA Directive 123-19 on administrative investigations.⁸⁶

D. Reasonable Accommodation

FEMA’s commitment to serving persons equally extends to providing access to applicants and employees with disabilities that is equal to the access provided to individuals without disabilities under any program or activity conducted by the agency.⁸⁷ FEMA’s policy is to comply with the reasonable accommodation requirements of the Rehabilitation Act and Americans with Disabilities Act (ADA).⁸⁸

These requirements have been supplemented by recent amendments to the ADA. The amendments, among other things, restate and clarify the original intent of the ADA, overturn several Supreme Court rulings that interpret the definition of “disability” too restrictively, and provide revisions to the definition that are consistent with broad coverage.⁸⁹ The amendments have been implemented by regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and other federal agencies.⁹⁰

⁸⁵ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 915.002 (June 18, 1999).

⁸⁶ FD-123-19 (2015)

https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/AllItems.aspx

⁸⁷ 44 C.F.R. § 16.140. Rehabilitation Act, Pub. L. 93-112; 29 U.S.C. § 701, *et seq.*, 42 U.S.C. § 12101, *et seq.* 29 C.F.R. 1614.203; Exec. Order No. 13164 (2000), 3 C.F.R. § 286 (2000), 65 Fed. Reg. 46565, (July 28, 2000).

⁸⁸ ADA, 42 U.S.C. §§ 12101, *et seq.*

⁸⁹ ADA Amendments Act of 2008, Pub. L. 110-325 (2008).

⁹⁰ FEMA Director’s Policy No. 4-05, (2005).

http://www.fema.gov/pdf/oer/state_4_05.pdf

FEMA is required to take all reasonable steps in making accommodations for employees with disabilities.⁹¹ In addition, federal agencies are required to develop written procedures for providing reasonable accommodation.⁹² FEMA's written procedures are outlined in FEMA's "Reasonable Accommodation Program" Manual 123-6-1⁹³ and Director's Policy No. 4-05.⁹⁴ In general, a reasonable accommodation is any change to the work environment or in the way things are customarily done that enables a qualified individual with a disability to have employment opportunities equal to those of an individual without a disability.⁹⁵

A request for reasonable accommodation is an oral or written statement in which an employee identifies his or her function limitation(s) and requests a modification or adjustment to (i) a job application process to enable him or her to be considered for the position; or (ii) the work environment, or to the manner or circumstances under which the position is customarily performed, to enable him or her to perform the essential functions of the position.

An employee with a disability may request a reasonable accommodation at any time, even if the employee has not previously disclosed the existence of a disability; however, the individual must state his or her functional limitation at the time of the request.⁹⁶ FEMA has an affirmative duty to accommodate an employee with an obvious disability to ensure effective reasonable accommodation solutions are provided.⁹⁷ All reasonable accommodation requests should be documented as soon as possible on FEMA Form 256-0-1; however, FEMA will begin processing the request as soon as it is made, whether or not the form has been completed.⁹⁸

⁹¹ FEMA Manual 123-6-1, *Reasonable Accommodations Manual* (2015). Ch. 1-7.

⁹² The provisions of FEMA Manual 123-6-1, are applicable to Title 5 and part-time employees, CORE employees, reservists, disaster local hires, and applicants for any of these positions at FEMA. FEMA Manual 123-6-1, Ch. 1-1.

⁹³ FEMA Manual 123-6-1 (2015).

⁹⁴ Director's Policy 4.05 (2005)

⁹⁵ 29 C.F.R. Part 1630; FEMA Manual 123-6-1, Ch. 1-5.

⁹⁶ FEMA Manual 123-6-1, Ch. 2.1.

⁹⁷ FEMA Manual 123-6-1, Ch. 3.1.E.

⁹⁸ FEMA Manual 123-6-1, Ch. 3.2.

A deciding official, usually a first-line supervisor, manager, or other designated official, in coordination with FEMA's Disability Employment Program Manager (DPM) located in FEMA's OER, determine whether reasonable accommodations will be provided by the agency. The DPM is the deciding official for applicants for employment. The Director of Equal Rights has been delegated the final authority in denying such accommodations.⁹⁹

A variety of accommodations may be made available to employees and applicants. Specific examples of accommodations outlined in FEMA Manual 123-6-1 include but are not limited to:¹⁰⁰

- Computers and electronic assistive devices
- Reader or sign language interpreter
- Telework
- Service animals
- Reassignment

Pursuant to FEMA policy, all requests for reasonable accommodation must be kept confidential.¹⁰¹ Deciding officials should engage FEMA's DPM to receive and review medical documents associated with reasonable accommodation requests.¹⁰²

Federal law requires that medical information obtained by FEMA in connection with the reasonable accommodation process must be kept confidential.¹⁰³ This includes medical information about functional limitations and reasonable accommodation needs. Requests for reasonable accommodation must also be kept in files separate from the individual's personnel file. Any FEMA employee who obtains or

⁹⁹ Director's Policy No. 4-05, (2005).

¹⁰⁰ FEMA Manual 123-6-1, Ch. 2; 29 C.F.R. 1614.203(c)(2).

¹⁰¹ FEMA Manual 123-6-1, Ch. 6.1.

¹⁰² FEMA Manual 123-6-1, Ch. 3.4.

¹⁰³ 29 U.S.C. § 701, *et seq.*

receives such information is strictly bound by these confidentiality requirements.

E. Retaliation and the No FEAR Act¹⁰⁴

It is unlawful to retaliate or engage in adverse treatment against anyone who has articulated concerns regarding unlawful harassment (sexual or nonsexual), discrimination, requested reasonable accommodation, or religious accommodation.¹⁰⁵ Adverse treatment is any action or omission that would deter a reasonable person from participating in the EEOC process.¹⁰⁶ It is an unlawful employment practice for an employer to discriminate against any employee or applicant for employment because the employee or applicant made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.

The Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002¹⁰⁷ acknowledges Congress' recognition that federal agencies cannot be run effectively if those agencies practice or tolerate discrimination, and that the United States and its citizens are best served when the federal workplace is free of discrimination and retaliation.

Further, in order to maintain a productive workplace that is fully engaged with the many important missions before the government, it is essential that the rights of employees, former employees, and applicants for federal employment under discrimination, whistleblower, and retaliation laws be steadfastly protected, and that agencies that violate these rights be held accountable. The No FEAR Act increased accountability of federal departments and agencies for acts of discrimination or retaliation/reprisal against employees

¹⁰⁴ No FEAR Act of 2002, § 101. Pub. L. 107-174 (2002), as amended, 5 U.S.C. § 2301, *et seq.*

¹⁰⁵ EEOC Compliance Manual section 8-3.

¹⁰⁶ *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 54 (2006).

¹⁰⁷ The Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 (Pub. L. No. 107-174) was passed by both houses of Congress and was signed into law by President George W. Bush on May 15, 2002.

resulting from whistleblower complaints and complaints before the Merit Systems Protection Board (MSPB) and EEOC by:

- Requiring federal agencies to be accountable for antidiscrimination and whistleblower laws;
- Prohibiting retaliation in discrimination; and
- Ensuring adequate posting of notices regarding rights and responsibilities.

F. Alcohol- and Drug-Free Workplace

Pursuant to federal law, FEMA facilities provide a drug- and alcohol-free workplace.¹⁰⁸ The use of alcohol is prohibited in all federal facilities;¹⁰⁹ and the use, possession, or distribution of illegal drugs by employees, whether on or off the job, will not be tolerated. These are zero-tolerance policies.¹¹⁰

Employees may not consume alcoholic beverages while at work, report to work under the influence of alcohol, perform FEMA-related work under the influence of alcohol, or operate any agency vehicle under the influence of alcohol. Law enforcement personnel on federal property may administer voluntary alcohol tests when there is an accident or reasonable cause to do so.¹¹¹

Executive Order 12564 establishes standards and procedures for a drug-free federal workplace and mandates testing for the use of illegal drugs for all federal employees in safety and security-sensitive positions.¹¹² The unlawful use, manufacture, distribution, possession, solicitation, or transfer of a controlled substance is strictly prohibited on any FEMA premises or worksite (including parking lots). FEMA

¹⁰⁸ Executive Order 12564 (1986) 3 C.F.R. § 1986 Comp. p. 224, 51 Fed. Reg. 32889 (September 15, 1986); Federal Property Management Regulations, 41 C.F.R. § 102-74.405; the Drug-Free Workplace Act of 1988; 41 U.S.C. § 701.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Executive Order 12564, 3 C.F.R. § 1986 Comp. p. 224, 51 Fed. Reg. 32889 (September 15, 1986); 41 C.F.R. §§ 102-74-400.

implements this executive order via its Drug-Free Workplace Program, which provides policies and procedures on drug testing, employee assistance programs, and training and education for supervisors and employees.¹¹³

G. Smoke-Free Workplace

Pursuant to executive order, a policy was established to provide a smoke-free environment for federal employees and members of the public visiting or using federal facilities.¹¹⁴ “The smoking of tobacco products is prohibited in all interior space owned, rented, or leased by the executive branch of the federal government and in any outdoor areas under executive branch control in front of air intake ducts.”¹¹⁵ Smoking is further “prohibited in courtyards and within 25 feet of doorways and air intake ducts on outdoor spaced under the jurisdiction, custody or control of GSA.”¹¹⁶

Accordingly, FEMA installations are designated as non-smoking facilities.¹¹⁷ There is no smoking inside **any** FEMA facility, including restrooms, break rooms, hallways, lobbies, elevators, tunnels, dorm rooms, or any other part of the facility, unless the area is designated for smoking.¹¹⁸ Current DHS policy does not include e-cigarettes or “vaping” in the definition of smoking.¹¹⁹ However, the DHS Office of Health Affairs “strongly recommends that e-cigarettes be treated as tobacco products in the workplace.”¹²⁰

¹¹³ FEMA Manual 123-20-1, *Drug-Free Workplace*, (February 20, 2015).

¹¹⁴ Executive Order 13058 (1997), 3 C.F.R. § 1997 Comp., p. 216, 73 Fed. Reg. 77518 (December 19, 2008), 41 C.F.R. §§ 102-74.400; *See also* Federal Management Regulation, 41 C.F.R. § 102-74.315

¹¹⁵ *Id.*; FEMA Instructions 6900.1 (January 11, 2002).

¹¹⁶ Federal Management Regulations (FMR), 41 C.F.R. § 102-74.330.

¹¹⁷ DHS Instruction Number 066-03-0001 (August 17, 2011).

¹¹⁸ DHS Instruction Number 066-03-0001 (August 17, 2011).

¹¹⁹ *Id.*

¹²⁰ DHS Office of Health Affairs, Occupational Health and Safety Advisory, February 19, 2015.

Smoking is also prohibited in all FEMA-owned or leased vehicles.¹²¹

H. Weapons, Security, and Safety

1. Weapons

Employees are expressly forbidden from bringing firearms or other dangerous weapons on to any FEMA facility; doing so constitutes grounds for immediate dismissal.¹²²

Persons who knowingly possess or cause to be present a firearm or other dangerous weapon in a federal facility, or attempt to do so, shall be fined pursuant to federal law or imprisoned not more than one year, or both.¹²³

Persons who, with intent that a firearm or other dangerous weapon be used in the commission of a crime, knowingly possess or cause to be present such firearm or dangerous weapon in a federal facility, or attempt to do so, shall be fined pursuant to federal law or imprisoned not more than five years, or both.¹²⁴

2. Security

FEMA facilities are secured and have controlled access. All individuals entering FEMA facilities must be properly identified and in possession of a recognized and accepted identity credential or access badge before being granted access to FEMA facilities.¹²⁵

In addition, the removal of government property from FEMA facilities must be monitored in order to avoid losses, negligence, and unauthorized use. Federal property management regulations state that “packages,

¹²¹ DHS Instruction Number 066-03-1, DHS Manual 118-01-01, Motor Vehicle Fleet Program Manual (March 18, 2011); FEMA Manual 119-24-1, Fleet Management Manual (October 13, 2011).

¹²² 18 U.S.C. § 930, Possession of Firearms and Dangerous Weapons in Federal Facilities.

¹²³ *Id.* at (a).

¹²⁴ *Id.* at (b).

¹²⁵ See FEMA Manual 121-3, Facility Access (2015) and FEMA Manual 121-3-1, FEMA Credentialing Access Manual (2012); See also Homeland Security Presidential Directive 12 (HSPD-12), Policy for a Common Identification Standard for Federal Employees and Contractors (2004).

briefcases and other containers in the immediate possession of visitors, employees, or other persons arriving on, working at, visiting, or departing from Federal property” are subject to inspection.¹²⁶ Property can only be removed from a FEMA facility with an authorized property pass.¹²⁷

3. Safety

Federal workers have a right to a safe and secure workplace, and anyone who depends on the work of the federal government for their health, safety and security has a right to a reliable and productive federal workforce.¹²⁸

FEMA adheres to the provisions of regulatory statutes applicable to FEMA’s goal of ensuring, to the highest degree possible, a safe and healthful workplace wherever FEMA employees are assigned or the agency’s mission is executed.¹²⁹

Under FEMA’s Occupational Safety and Health Administration (OSHA) Program, goals and objectives are established for reducing and eliminating occupational accidents, injuries, and illnesses, and for appropriate corrective actions to be taken.¹³⁰ Qualified and authorized occupational safety and health inspectors inspect FEMA worksites; management and supervisory evaluations measure performance in meeting the program requirements; and all agency employees and bargaining unit representatives have an opportunity to participate in the program without restraint, coercion, interference, or reprisal.¹³¹

Employees are responsible for complying with OSHA standards and following all FEMA safety and health rules; they are encouraged to report

¹²⁶ 41 C.F.R. § 102-74.370.

¹²⁷ FEMA Manual 119-7-1, Personal Property (2013).

¹²⁸ Occupational Safety and Health Administration (OSHA) Regulations, Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters 29 C.F.R. § 1960.8(a).

¹²⁹ FEMA Occupational Safety and Health Program, FEMA Manual 066-3-1 (January 28, 2013)

¹³⁰ *Id.*

¹³¹ *Id.*

hazardous workplace conditions and promptly report any job-related injury, illness, or accident to supervisors.¹³²

I. Workers' Compensation¹³³

All federal civilian employees (including SAEs, but with the exception of non-appropriated fund employees¹³⁴) are covered under the Federal Employees Compensation Act (FECA), more commonly referred to as workers' compensation.¹³⁵ The rules governing administration of all claims filed under the FECA are set forth at 20 C.F.R. Part 10.

The FECA provides compensation for wage loss, medical care, and vocational rehabilitation for federal employees who are injured in the performance of their duties or who develop illnesses as a result of factors of their federal employment.¹³⁶ FECA also provides monetary benefits to dependents if a job-related injury, illness, or disease causes the employee's death. Benefits cannot be paid if the injury, illness, or death is caused by the employee's willful misconduct, intent, or intoxication by alcohol or illegal drugs.¹³⁷

The FECA is administered by the U.S. Department of Labor, Office of Workers' Compensation Program, Division of Federal Employees'

¹³² *Id.*

¹³³ For general reference, see U.S. Department of Labor, Division of Federal Employees' Compensation Q&A Concerning Benefits of the Federal Employees' Compensation Act, <http://www.dol.gov/owcp/dfec/regs/compliance/feca550q.htm>.

¹³⁴ Non-appropriated fund employee means a civilian employee who is paid from non-appropriated funds of Army and Air Force Exchange Service, Navy Exchange Service Command, Marine Corps exchanges, or any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces. Such term includes a civilian employee of a support organization within the Department of Defense or a military department, such as the Defense Finance and Accounting Service, who is paid from non-appropriated funds on account of the nature of the employee's duties. They are typically paid from funds generated by those activities.

¹³⁵ The Federal Employees' Compensation Act, Pub. L. 16-176 (1916), as amended, 5 USC § 8101, *et seq.*

¹³⁶ Damage to or destruction of medical braces, artificial limbs, and other prosthetic devices incidental to a job-related personal injury is also compensable. 5 U.S.C. § 8101(5).

¹³⁷ 5 U.S.C. § 8102(a).

Compensation, through district offices located throughout the United States. Seventeen district offices adjudicate claims and pay benefits, and the costs of those benefits are charged back to the employing agency.

J. Unemployment Compensation¹³⁸

Subject to individual state regulations, FEMA employees (including DAEs and other SAEs) may, upon completion of assignment, placement in non-pay status, or expiration of appointment, be eligible to receive unemployment insurance (UI) benefits.

UI benefits are intended to provide temporary financial assistance to unemployed workers who meet the requirements of state law. The Unemployment Compensation for Federal Employees program provides UI benefits for eligible former civilian federal employees who are unemployed through no fault of their own (as determined under state law) and meet other state law eligibility requirements.

FEMA challenges claims by FEMA employees where the employee has quit or has been terminated for misconduct or poor performance, as a general rule. FEMA OCC represents FEMA in unemployment proceedings.

The UI program is administered by states as agents of the federal government, within guidelines established by federal law, and operated under the same terms and conditions that apply to regular state unemployment insurance.¹³⁹ Eligibility for UI benefits, benefit amounts, and the length of time benefits are available are determined by the state law under which unemployment insurance claims are established.

In the majority of states, benefit funding is based solely on a tax imposed on employers. UI for unemployed federal workers is paid

¹³⁸ See generally, U.S. Department of Labor, Unemployment Insurance (UI), <http://www.dol.gov/dol/topic/unemployment-insurance/index.htm>.

¹³⁹ Social Security Act, Pub. L. 74-271 (1935), as amended, 5 U.S.C. § 8501 *ET seq*; 5 C.F.R. § 8501, *et seq*.

from U.S. government funds. There is no payroll deduction from a FEMA or other federal employee's wages for UI protection.

K. Fair Labor Standards Act¹⁴⁰

The Fair Labor Standards Act (FLSA) prescribes standards for the basic minimum wage and overtime pay, child labor, equal pay, and portal-to-portal activities.¹⁴¹ The act exempts specified employees or groups of employees from the application of certain of its provisions; requires government agencies to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one and one-half times the regular rate of pay; and prescribes penalties for the commission of specifically prohibited acts. OPM administers the provisions of the FLSA with respect to FEMA employees and other persons employed by a federal agency, except as otherwise provided.¹⁴²

L. Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act of 1993 (FMLA)¹⁴³ allows employees to take up to 12 workweeks of unpaid leave during any 12-month period for the following purposes:¹⁴⁴

¹⁴⁰ The Fair Labor Standards Act Pub. L. 75-718 (1938), as amended, is published at 29 U.S.C. §§ 201-219; OPM's FLSA regulations are published at 5 C.F.R., Part 551, §§ 551.101-551.710.

¹⁴¹ "Section 3(e)(2) of the Act authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section." 5 C.F.R. § 551.102.

¹⁴² 5 C.F.R. § 551.102(a). The U.S. Equal Employment Opportunity Commission administers the equal pay provisions contained in § 6(d) of the act. Under the Congressional Accountability Act of 1995, as amended, 5 U.S.C. §§ 1301, *et seq.*, the U.S. Office of Compliance administers the provisions of the FLSA for employees of the U.S. House of Representatives, U.S. Senate, Capitol Guide Service, Capitol Police, Congressional Budget Office, Office of the Architect of the Capitol, Office of the Attending Physician, and Office of Compliance. The U.S. Department of Labor, Wage and Hour Division, administers FLSA provisions for private employers, state and local governments, the Library of Congress, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority. 5 C.F.R. §§ 551.102(b), (c), and (d).

¹⁴³ 29 U.S.C. § 2601, 29 C.F.R. § 825. Also see FEMA Manual 123-10-1, Absence and Leave, dated December 29, 2015.

¹⁴⁴ 5 C.F.R. § 630.1203.

- A serious health condition of the employee who makes the employee unable to perform the essential functions of his or her position;
- The care of a spouse, son, daughter, or parent of the employee who has a serious health condition;
- The birth of a son or daughter of the employee and the care of such son or daughter;
- The placement of a son or daughter with the employee for adoption or foster care.

The rights and the conditions under which an employee can take leave under FMLA depend on the nature of the FEMA appointment and the schedule. Generally, permanent employees with a scheduled tour of duty and employees on temporary appointments not limited to one year or less (typically CORE employees) are covered by OPM regulations published at 5 C.F.R., Part 630, subpart L.¹⁴⁵ Employees who do *not* have a scheduled tour of duty (i.e., those on an intermittent duty schedule, such as Reservists) and employees on temporary appointments of one year or less are subject to Department of Labor regulations published at 29 C.F.R., Part 825.¹⁴⁶

Employee rights and requirements are similar under both regulations. Both sets of regulations require 12 months of service to be eligible for FMLA leave, but the total service does not have to be recent or continuous.

- For permanent and CORE employees, the service must have been as a permanent or CORE employee. Time in temporary or intermittent service will not count toward meeting the basic eligibility requirement.
- Reservist or intermittent employees must have 12 months of service and the employee must have worked for at least 1,250

¹⁴⁵ 29 C.F.R. § 825.109(a).

¹⁴⁶ 29 C.F.R. §§ 825.109(b)(3), (4).

hours during the previous 12 months prior to the period for which FMLA is to be used. Further, the employee must work at a location in the United States (or one of its territories or possessions) where at least 50 persons are employed by the federal government within 75 miles.

Under certain circumstances, leave taken under the FMLA does not have to be taken all at once or continuously.¹⁴⁷ Employees may elect to substitute annual leave and/or sick leave, consistent with current laws and OPM regulations for using annual and sick leave, for any unpaid leave under the FMLA.¹⁴⁸

M. Violence in the Workplace

FEMA's policy regarding violent acts or threats of violence or other inappropriate behaviors that have the potential for causing harm to one's self or others in the performance of official duties is as follows:

FEMA strives to minimize the likelihood of violence in the workplace through early intervention and will not tolerate acts or threats of violence (explicit or implied). Employees found in violation of this policy will be subject to disciplinary action, up to and including termination of employment, and referral to appropriate law enforcement authorities. For other than FEMA employees, comparable appropriate action will be taken.¹⁴⁹

It is strictly forbidden to commit any action which causes, is intended to cause, or is perceived as an intent to cause harm to persons or damage to property. Any such behavior will be subject to immediate disciplinary action. The prohibition includes acts, remarks, or gestures that communicate a threat of harm or otherwise cause concern for the safety of any individual; or damage, destruction, or sabotage of property at a FEMA facility; or any such actions by an employee while on or because of his or her official duties. This prohibition also

¹⁴⁷ 5 C.F.R. § 630.1204.

¹⁴⁸ 5 C.F.R. § 630.1205.

¹⁴⁹ *Id.*

applies to contractors and personnel from other agencies that are performing official duties in support of FEMA’s mission.¹⁵⁰

All managers, supervisors, and employees should immediately contact the Office of the Chief Security Officer (OCSO), OCC, or the OCCHCO LER Branch if they witness or are informed of violent, abusive, or threatening behavior. In instances of imminent danger, appropriate law enforcement authorities should be immediately contacted.

V. Employee Misconduct

A. Required Notifications to the DHS Office of Inspector General

The DHS Office of Inspector General (OIG) operates independent of DHS and all DHS offices. The OIG receives and investigates complaints “concerning the possible existence of criminal or other misconduct constituting a violation of law, rules, or regulations, a cause for suspension or debarment, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety.”¹⁵¹ DHS MD 0810.1 requires that the following matters be reported to the OIG:

- All allegations of criminal misconduct against a DHS employee;
- All allegations concerning employees at the GS-15 level or higher;
- All allegations against a law enforcement officer of serious, non-criminal misconduct;

¹⁵⁰ *Id.*

¹⁵¹ See DHS Management Directive (DHS-MD) 0810.1, (2004), § VI(A)(6). *Also see* FEMA Manual 123-19-1 Administrative Investigations Policy, dated 04/05/2012, https://portalapps.fema.net/apps/policy/Lists/Master_Inventory/DispForm.aspx?ID=215.

- All instances regarding discharge of a firearm that results in death or personal injury or otherwise warrants referral to the Civil Rights Criminal Division of the Department of Justice;
- All allegations of fraud by contractors, grantees, or other individuals or entities receiving DHS funds or otherwise engaged in the operation of DHS programs or operations;
- All allegations of visa fraud by DHS employees working in the visa issuance process; and
- Allegations against individuals or entities that do not fit into the categories identified here if the allegations reflect systemic violations, such as abuse of civil rights, civil liberties, or racial and ethnic profiling; demonstrate serious management problems within the department; or otherwise represent a serious danger to public health and safety.¹⁵²

The FEMA OCSO is the primary point of contact with the DHS OIG and regularly refers allegations fitting within the named parameters to the DHS OIG; however, all federal employees are required to refer the allegations shown here and may do so on their own. Until advised by the DHS OIG, investigation into the allegation should not be undertaken by the agency.¹⁵³ If substantiated, the matter will be referred to the appropriate Assistant United States Attorney or other applicable prosecution authority.¹⁵⁴

¹⁵² *Id.* at Appendix A-1.

¹⁵³ Exception to DHS OIG required notifications: Criminal activity that occurs on FEMA owned or leased facilities should be immediately reported to the Office of Federal Protective Service (FPS) with concurrent notification to FEMA's OCSO. *See* 40 U.S.C. 1315 for FPS' operational authority. If the FPS has no police officers or investigators in close proximity to the FEMA property, criminal activity should be reported to local law enforcement with jurisdiction (sheriff, local police, state police), generally by dialing 9-1-1, with separate notifications to FPS and FEMA's OCSO.

¹⁵⁴ FEMA Instruction 1200.1, ¶ 5, (2000) (emphasis added).

All FEMA counsel must refer to the OCC Criminal Misconduct Checklist¹⁵⁵ when they become aware of any allegation of possible criminal misconduct by any FEMA employee. This checklist provides essential instructions for how to respond to, report, and investigate allegations of criminal misconduct.

B. Note about Performance-Based Actions and Stafford Act Employees

When dealing with poor performance that does not involve misconduct, the steps taken and options vary; SAE supervisors should consult FEMA Manual 255-1-1, Employee Performance Management Program. Most performance problems can be resolved through effective communications between the supervisor and employee. The supervisor should take the following steps:

- **Counsel Employee.** It is critical that supervisors counsel employees when their performance is not at an acceptable level. The counseling session provides the opportunity for the supervisor to clarify job expectations, and identify performance deficiencies and what the employee needs to do to bring performance up to an acceptable level. Document the session and provide the employee with a copy to prevent misunderstandings or mischaracterization of the discussion.
- **Monitor performance.** Monitor the employee's performance following the discussion, and document the employee's progress toward improving his or her performance.
- **Discuss with an LER specialist.** If the employee's performance has not improved subsequent to the initial counseling, the supervisor must discuss the employee's performance deficiencies with the LER specialist to determine (1) whether to remove the employee for substandard performance

¹⁵⁵ Memorandum from the Chief Counsel, FEMA OCC Criminal Misconduct Checklist, February 28, 2013.
<https://intranet.fema.net/org/occ/collab/Newsletter/Pages/default.aspx>

immediately or (2) whether to provide the employee time to demonstrate improvement and, if so, the length of time to do so.

- If employee fails to improve acceptably, the supervisor can initiate action to terminate employment and should ensure that the employee does not receive a within-grade increase prior to the termination's effective date.¹⁵⁶

C. Administrative Disciplinary Action

What happens next? If the DHS OIG or Office of Federal Protective Service (FPS) decline to investigate reportable misconduct, then the matter is returned to FEMA for whatever administrative action is deemed advisable. Each agency, including DHS and its component agencies, has the right to conduct investigations into alleged employee misconduct issues.¹⁵⁷ The authority to investigate is derived from statutes that authorize discipline for employees.¹⁵⁸

Who does the investigation? Any allegation should be elevated to one or all of the following: OCC Personnel Law Branch representative, local Human Capital LER representative, and/or the local OCSO representative (in the Regional Office, this is usually a Security Manager). Following coordination with appropriate HQ counterparts, a decision will be made as to who will further investigate the matter. Once complete, any substantiated allegation of misconduct may be subject to administrative disciplinary action.

The Human Capital Division, LER at FEMA HQ, has overall responsibility for ensuring equitable application of employee discipline and compliance with statutory and regulatory requirements in the proposing and effecting of actions. Management or supervisory officials desiring to take

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., 5 U.S.C. § 7106 (a) (authorizing the agency to take disciplinary action against employees).

¹⁵⁸ See, for example, 5 U.S.C. § 7503 (authorizing suspensions for 14 days or less against employees [non-SES] for such cause as will promote the efficiency of the service); 5 U.S.C. § 7513 (authorizing suspensions in pay for more than 14 days, reductions in grade or pay, removal, and furloughs of 30 days or less against employees [non-SES] for such cause as will promote the efficiency of the service); and 5 U.S.C. § 7542 (authorizing adverse action against SES employees), *inter alia*.

disciplinary actions beyond an official reprimand should contact their appropriate LER point of contact at FEMA HQ. Transitional Recovery Offices have an assigned LER Specialist, as do all regional offices, all National Processing Service Centers, the National Emergency Training Center, and Mt. Weather.

OCC reviews any adverse employment action upon request and must review those that may result in litigation (e.g., suspensions, terminations, grievances that are going to be arbitrated). OCC represents the agency at formal hearings and appeals.

D. Administrative Discipline for Stafford Act Employees

The disciplinary/adverse action process is conducted with fairness and integrity as management considers all important factors relevant to employee discipline. While SAEs are not subject to Title 5 protections, management has the prerogative to consider the following types of discipline:

1. Counseling

The purpose of counseling is to correct behavior or performance problems soon after they occur in order to prevent the need for formal discipline.¹⁵⁹ This would be appropriate where the violation is minor and where the employee has a good record with no prior instance of misconduct (or performance issues, if the violation involves poor performance) and is committed to correcting the problem. Documentation of the conversation, such as a follow-up email recounting the conversation entitled “Discussion Dated XX” can be provided to the employee and is strongly recommended. At a minimum, the supervisor shall send an email to himself or herself to document the content of the conversation. Such memoranda can be used to demonstrate that the employee was put on notice about the problem and knew of the potential for a harsh penalty if the problem continued. A memorandum documenting the counseling is not placed in the employee’s official personnel folder (OPF).

¹⁵⁹ FEMA Manual 252-11-1, Chapter 11.

2. Reprimand

A written reprimand is the lowest level of formal discipline; it is addressed to the employee and signed by the immediate supervisor (or higher level supervisor in the chain of command) for repeated lesser infractions or inadequate performance.¹⁶⁰ It is appropriate for a first offense of misconduct for which written formal discipline is necessary or where counseling and written warnings have not been effective in preventing continued problems.

The reprimand should, at a minimum: reference previous counseling or other action that was relied on to support the action (if any); advise employee of any appeal rights, such as the right to file an appeal with the next higher level supervisor within five workdays after receipt of the reprimand; advise of negative consequences for future misconduct; advise of Employee Assistance Program services available to assist with any work-related or personal concerns that may have an impact on performance and/or behavior at work; inform the employee of the Alternative Dispute Resolution (ADR) Program and of his or her right to seek counseling with an EEO advisor if he or she believes the reprimand is based on a prohibited factor; provide a signature line upon which the employee will acknowledge receipt of the notice of reprimand; state whether a copy will be placed in the OPF for a period not to exceed three years; and identify the servicing LER Specialist to contact for advice and assistance.

3. Suspension Without Pay (COREs Only)

A notice of suspension is a memorandum on FEMA letterhead, addressed to the employee and signed by the immediate supervisor (or higher level supervisor in the chain of command), that notifies the employee that he or she is being placed in a non-duty, non-pay status for a serious offense or repeated lesser infractions.¹⁶¹

The notice should identify the specific charge(s) with supporting information, regulations, or policies violated; identify the effective date of the action; advise of any applicable appeal rights, such as the right to

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

appeal the suspension to the next-higher level supervisor within five calendar days of receipt of the notice and of the employee's right to file a grievance under any applicable collective bargaining agreement (if the employee is a bargaining unit employee); advise the employee of the right to file a discrimination complaint if the person believes the action is based on a discriminatory factor; contain information on the Employee Assistance Program; provide a signature line upon which the employee will acknowledge receipt of the notice of suspension; and identify the servicing LER Specialist's name and phone number to contact for advice and assistance.

A copy of the notice (signed and dated by the supervisor) and the Request for Personnel Action (SF-52) are forwarded to the LER Specialist. The Specialist codes the SF-52 and forwards it to the Human Resources (HR) operations staff for processing

4. Termination

A notice of termination is a memorandum on FEMA letterhead, addressed to the employee from the immediate supervisor (or higher level supervisor in the chain of command). A termination may be appropriate when the facts and supporting information cause the supervisor to conclude that the employee has demonstrated an unwillingness or refusal to conform to acceptable standards of conduct, a lesser penalty would not deter future misconduct, or there is little probability of the employee's rehabilitation. The notice should include the same items identified in the suspension notice¹⁶² and should advise the employee to return all government property obtained during the period of employment.

If the employee refuses to acknowledge the notice, the supervisor should place a note on the last page to indicate that the notice was given to the employee and the employee refused to acknowledge receipt. Failure to acknowledge receipt has no impact on implementing the decision.

If the notice is mailed, the date should be set so that the effective date is on or around the date of receipt of the notice. Send by overnight mail to ensure prompt delivery and for tracking purposes. The original is given to the employee. A copy of the notice is maintained in the employee

¹⁶² *Id.*

relations case file and is not placed in the employee's OPF. The OPF is documented with the Notification of Personnel Action (SF-50).

A copy of the notice (signed and dated by the supervisor) and the SF-52 are forwarded to the LER Specialist. The Specialist codes the SF-52 and forwards it to the HR operations staff for processing. The notice should be given to the employee at or before the effective date of the action.

Termination of SAEs is done by the supervisor of record. For SAEs who regularly deploy, this is often not the temporary duty supervisor; that is, the employee directing the SAE's work on the deployment. Questions as to the supervisor of record should be answered through LER (National Finance Center database). That supervisor may delegate his or her authority but said delegation MUST be coordinated prior to the action being taken.

E. Status of the Stafford Act Employee During Investigation into Misconduct

Normally, employees continue to work their regular duties during the time an investigation or facts are being gathered. However, there are times where allegations or work problems are so serious that the employee's continued performance of regular duties or presence at work could be disruptive to the organization and work of other employees. In these situations, the following options are available: Assign other work to the employee, or place the employee in a non-duty, non-pay status while the investigation/fact-finding is being conducted and until other administrative decisions are made. (FEMA does not place SAEs on paid administrative leave.)

F. Stafford Act Employees and Appeals from Adverse Administrative Actions

FEMA provides, as noted, a five-day internal appeal to the next higher supervisory level for reprimands, suspensions, and termination actions. COREs are currently expressly or implicitly in four of FEMA's union certifications: Region 2 (express); National Emergency Training Center, or NETC (implicit); Region V (implicit); and Region VII (implicit). For COREs expressly or implicitly covered by a FEMA union certification, the

applicable CBA may contain appeal provisions for disciplinary/adverse actions. Generally, SAEs have no right to appeal to the MSPB. SAEs may, however, file an EEO complaint with FEMA's OER if alleging that a personnel action was taken against the employee based on illegal discrimination.

G. Administrative Discipline for Title 5 Employees

Statutory and regulatory due process rules apply to Title 5 employees when taking disciplinary or performance-based actions.¹⁶³ During investigations, the same considerations apply as for Stafford Act employees in deciding whether or not to assign other work or to make them leave the workplace pending the outcome of the investigation. However, in the latter case, the Title 5 employee will be placed on administrative leave with pay.

In general, all officially designated supervisors are authorized to issue counseling and official reprimands to subordinates without review by the MSPB. When the agency terminates or suspends without pay for 15 days or more, Title 5 employees may appeal the matter to the MSPB.¹⁶⁴ If the employee also alleges that the matter is the result of unlawful discrimination, that claim may be added to the grounds for appeal. OCC represents FEMA in MSPB appeals.

H. Alternative Forums for Appeals

1. Negotiated Grievance Procedure

Employees who are members of a bargaining unit are covered by negotiated agreements.¹⁶⁵ These negotiated agreements include grievance procedures that allow employees to challenge management actions and decisions. Employees who receive disciplinary actions may appeal that

¹⁶³ See, for example, 5 U.S.C. Chapters 43, 75; 5 C.F.R. Parts 430, 432, 735, and 752.

¹⁶⁴ These are not the only personnel actions that can be appealed to the MSPB by Title 5 employees; however, they are the most commonly appealed actions in FEMA. See 5 C.F.R. Part 1201.

¹⁶⁵ As of January 2016, FEMA and American Federation of Government Employees, AFL-CIO are undergoing a final review of a CBA that would govern all FEMA bargaining unit employees.

action using the negotiate grievance procedures, which include the ability to request an arbitration hearing for some cases.

The American Federation of Government Employees and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)¹⁶⁶ local unions are the recognized exclusive representatives of the bargaining units comprised of a specified group or groups of FEMA employees whose workplace is FEMA HQ; Mount Weather; the NETC; and Regions II, III, IV, V, VII, and IX. Members of each recognized bargaining unit generally do not include part-time, temporary, or intermittent employees and consist of permanent full-time employees only.¹⁶⁷

2. Administrative Grievance System

Under FEMA Manual 256-3-1, the Administrative Grievance System, suspensions without pay of 14 days or less, other personnel actions, and any matter of employee concern or dissatisfaction for which personal relief is possible and is subject to the control of FEMA management may be grieved by Title 5 employees who are not covered by a negotiated agreement's grievance procedures.¹⁶⁸ The Administrative Grievance System does not cover SAEs;¹⁶⁹ is not available for grievances of reprimands or suspensions for 15 calendar days or more;¹⁷⁰ and, for bargaining unit employees, may be preempted by a negotiated grievance procedure.

3. FEMA Equal Rights Office

All employees may file complaints alleging that personnel actions were the result of unlawful discrimination. However, once a formal complaint has been filed, the employees may not also file the same complaint at the

¹⁶⁶ American Federation of Labor and Congress of Industrial Organizations. The AFL-CIO local, national, and international unions are autonomous; the AFL-CIO does not negotiate collective bargaining agreements and is not directly a bargaining agent of any designated group of employees.

¹⁶⁷ As noted, COREs are covered by the applicable CBA at NETC and regions II, V, and VII.

¹⁶⁸ FEMA Manual 256-3-1, Administrative Grievance, Section 1-2 (Sept. 2014).

¹⁶⁹ *Id.*

¹⁷⁰ For a list of all issues not covered by the administrative grievance system, see *Id.*, Ch. 2-2 (b).

MSPB.¹⁷¹ Employees cannot bring new complaints for matters raised in formal grievance procedures or negotiated in ADR.¹⁷²

Individuals who believe they were the victim of discrimination must consult an OER counselor prior to filing a complaint in order to try to informally resolve the matter.¹⁷³ OER contact must be initiated within 45 days of the alleged discriminatory act.¹⁷⁴ Accepted allegations of discrimination are investigated by the agency pursuant to EEOC guidelines.¹⁷⁵ After an investigation is completed, employees may elect to have their claims heard by an EEOC administrative judge or request an immediate decision based on the investigative report by the DHS Division of Civil Rights and Civil Liberties.¹⁷⁶

I. Alternative Dispute Resolution (ADR)

In an effort to significantly strengthen the mission of the federal government, Congress passed the Administrative Dispute Resolution Act of 1990 (reauthorized in 1996).¹⁷⁷ This statute requires federal agencies to promote ADR processes. The President issued an Executive Memorandum,¹⁷⁸ the Attorney General issued an Order,¹⁷⁹ and Congress further passed the Alternative Dispute Resolution Act,¹⁸⁰ all advocating greater federal use of ADR. Under these authorities, FEMA established the ADR Division within the Office of Chief Counsel in 1999 and the ADR Field Cadre in 2005.

ADR refers to a broad range of organizational, conflict management methods that eschew traditional approaches, such as litigation and formal administrative venues, in favor of less expensive and more expeditious

¹⁷¹ 29 C.F.R. § 1614.107.

¹⁷² *Id.*

¹⁷³ *Id.* at § 1614.105(a).

¹⁷⁴ *Id.*

¹⁷⁵ 29 C.F.R. § 1614.108.

¹⁷⁶ *Id.* at § 1614.110.

¹⁷⁷ Administrative Dispute Resolution Act of 1996, Pub. L. 104-320 (1996), as amended, 5 U.S.C. §§ 571-83 (2013) (enacted in 1990 and reauthorized in 1996).

¹⁷⁸ William J. Clinton's Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 1 Pub. Papers 663, 664 (May 1, 1998).

¹⁷⁹ Attorney General Order OBD 1160.1, "Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques" (Apr. 6, 1995).

¹⁸⁰ Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (2013).

techniques. ADR options for dispute resolution include conflict coaching, facilitated group work, and mediation. ADR also encourages conflict prevention measures, such as team building, conflict management training, assessments, and informal listening and problem solving.

ADR can promote workplace communication, readiness, and resiliency because it can be used to:

- Build and maintain professional relationships
- Work with individual employees and/or groups to bolster engagement, trust, and motivation
- Increase the capacity of all employees to manage and reduce the sources of conflict at the lowest possible level
- Learn about, appreciate, and capitalize on different perspectives
- Advance a high-quality work environment where employees feel valued
- Multiply skill competencies and use work challenges as opportunities to excel
- Help create and develop best practices to foster success, integrity, honesty, and accountability
- Enhance the operation of FEMA and better serve the public

The prevalence of ADR is growing in all sectors of our society. The Supreme Court has ruled that an employer may offer as an affirmative defense that the employer provides ADR services to anticipate and address issues for employees.¹⁸¹

¹⁸¹ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (employer may raise, as an affirmative defense, that employer provided an ADR program to prevent and correct complaints).

ADR is simple and effective. Participation in an ADR process generally does not prevent parties from pursuing a formal grievance or complaint process if no agreement is reached. Deadlines for initiating a formal grievance, an administrative claim (such as EEO and MSPB claims), or a lawsuit are not tolled when parties choose ADR.¹⁸² Processes are generally confidential to encourage frank discussions. Certain information such as sexual harassment, threats of harm to self or others, fraud, or criminal acts, however, may have to be disclosed.

VI. Official Travel – Entitlement to Per Diem (Lodging, Meals, and Incidental Expenses)

Federal employees may be entitled to per diem while on official travel.¹⁸³ The per diem allowance is an established daily amount intended to provide for an employee's daily lodging and meal and incidental expenses while in travel status. The Federal Travel Regulations and agency policies define employee eligibility for the per diem allowance.¹⁸⁴

A. Conditions Precedent for *Per Diem*

FEMA Directive 126-2 provides that a FEMA employee is eligible for a per diem allowance when all of the following conditions have been met:

- Per diem has been authorized on the travel authorization by an Approving Official;
- The employee is performing official travel at least 50 miles from his or her permanent duty station and his or her residence of record; and

¹⁸² See, e.g., *Int'l Union of Elec. v. Robbins & Myers*, 429 U.S. 229 (1976) (holding that use of an alternative procedure or forum other than the EEOC to resolve or pursue remedies under Title VII of the Civil Rights Act does not toll the time limit for contacting an EEO counselor); See also *Stewart v. Memphis Hous. Auth.*, 287 F. Supp. 2d 853 (W.D. Tenn. 2003); See also *Pearson v. Napolitano*, 2012 U.S. Dist. LEXIS 30707 (E.D. La. 2012).

¹⁸³ 5 U.S.C. § 5702.

¹⁸⁴ 41 C.F.R. Subtitle F (Federal Travel Regulation System).

- The employee has been in a travel status for more than twelve hours.¹⁸⁵

¹⁸⁵ FEMA Travel Manual 22-1-1, Chapter 4(Sept. 23, 2015); 41 C.F.R. § 301-11.1.

Examples: Determining Entitlement to Per Diem

The following examples illustrate the application of the rules under the Federal Travel Regulations, DHS Financial Management Policy Manual, and FEMA Directive No. 126-2 for determining whether a FEMA employee is entitled to per diem.

Example 1 – Travel Time Is Less Than 12 Hours: A FEMA employee assigned to Region I uses a fleet vehicle to travel to a JFO in New Hampshire that is 75 miles away from the Regional Office in Boston, Massachusetts. The employee departs from the Regional Office at 8 a.m., arrives at the location at 9:30 a.m., conducts a two-hour meeting, departs at 11:30 a.m., and returns to the Regional Office at 1 p.m. In this case, the employee is ineligible for per diem, as the employee was not in a travel status for at least 12 hours.¹⁸⁶

Example 2 – Determining Distance to Temporary Duty Location: A FEMA employee assigned to the FEMA Region I Regional Office in Boston, Massachusetts, travels with a privately owned vehicle to a JFO in Connecticut. The employee will be in a travel status for more than 12 hours, the Approving Official has authorized per diem in the travel orders, and the employee's residence is more than 50 miles from the JFO. Furthermore, the JFO is 55 miles away from the Regional Office as shown in a standard highway mileage guide, but only 48 miles in straight-line distance from the Regional Office. Per diem would be appropriate in this case, as the Federal Travel Regulations provide that if an employee travels via privately owned automobile, the distance between the point of origin and the destination is as shown in paper or electronic standard highway mileage guides, or the actual miles driven as determined from odometer readings.¹⁸⁷ In this case, that distance is 55 miles.

Example 3 – Complimentary Meals at Hotel: A FEMA employee is on official travel and staying at a hotel that offers complimentary free breakfast. In this case, FEMA will not reduce the amount of per diem. The Federal Travel Regulations provide that a complimentary meal provided by a hotel/motel does not affect an employee's per diem.¹⁸⁸

Example 4 – Inclement Weather Precluding the Return Trip Home from the Temporary Duty Location: A FEMA employee from the Regional Office in Boston, Massachusetts, had been on a 2-month deployment to Texas and returned to Boston via a scheduled flight from Dallas. Unfortunately, Boston was experiencing a heavy blizzard

at the time, with over three feet of snow and heavy icing. Soon after landing, the Governor of Massachusetts issued a travel ban, and it was not possible for the employee to make it back safely to his home north of Boston. There were no taxis available at the airport; busses, the subway, and trains had suspended service. Since there was no safe way possible to get home due to the lack of transportation and dangerous road conditions, the only option was to secure a hotel room located near the airport.

In this case, reimbursement for the one-night hotel would be permissible, even though the employee is from the Regional Office in Boston and located within the official station. The regulation at 41 C.F.R. § 301-11.9 provides that an employee's per diem or actual expense entitlement starts on the day the employee departs his home, office, or other authorized point and ends on the day the employee returns to his home, office, or other authorized point. Here, the employee's per diem allowance had not ceased simply because his airplane had touched the ground at the Boston airport, and the weather conditions prevented his return to his home until the next day. Under the regulation, he is entitled to per diem reimbursement until the day he was able to return to his home, which was the authorized point of departure under his travel authorization.¹⁸⁹

This is unlike the situation where an employee is on official travel and reaches his official station but, on his own, elects to take a hotel room rather than driving home even though it is possible to continue.¹⁹⁰ This is also distinguishable for those cases where employees were never on official travel that took them away from their duty stations.¹⁹¹

¹⁸⁶ FEMA Travel Manual 122-1-1, Chapter 4, p. 36.41 C.F.R. § 301-11.2.

¹⁸⁷ 41 C.F.R. § 301-10.302.

¹⁸⁸ 41 C.F.R. § 301-11.17.

¹⁸⁹ *Mark E. Byers and Pamela S. Diaz*, CBCA No. 2371-TRAV, 2011 CIVBCA LEXIS 137 (May 18, 2011).

¹⁹⁰ *See, e.g., Herman T. Whitworth*, GSBCA 14401-TRAV, 98-2 BCA P 29,804 (Jun. 1, 1998).

¹⁹¹ *See, e.g., Jerry B. Dulworth*, GSBCA 16035-TRAV, et al., 2003-2 BCA (CCH) P 32,312 (Apr. 22, 2003).

B. Determining Maximum Per Diem Allowance

The Federal Travel Regulations provide that a temporary duty (TDY) location determines the maximum per diem rate.¹⁹² If lodging is not available at a TDY location, then the Federal Travel Regulations allow FEMA to authorize or approve the maximum per diem rate for the location where lodging is obtained.¹⁹³

FEMA Directive No. 126-2 provides that employees unable to secure accommodations in the locality specified on their approved travel authorization must find lodging at an alternate location, but that the per diem allowance will remain consistent with that of the original location shown in the travel authorization.¹⁹⁴ Notwithstanding this general policy, an employee may—in the case where the only available lodging is in a different locality with a higher per diem and federal room rate—request to be reimbursed for his “actual expense” for the increased cost of lodging.¹⁹⁵

The cost for meals may be provided by direct procurement by FEMA in lieu of a per diem allowance.¹⁹⁶ If meals are provided directly by FEMA, the traveler must deduct the value of these meals from his or her per diem allowance when submitting travel vouchers.¹⁹⁷ The employee will also not normally be reimbursed for alternate meals where the government directly provides meals unless the employee is unable to consume the government provided meal for bona fide

¹⁹² 41 C.F.R. § 301-11.7.

¹⁹³ 41 C.F.R. § 301-11.8.

¹⁹⁴ FEMA Travel Manual 122-1-1, Chapter 4, *Per Diem and Miscellaneous Travel Expenses*, (September 23, 2015). (“Employees unable to secure accommodations in the locality specified on their approved TA must find lodging at an alternate location. However, the per diem allowance will remain consistent with that of the original location shown on the approved TA. For circumstances beyond an employee's control, see Section III(E)(2)”).

¹⁹⁵ *Id* § III(C)(1)(b) and III(E)(2).

¹⁹⁶ *Bureau of Indian Affairs -- Procurement of Lodgings and Meals for Employees on Temporary Duty*, B-195133 (Jan. 19, 1981).

¹⁹⁷ The value of the food procured for an individual may not exceed the applicable per diem rate. *Id*.

reasons that transcend personal taste or choice, such as medical requirements or an employee's religious beliefs.¹⁹⁸

C. Double and Triple Occupancy

FEMA has the responsibility and the discretionary authority to reduce a per diem allowance rate to an amount less than the maximum authorized when warranted by the circumstances affecting the travel.¹⁹⁹ Under an emergency or major disaster or other unique requirements, FEMA may determine that there is an operational need to maximize available billeting for FEMA response and other personnel, and may require FEMA employees to share lodging accommodations (i.e., double and triple occupancy).²⁰⁰

FEMA employees sharing a room at double or greater occupancy will be limited to reimbursement of one-half or appropriate share of the double or greater occupancy rate (e.g., those with triple occupancy will be limited to a third of the rate).²⁰¹

The following comprise the guidelines from the FEMA Chief Financial Officer for shared lodging:

- Authorizing officials should issue travel authorizations that specifically enumerate the requirement for shared lodging.
- Shared lodging arrangements must be same-sex.

¹⁹⁸ Howard L. Magnas - *Per Diem Allowance -- Meals Furnished at Conference*, B-231703 (Oct. 31, 1989).

¹⁹⁹ FEMA Chief Financial Officer Bulletin 152, *Shared Lodging for Disasters or Other Unique Requirements* (Oct. 31, 2012); Laurie S. Meade, Jr. - *Official Travel – Per Diem – Shared Lodgings*, B-222155 (Jul. 25, 1988).

²⁰⁰ Chief Financial Officer Bulletin 152; FEMA Travel Manual 122-1-1, Chapter 4, *Per Diem and Miscellaneous Travel Expenses*, (September 23, 2015) III(G)(5)(a); 41 C.F.R. § 301-11.13.

²⁰¹ Chief Financial Officer Bulletin 152.

- Employees should be given the opportunity to select their shared lodging partner(s) as practical.²⁰²

FEMA is not required to establish identical maximum expense reimbursement rates for different employees performing the same or similar travel assignments, but reimbursement rates should be reasonably fixed under uniform policies applicable to all employees.²⁰³ As such, FEMA authorizing officials may exempt an employee from shared lodging for reasonable cause on a case-by-case basis (such as a medical problem).²⁰⁴

Example: Double Occupancy

A catastrophic hurricane impacts the State of New York, causing widespread devastation and flooding. The President declares a major disaster and the FCO establish a JFO near New York City. To support response and recovery efforts, FEMA activates 500 Disaster Reservists to work out of the JFO. Due to the paucity of lodging accommodations and size of the response and recovery effort, FEMA reduces the per diem rate by one-half and requires all Disaster Reservists to have double occupancy with another Disaster Reservist, placing such a requirement in the travel authorization.

Disaster Reservist Joe decides not to share hotel accommodations as a matter of personal preference, and seeks a higher per diem rate on the basis of the theory that the shared lodging policy is invalid. The FCO properly denies the claim.

D. Dual Lodging

In special and unusual circumstances, employees may require reimbursement for dual lodging while on official travel.²⁰⁵ Dual

²⁰² Howard L. Magnas - *Per Diem Allowance -- Meals Furnished at Conference*, B-231703 (Oct. 31, 1989).

²⁰³ *Id.*; *Savings and Loan Examiners*, B-198008 (Sep. 17, 1980).

²⁰⁴ FEMA Chief Financial Officer Bulletin; *Laurie S. Meade, Jr. -- Official Travel -- Per Diem -- Shared Lodgings*, B-222155 (Jul. 25, 1988).

²⁰⁵ *Id.*; *Savings and Loan Examiners*, B-198008 (Sep. 17, 1980).

lodging may occur when an employee has obtained lodging at two different lodging locations on the same day. For example, dual lodging may occur when an employee is on official travel at a TDY location (primary worksite) and, due to mission requirements, is required to travel to a second TDY location (secondary worksite).

If an employee has lodging at his or her primary worksite and is unable to check out of the primary worksite lodging without incurring substantial cost or penalties, the employee may be reimbursed for lodging at the primary worksite in addition to lodging at the secondary worksite. Dual lodging requires specific authorization.

Example: Dual Lodging

Example of Permissible Dual Lodging: A FEMA employee is on official travel to JFO (primary worksite) in City Y. Due to mission requirements, he is directed by his supervisor at 5 p.m. to travel to a second TDY location in City Z (second worksite is 100 miles away from the JFO). The employee checks out of his primary worksite lodging after being notified of the need to travel to City Z, but the deadline for cancelling the room was 4 p.m. and the employee must pay for the daily rate. The employee checks into lodging at the secondary worksite. In this case, the FCO may authorize dual lodging.

Example of Impermissible Dual Lodging: A FEMA employee is on official travel to a JFO (primary worksite) in City Y. This employee is also a member of the Regional IMAT and scheduled to go on official travel to participate for a week-long training event in Washington, DC (second worksite), where he will incur additional lodging expenses. Following the week of training, he will return to the JFO. The employee requests to keep his primary worksite lodging during the week's exercise to avoid the inconvenience of checking out of his primary worksite lodging and storing his personal items at the JFO while he is away for a week. Based on this information, the Disaster Recovery Manager may not authorize dual lodging.

E. Staying at a Second Home or with a Family or Friend While on Official Travel

The per diem allowance for employees on official travel and lodging in a private residence will depend upon whether the residence is owned by the employee, owned by a friend or relative of the employee, or owned by neither the employee nor a friend or relative.

A FEMA employee otherwise eligible for a per diem allowance that chooses to lodge at his privately owned secondary residence is eligible for the meals and incidental expenses (M& IE) portion of his per diem entitlement but is not eligible for any lodging costs.²⁰⁶ The agency, however, cannot mandate that an employee lodge in a privately owned secondary residence.²⁰⁷

A FEMA employee otherwise eligible for a per diem allowance that chooses to lodge at the residence of friends or relatives may be reimbursed lodging expenses for additional costs the host incurs in accommodating the employee only if the costs can be substantiated and FEMA determines them to be reasonable.²⁰⁸ In such instances, the additional costs must be substantiated (with receipts) and authorized by the FEMA approving official. Should the employee claim that lodging at a private source was not secured as a result of a personal

²⁰⁶ 41 C.F.R. § 301-11.12(b)(1) (“You will not be reimbursed for any lodging expenses for staying at your personally-owned residence or for any real estate expenses associated with the purchase or sale of a personal residence at the TDY location...”); *Neil I. Messer*, GSBGA 16975-TRAV, 16988-TRAV, 2007-1 B.C.A. (CCH) P33, 454 (Nov. 29, 2006) (“Our conclusion is consistent with those cases holding that when an employee travels on TDY and stays in a house the employee owns at the TDY location, the employee is entitled to at least the M & IE portion of the per diem allowance.”).

²⁰⁷ *Daniel Brady*, GSBGA No. 16580-TRAV, 2005-1 B.C.A. (CCH) P32, 908 (Feb. 22, 2005) (“We are aware of no authority that would permit an agency to require an employee to stay with friends, relatives, or even at a second residence in order to lower TDY costs.”).

²⁰⁸ 41 C.F.R. § 301-11.12(a)(3) (“You may be reimbursed for additional costs your host incurs in accommodating you only if you are able to substantiate the costs and your agency determines them to be reasonable. You will not be reimbursed the cost of comparable conventional lodging in the area or a flat “token” amount.”); *Javier R. Hernandez*, GSBGA No. 15338-TRAV, 2000-2 B.C.A. (CCH) P31,139 (Oct. 11, 2000); *Robert J. Gofus - Reimbursement for Noncommercial Lodging*, B-223805 (Mar. 20, 1987); *Jerome R. Serie*, B-219477 (Feb. 11, 1986); *Decision of the Comptroller General*, B-193382 (Feb. 16, 1979).

relationship, but a commercial transaction, it is incumbent upon the employee to establish that the lodging was secured as a result of genuine business transaction.²⁰⁹ The best evidence that noncommercial lodging was procured through an arms-length business transaction is the demonstration of a continuing practice of the homeowner renting the room for an established price.²¹⁰

²⁰⁹ *Theresa E. Kanter*, GSBCE No. 16770-TRAV, 2006-1 B.C.A. (CCH) P33,224; 2006 GSBCE LEXIS 32 (Feb. 24, 2006) (“the underlying concern when an employee secures lodging from a private source is ‘whether the expenses claimed were actually spent for the lodgings or were merely transfers of money arranged for the purpose of supporting a claim against the Government and thereby enriching both the employee and the host’” citing *Guy E. Mercier*, GSBCE No. 13795-RELO, 97-1 B.C.A. (CCH) P28,925; 1997 GSBCE LEXIS 85 (Mar. 20, 1997)).

²¹⁰ *Id.*; *Jerome R. Serie*, B-219477 (Feb. 11, 1986); FEMA Directive 126-2, *supra* note ___, § III(G)(4).

**Example: Disaster Reservist Staying at Residence
within 50 Miles of the Worksite**

A Disaster Reservist maintains two residences in Massachusetts, one in Cape Cod and one in Springfield. The Springfield address is her mailing address and her address in FEMA's files. Following a Presidential declaration for a severe storm, the Disaster Reservist is deployed to Greenfield, Massachusetts, to perform duties at a JFO. While working in Greenfield, the Disaster Reservist lives in her Springfield residence, which is 38 miles from Greenfield.

The Disaster Reservist asserts that her primary residence is on Cape Cod (which is more than 50 miles from Greenfield) and requests per diem. If not approved, she alternatively requests that FEMA approve her daily transportation expenses to travel back and forth between her residence in Springfield and the JFO in Greenfield.

FEMA appropriately denies both requests. First, the employee is not entitled to per diem, as she is staying at her primary residence as listed in FEMA files, and this location is within 50 miles of the JFO in Greenfield. Second, the employee is not entitled to local travel reimbursement, as Disaster Reservists are not entitled to travel reimbursement for the costs to commute back and forth from the JFO if they live within 50 miles of the JFO.²¹¹

F. Actual Expenses

"Actual expense" reimbursement is an authorized payment of actual expenses incurred by an employee while on official travel that may occur when special or unusual circumstances beyond the employee's control preclude an employee from obtaining lodging and/or M& IE using the established per diem rate.²¹² The Federal Travel Regulations and FEMA policy provide that actual expense reimbursement is warranted when:

²¹¹ *In re Facchini*, CBCA No. 2861-TRAV, 2012 CIVBCA LEXIS 261 (Oct. 4, 2012).

²¹² 41 C.F.R. § 300-3.1.

- Lodging and/or meals are procured at a prearranged place such as a hotel where a meeting, conference,²¹³ or training session is held;
- Costs have escalated because of special events (e.g., missile launching periods, sporting events, World's Fair, conventions, natural or manmade disasters); lodging and meal expenses within prescribed allowances cannot be obtained nearby; and costs to commute to/from the nearby location consume most or all of the savings achieved from occupying less expensive lodging;
- The TDY location is subject to a presidentially declared disaster and FEMA has issued a blanket actual expense authorization for the location;
- Because of mission requirements; or
- Reasons justified and approved by the FEMA approving official and/or FEMA Chief Financial Officer.²¹⁴

The appropriate FEMA approving official may approve actual expenses up to 150% of the established per diem rate, and the FEMA Chief Financial Officer may approve actual expenses greater than 150% and up to 300%.²¹⁵ FEMA does not have the authority to increase the approval amount above 300% of the established per diem rate.²¹⁶

A FEMA employee must request actual expense reimbursement on the travel authorization before travelling, and a FEMA approving official must authorize the actual expense reimbursement before travel commences.²¹⁷ The FEMA approving official must document the reasons for actual expense reimbursement, and the documentation

²¹³ FEMA policy is that, in the event of a conference, conference planners may authorize attendees an additional 25% over the established per diem rate for the location of the conference. The approval for the increased rate must be noted on the TA and supported by a conference itinerary. FEMA Travel Manual 1221-1,

²¹⁴ 41 C.F.R. § 301-11.300; FEMA Travel Manual 1221-1,

²¹⁵ FEMA Travel Manual 1221-1,

²¹⁶ *Id.*; 41 C.F.R. § 301-11.303. FEMA Travel Manual 1221-1.

²¹⁷ *Id.*

must show that multiple hotels were contacted (i.e., the names and rates at each hotel) and that no lodging was available within the approved federal government rate.²¹⁸ If an employee has already commenced travel and special and unusual circumstances exist that require actual expense reimbursement, the employee must obtain written approval from the FEMA approving official and file an amended travel authorization after approval is complete.²¹⁹ If an employee is authorized to use actual expense reimbursement, an employee has certain itemization and documentation requirements set forth in FEMA Travel Manual 122-1-1.²²⁰

Example: Actual Expense

FEMA is operating a JFO in Town, VT, to coordinate the response and recovery efforts to a flooding event for which the President declared a major disaster under the Stafford Act. Approximately 50 Disaster Reservists assigned to the JFO are staying at the Marlon Residence Hotel and began their stay approximately 30 days ago when the JFO first opened. In the coming week, there will be a large golf tournament in town, which has caused the Marlon Residence Hotel to raise its rates significantly so that there are no rooms available at the federal lodging rate. The FEMA staff does not want to move out of the Marlon Residence Hotel and requested that the FCO approve “actual expenses.” The actual expense request would involve an increase from the federal lodging rate of \$85 to a daily rate of \$150 for the seven days of the golf tournament.

The FCO calls National Travel and requests a hotel survey of available hotels in the commuting area of the JFO. National Travel completes the survey and informs the FCO that there are more than 50 available rooms in the commuting area at the federal rate of \$85. Based on this information, the FCO properly denies the request for actual expenses.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ FEMA Travel Manual 122-1-1.

1. Emergency Lodging

Under certain, extremely rare circumstances, FEMA may use appropriated funds to pay an employee's expenses for lodging within the employee's official station despite the general prohibition against paying such expenses. Such payments for lodging can only be authorized in extreme emergencies that meet the following conditions:

- The President has declared or is expected to imminently declare an emergency or major disaster under the Stafford Act in the geographical area where an employee performs Stafford Act response duties;
- The emergency or major disaster presents an immediate threat to life and property, and FEMA is carrying out its statutory response authorities under the Stafford Act to address those threats;
- The employee's physical presence at the duty location is essential for FEMA operations necessary to respond to the emergency or major disaster; and
- Extreme conditions render it impossible or perilous for the employee to travel between his or her home and place of duty, raising significant risk that the employee would not be able to return to the place of duty after returning home.

If all of the foregoing conditions are present, the Associate Administrator for Response and Recovery (or Deputy), the Assistant Administrator for Response (or Deputy), or the applicable Regional Administrator (or Deputy) may authorize emergency lodging by issuing a written authorization that certifies the presence of the emergency conditions and identifies the employees for whom lodging is authorized. The official who issued the authorization must review and reassess the authorization every 24 hours. Authorizations for emergency lodging must not exceed the minimum cost necessary to sustain response operations and must not extend beyond the duration of the emergency conditions.

FEMA's procedures for approving emergency lodging are based, in large part, on a Comptroller General decision on this issue in a case involving the question of "whether it is appropriate for [FEMA] to reimburse, from the President's Disaster Relief Fund, the hotel costs of 17 workers whose services were essential to performing urgent disaster relief duties pursuant to the Stafford Act."²²¹ Under the facts of the case, the President had declared a major disaster for the District of Columbia and Maryland on January 11, 1996, due to winter storms, and five other disaster declarations were imminent for winter storms in other states. Another severe storm was predicted to begin later in the day on January 11. Because of the ongoing and imminent disaster response activity, the FEMA Director determined that it was essential for FEMA's response activities to continue through the night of January 11 and into the next day. The FEMA Director, therefore, activated the then Emergency Support Team at midday on January 11 to serve as the federal government's mechanism for coordinating the entire federal government's response to the severe winter storm, which was predicted to begin later on January 11. The challenge FEMA faced was that the winter storm conditions would have prevented 17 members of the 30-member Emergency Support Team from returning to duty at FEMA headquarters if they went home between duty shifts.²²² FEMA's solution was to authorize those 17 employees to obtain lodging at a hotel adjacent to FEMA headquarters.

In reviewing the matter, the Comptroller General decided that the particular facts of this situation warranted an exception to the general prohibition against payment from appropriated funds of an employee's lodging expenses at the employee's official station.²²³ The Comptroller General found that, under the particular circumstances of a major winter storm disaster with immediate danger to life and property, FEMA could reasonably determine that providing lodging for these 17 Emergency Support Team members was necessary to fulfill disaster relief duties because those employees were essential disaster workers, and it would have been impossible for them to travel through the winter storm from

²²¹ *In re Carey*, B-271666, 1996 U.S. Comp. Gen. LEXIS 235 (Apr. 24, 1996).

²²² The remaining 13 members of the Emergency Support Team reportedly had access to four-wheel-drive vehicles that allowed them to traverse the snow-covered roads or lived near the Washington metropolitan area's underground subway stations such that they could commute to FEMA headquarters relatively unimpeded. *Id.* at *3-4.

²²³ *Id.* at *5-7.

home to their duty station.²²⁴ Thus, the FEMA Director could provide lodging near FEMA headquarters for those employees for the night of the storm.²²⁵

FEMA’s Travel Policy Manual, FEMA Manual 121-1-1, Chapter 7, “Emergency Food & Lodging,” describes FEMA’s policy and procedures for providing emergency lodging and emergency food for employees directly supporting FEMA’s response to emergencies or major disasters declared by the President pursuant to the Stafford Act and for providing an allowance to reimburse employees for any lodging and food costs they incur directly.²²⁶

Examples – Emergency Lodging

Example of Impermissible Use – Employee Fatigue. The Regional Administrator has activated the FEMA Region I Regional Response Coordination Center (RRCC) to Level I to coordinate the federal response to severe storms and tornadoes which impacted two counties in western Massachusetts and for which the President declared an emergency under the Stafford Act. The RRCC is located in Maynard, Massachusetts, which is less than 50 miles from the Regional Office in Boston, and is in the eastern portion of the state in an area unaffected by the severe storms and tornadoes. Many of the employees staffing the RRCC live over 50 miles from the RRCC and are working 12-hour shifts, which has raised concerns over employee safety in travelling back and forth from their residences and the RRCC because of fatigue.

Emergency lodging would be not appropriate, as there are not conditions rendering it impossible or perilous for the employees to travel between their home and the RRCC, and the conditions do not raise a significant risk that the employees would be unavailable to perform emergency response duties. The fact that an employee is fatigued from working long hours is not sufficient by itself to meet these elements.

Example of Permissible Use – Designated Watch Employee. The Regional Administrator has activated the FEMA Region I RRCC to Level

²²⁴ *Id.* at *6-7.

²²⁵ *Id.*

²²⁶ FM 121-1-1, Travel Policy Manual

I to coordinate the federal response to a hurricane that is currently impacting Massachusetts and for which the President has declared an emergency under the Stafford Act. As part of this activation, the Regional Administrator deployed the Regional IMAT to the Massachusetts Emergency Operations Center in Framingham, Massachusetts, which is also within 50 miles of the Boston Regional Office.

The IMAT's presence at the Massachusetts Emergency Operations Center is necessary for FEMA to perform statutorily required disaster response and relief duties, and these duties are directly related to the protection of lives and property from imminent danger and directly support RRCC activation.

The presidentially declared emergency—a hurricane—impacts the area of the IMAT members' duty station and presents an immediate threat to life and property. To the extent that the hurricane conditions render travel between the IMAT members' homes and duty station impossible or perilous, the Regional Administrator could reasonably determine that all conditions necessary for emergency lodging have been met and approve emergency lodging for the affected IMAT members.

2. Delay or Interruption of Personal Travel Plans

There can be situations where the need to perform official duties causes delays or cancellation of personal travel plans and results in increased personal travelling expenses to the employee. In these cases, there is no legal basis for FEMA to reimburse those additional costs.²²⁷

3. Making Travel Reservations

The Federal Travel Regulations require federal employees to “use the eTravel Service when your agency makes it available to you. Until then, you must use your agency's existing Travel Management Service (TMS) to make your travel arrangements.”²²⁸ The Federal Travel Regulations also provide that, where an employee fails to use either the eTravel Service or

²²⁷ *Alexander Baumgarten, M.D.*, B-252599 (Aug. 5, 1993); *Matter of Rod W. Schmit*, GSBGA No. 16146-TRAV, 2004-1 B.C.A. (CCH) P32,422 (Aug. 6, 2003).

²²⁸ 41 C.F.R. § 301-50.3.

its agency's TMS, he or she will have to bear responsibility for any additional costs, including service fees, cancellation penalties, or other additional costs (e.g., higher airfares, rental car changes, or hotel rates).²²⁹ For FEMA employees, this means making lodging and other travel reservations through the Concur travel system or FEMA Travel Management Center (TMC).²³⁰

Example: Liability of Employee That Does Not Use Concur or TMC

An employee assigned to Region I Regional Office in Boston is ordered to deploy to a JFO in New Hampshire, which is more than 50 miles from both his home and the Regional Office. Upon receiving the order, he asks an employee from the Regional Office's Mission Support Division whether he needs to make the reservation through Concur or TMC, and the employee tells him that this is not required. Based upon this representation, the employee calls a hotel near JFO and makes a reservation but does not make the reservation through Concur or the TMC.

At 8:00 a.m. on the date of scheduled departure, he drives to the JFO (which was approved under the travel authorization). Upon arrival at the hotel later that evening, the federal employee discovers that the hotel has raised the rates above the federal per diem rate, as the room was not reserved through Concur or the TMC. The employee, in turn, checks out of his room the next day and into another hotel where he could obtain the federal rate. He requests reimbursement for his lodging expenses on the first night that exceeded the federal lodging rate. FEMA properly denied the request because the employee did not schedule the travel through Concur or TMC.²³¹ It makes no difference that the employee detrimentally relied upon the erroneous advice from the employee in the Mission Support Division.

²²⁹ 41 C.F.R. § 301-50.5.

²³⁰ⁿFEMA Travel Manual 122-1-1 (September 23, 015).

²³⁰ *Nicholas Kozauer*, CBCA No. 2525-TRAV, 2011 CIVBCA 335 (Dec. 20, 2011).

VII. Tax Implications of Travel Expenses Reimbursement and Per Diems

A. Overview of the Applicable Law Regarding the Reimbursement of Travel Expenses

FEMA employees, especially Reservists, are often required to deploy far from home for significant periods of time. For the purposes of Section 162(a)(2) of the Internal Revenue Code, a taxpayer's "home" is generally considered to be located at (1) the taxpayer's regular or principal (if more than one regular) place of business, or (2) if the taxpayer has no regular or principal place of business, then at the taxpayer's abode in a real and substantial sense.²³²

If the taxpayer comes within neither of these categories, then the taxpayer is considered to be an itinerant whose "home" is wherever the taxpayer happens to work.²³³ Generally, an employee's regular work location is a location at which the employee works or performs services on a regular basis, whether or not the employee works or performs services at that location every week or on a set schedule.²³⁴

A taxpayer may be away from home on a temporary, as opposed to an indefinite or permanent, work assignment away from the taxpayer's regular or principal place of employment.²³⁵ Employment is temporary for this purpose only if its termination can be foreseen within a reasonably short period of time.

²³² 26 U.S.C. § 162(a); 26 C.F.R. § 1.262-1, 1.262-2. A taxpayer's abode in a "real and substantial sense" is a residence where the taxpayer maintains certain personal and business connections; Rev. Rul. 73-529, 1973-2 C.B. 37.

²³³ See Rev. Rul. 73-529, 1973-1 C.B. 2; Rev. Rul. 60-189, 1960-1 C.B. 60.

²³⁴ See Rev. Rul. 90-23, 1990-1 C.B. 28 (obsolete on other grounds by Rev. Rul. 99-7).

²³⁵ See Rev. Rul. 54-147, 1954-1 C.B. 51; *Norwood v. Commissioner*, 66 T.C. 467 (1976). In *Norwood*, a welder was employed at a temporary job location for five months and, after that, had a number of jobs at the same site for over a period of two years. The court held that the first assignment was temporary and that the expenses related to that time period were deductible. However, once the taxpayer was retained and not let go with the rest of the crew, the job became of indefinite duration, as it was reasonable for the taxpayer to assume that he would be employed there for some time.

Section 162(a)(2) allows a deduction for ordinary and necessary business expenses, which include travel expenses while away from home in pursuit of a trade or business.²³⁶ A taxpayer may be in the “trade or business” of being an employee.²³⁷ In order to be “away from home,” a taxpayer must be far enough away to require sleep or rest.²³⁸ Section 162(a) provides that a taxpayer shall be treated as not being temporarily away from home during any period of employment that exceeds one year.

Revenue Ruling 93-86 holds that, if the employment is realistically expected to last (and does in fact last) for one year or less, the employment is temporary, unless facts and circumstances indicate otherwise. If, at some point during that year, the expectation as to the duration of the employment changes to exceed one year, the employment will be treated as temporary only until the date at which the employee’s realistic expectation changes, in the absence of facts and circumstances indicating otherwise. If the employment lasts for more than one year, the employment is not temporary and the taxpayer’s tax home has switched to the new location.²³⁹

Case law regarding whether or not employment is temporary or indefinite remains relevant for purposes of determining whether employment for periods under one year is temporary. Further, case law determining whether and when the tax home of the taxpayer has shifted to what was termed the temporary location, making the original location no longer the taxpayer’s tax home, and whether a series of assignments should be considered as one assignment or separate assignments, remains important.

A taxpayer might be said to change his tax home if there is reasonable probability known to him that he may be employed for a long period of time at his new station. What “constitutes a long period of time varies with circumstances surrounding each case. If such be the case, it is reasonable to expect the taxpayer to move his permanent abode to

²³⁶ *Id.*

²³⁷ 26 U.S.C. § 162(a)(2).

²³⁸ See *Primuth v. Commissioner*, 54 T.C. 374 (1990).

²³⁹ See *United States v. Correll*, 389 U.S. 299 (1967).

his new station, and thus avoid the double burden that the Congress intended to mitigate.”²⁴⁰

The determination of whether a job location is temporary or indefinite is a question of facts and circumstances. The court looks at such factors as: length of time actually spent away from home; how long the employment is reasonably expected to last; the degree of certainty that it will come to an end in a reasonably short period; the strength of the taxpayer’s business, personal, and economic ties with his original home; the extent that the living expenses are duplicated; and the foreseeable economic cost of moving one’s home and family to the new location and back again.²⁴¹

Brief interruptions of work at a particular location do not, standing alone, cause employment that would otherwise be indefinite to become temporary.²⁴² In *Blatnick v. Commissioner*, the taxpayer had a three-week break due to inclement weather at his remote job site. The court found that the taxpayer’s employment was indefinite despite this break and held that his travel expenses were not deductible.²⁴³ The IRS has not published guidance regarding whether, or to what extent, a break in service at a work location will affect the determination that a taxpayer is or is not employed in a single location for one year or less.²⁴⁴

An employee’s transportation expenses incurred in going between the employee’s residence and a work location not involving overnight travel generally are nondeductible personal commuting expenses rather than deductible business expenses. There are, however, three exceptions to this rule.²⁴⁵ One of these exceptions is that if a taxpayer has one or more regular work locations away from the taxpayer’s residence, the taxpayer may deduct daily transportation expenses

²⁴⁰ *Harvey v. Commissioner*, 283 F. 2d 491, 495 (9th Cir. 1960), *rev’g* 32 T.C. 1368 (1959).

²⁴¹ *Blatnick v. Commissioner*, 56 T.C. 1344, 1348

²⁴² *Id.*

²⁴³ *See Blatnick v. Commissioner*, 56 T.C. 1344, 1348 (1971) (brief interruptions of work at a particular location do not, standing alone, cause employment that would otherwise be infinite to become temporary);

²⁴⁴ Rev. Rul. 99-7, 1997-5 I.R.B. 4

²⁴⁵ *Id.*

incurred in going between the taxpayer's residence and a temporary work location in the same trade or business, regardless of the distance.

CHAPTER 11
Ethics
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I. Introduction

FEMA deals with individuals when they are at their most vulnerable and is entrusted with marshaling the vast resources of the federal government in support of state, tribal, and local efforts when an emergency or major disaster occurs. FEMA must maintain the public's trust in order to be successful, and its employees must be above reproach in carrying out FEMA's mission.

Federal employees have obligations to both the federal government and to the public to uphold the highest standards of ethical behavior. As such, each FEMA employee must comply with the federal ethics laws and regulations including the Ethics in Government Act of 1978,¹ criminal conflicts of interest,² and regulations promulgated by the Office of Government Ethics (OGE).³

These ethics laws apply to all FEMA employees, including Reservists and Local Hires despite their temporary nature as FEMA employees. OGE regulations state that "Status as an employee is unaffected by pay or leave status...or by the fact that the individual does not perform official duties on a given day."⁴ The temporary employment status of Local Hires, Reservist employees and Special Government Employees (SGEs), and whether they are activated or not, does not exempt them from federal ethics laws and regulations.

In 1989, President George H.W. Bush signed an executive order setting out 14 basic principles of ethical conduct for employees of the federal

¹ 5 U.S.C. app. § 101 *et seq.*

² 18 U.S.C. § 201 *et seq.*

³ Title 5 of the Code of Federal Regulations (C.F.R.) Parts 2634-2641.

⁴ 5 C.F.R. § 2635.102(h).

executive branch.⁵ This chapter will focus on these ethical principles, the ethics laws and regulations, and their interpretation. This chapter will also provide examples of how a FEMA employee can avoid the civil and criminal penalties that may apply for violating these ethical standards. Of course, if employees have a specific ethics question, they should contact their certified FEMA Ethics Counselor(s), which contact information may be found at:

<https://intranet.fema.net/org/occ/Lists/Ethics%20Counselor%20list/AllItems.aspx>

In addition, all new FEMA employees must receive an initial one-hour ethics orientation within 90 days from the time they begin to work for the agency.⁶ Thereafter, FEMA employees who are required to file public or confidential financial disclosure reports must receive one hour of ethics training annually as required by the regulations.⁷ All other FEMA employees may be required to receive one hour of ethics training in accordance with the agency-wide annual written plan for ethics training.⁸ For example, in 2012, FEMA required all of its employees to take the online independent study course IS-33.12 at <http://training.fema.gov/is/> in lieu of other courses or trainings.

⁵ Exec. Order. No. 12674 (1989), 3 C.F.R., 1989 Comp., p. 215; 54 Fed. Reg. 15159 (April 14, 1989), as modified by E.O. 12731, 55 FR 42547, 3 C.F.R., 1990 Comp., p. 306. 54 Fed. Reg. 15159, (April, 12 1989), as modified by Exec. Order No. 12731, 3 C.F.R.1990 Comp., p. 306. 57 Fed. Reg. 35006, (August 7, 1992), 57 Fed. Reg. 58399 (December 10, 1992).

⁶ 5 C.F.R. § 2638.701.

⁷ 5 C.F.R. §§ 2638.704 and 2638.705, respectively.

⁸ 5 C.F.R. § 2638.706, mandating that agencies have a written plan for annual ethics training.

FEMA Certified Ethics Counselors

Beginning in 2011, FEMA OCC instituted a program to train and certify additional attorneys to be Adjunct Ethics Counselors with ethics advice as a collateral duty. The purpose of this action was to ensure that more OCC attorneys received specialized training and certification in ethics and to broaden significantly FEMA employee access to ethics advice. Today, all those attorneys in OCC who are certified Ethics Counselors can issue ethics opinions on behalf of FEMA. Ethics advice is now more accessible to FEMA employees, regardless of whether the employee works in FEMA headquarters, in one of the 10 regional offices, or in one of the many field offices throughout the country. Adjunct Ethics Counselors include the Regional Counsel, the Deployable Field Counsel, and many of the attorneys now embedded with each FEMA office. The current list of Ethics Counselors can be found at: <https://intranet.fema.net/org/occ/Lists/Ethics%20Counselor%20list/AllItems.aspx>

II. Ethics Education Requirements for all FEMA Employees⁹

In addition, all new FEMA employees must receive an initial one-hour ethics orientation within 90 days from the time they begin to work for the agency.¹⁰

Thereafter, FEMA employees who are required to file public or confidential financial disclosure reports must receive one-hour of ethics training annually as required by the regulations.¹¹ All other

⁹ Exec. Order. No. 12674 (1989), 3 C.F.R., 1989 Comp., p. 215, as modified by Exec. Order. No. 12731, 3 C.F.R., 1990 Comp., p. 306. 54 Fed. Reg. 15159, (April, 12 1989), was modified by Exec. Order No. 12731, 3 C.F.R. 1990 Comp., p. 306. 54 Fed. Reg. 15159, (April, 12 1989). which directs the Office of Government Ethics (OGE) to issue standards of conduct for executive branch employees. Part 2635 of Title 5 of the Code of Federal Regulations implemented these standards. *See* 57 Fed. Reg. 35006 (August 7, 1992).

¹⁰ C.F.R. § 2638.701.

¹¹ .S. Office of Government Ethics Education Requirements for Federal Employees were revised in 2016, at 5 C.F.R. Part 2638, Subpart C, and OGE Legal Advisory LA-16-09, November 10, 2016

FEMA employees are encouraged to take one hour of ethics training on line in accordance with the agency-wide annual written plan for ethics training.¹⁰

FEMA Office of the Chief Human Capital Officer (OCCHCO) employment offers for new FEMA employees must now include a statement regarding FEMA's commitment that all FEMA employees comply with all federal ethics laws and regulations, including conflict of interest laws, post-federal employment restrictions, and prohibitions on FEMA employees representing individuals before the federal government, and adhering to Federal Standards of Ethical Conduct for Employees of the Executive Branch, at 5 C.F.R. Part 2635, Sections 2635.101-.902].

A. Ethics Education for FEMA Employees¹²

Federal ethics education requirements for federal employees were updated in 2016, including requiring that federal agency human capital offices must now include a statement regarding agency commitment to comply with all federal ethics laws and regulations to any individuals who apply for federal agency employment.¹³ Additionally, new federal supervisors must take ethics training for supervisors within one year of their appointment as a federal supervisor.¹⁴

III. Basic Obligations of Public Service and the 14 Ethical Principles

To ensure public confidence in the integrity of the federal government, Executive Order 12674 (as amended) forms the framework for the ethical behavior required and expected of all executive branch employees.¹⁵ As a condition of public service, FEMA

¹³ 5 C.F.R. §2638.303.

¹⁴ 5 C.F.R. § 2638.306.

¹⁵ The federal ethics rules are contained in Executive Orders 12674, 12731, and 13490; sections 201 to 209 of Title 18 of the United States Code (U.S.C.); and part 2635 of Title 5 of the Code of Federal Regulations. The OGE is responsible for ensuring that executive

employees are expected to adhere to these fundamental principles of ethical behavior.¹⁶

- Public service is public trust, requiring employees to place loyalty to the U.S. Constitution, the law, and ethical principles above private gain.
- Employees shall act impartially and not give preferential treatment to any private organization or individual.
- Employees shall protect and conserve federal property and shall not use it for other than authorized activities.
- Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official governmental duties and responsibilities.
- Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
- Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or disability.
- Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as federal, state, or local taxes that are imposed by law.
- An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or

branch employees maintain the highest ethical standards identified in these laws and regulations.

¹⁵ The federal ethics rules are contained in Executive Orders 12674, 12731, and 13490; sections 201 to 209 of Title 18 of the United States Code; and part 2635 of Title 5 of the Code of Federal Regulations. The OGE is responsible for ensuring that executive branch employees maintain the highest ethical standards identified in these laws and regulations.

conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

- Employees shall endeavor to avoid any actions creating the appearance that the employees are violating the law, the Standards of Ethical Conduct for Employees of the executive branch contained in Part 2635 of Title 5 of the Code of Federal Regulations, any Department of Homeland Security (DHS) supplemental ethics regulations, or Executive Order 12674.¹⁷
- Employees shall not hold financial interests that conflict with the conscientious performance of duty.
- Employees shall not engage in financial transactions using nonpublic government information or allow the improper use of such information to further any private interest.
- Employees shall put forth honest effort in the performance of their duties.
- Employees shall make no unauthorized commitments or promise of any kind purported to bind the government.
- Employees shall not use public office for private gain.

IV. Criminal Ethics Laws

While the ethical principles and standards of ethical conduct contained in 5 C.F.R. Part 2635 are applicable only to executive branch employees, the criminal ethics laws contained in Title 18 of the United States Code apply to all federal employees. This subpart will discuss each of these criminal ethics laws.

¹⁷ As of the time of this writing, the Department of Homeland Security had not promulgated any supplemental ethics regulations.

A. Bribery of Public Officials Prohibited (18 U.S.C. § 201)

This statute prohibits a public official, including a federal employee, from directly or indirectly receiving or soliciting anything of value in exchange for being influenced in the performance or nonperformance of any official act, including giving testimony, or in exchange for committing fraud.

B. Restrictions on Compensated Representational Activities (18 U.S.C. § 203)

This statute prohibits a federal employee, while in a duty or non-duty status, from seeking or accepting compensation for representational services (rendered either personally or by another) before a federal court or agency in a particular matter in which the United States is a party or has a direct and substantial interest.

There are limited exceptions, such as for representing oneself or one's immediate family or a person or estate for which the employee acts as a fiduciary, but not where the employee has participated officially or has official responsibility.

C. Restrictions on Acting as an Agent or Attorney (18 U.S.C. § 205)

This statute prohibits a federal employee, while in a duty or non-duty status, from acting as an agent or attorney for anyone before a federal court or agency, whether compensated or not, when the United States is a party or has a direct and substantial interest in the case or matter.

There are some limited exceptions to this prohibition. The first exception allows an employee, when not compensated, to represent: (1) any person subject to loyalty, disciplinary, or other personnel matters; and (2) a not-for-profit organization in certain matters, when the majority of the organization's members are current federal employees, their spouses, or their dependent children, such as a federal agency credit union board of directors, or an agency employee association. This exception does not apply when the organization is a party to the judicial or administrative proceeding or when the claim is

against the United States or involves a federal grant or contract (or other agreement) in which the organization or group would receive the federal funds.

The second exception allows an employee to represent, with or without compensation, oneself or one's immediate family or a person or estate for which the employee acts as a fiduciary. This exception does not apply when the employee has participated personally and substantially as a federal employee or where the employee has official responsibility.

D. Post-Government Employment Restrictions (18 U.S.C. § 207)

This statute imposes restrictions on certain communications and appearances that employees may make as a representative of a third party (e.g., a FEMA and/or DHS contractor or grantee) back to the federal government, including any FEMA and/or DHS contract or grant they may have personally and substantially worked on as a FEMA employee. These restrictions are covered more fully in the section on *Post-Government Restrictions* in this chapter.

This statute does not bar an individual, regardless of rank or position, from accepting employment with any private or public employer.

E. Conflicts of Interest (18 U.S.C. § 208)

This statute prohibits a federal employee from participating personally and substantially, on behalf of the federal government, in any particular matter in which he or she has a financial interest. Particular matters include contracts, grants, and government cooperative agreements or other transfers of agency funds to a specific person or entity.

In addition, the statute provides that the interests of certain other "persons" are the same as if they were the employee's. These include the employee's spouse, minor child, general partner, an organization in which he or she serves as an officer, trustee, partner or employee, and any person or organization with whom the employee is negotiating or has an arrangement concerning future employment.

The statute applies whether the employee is on or off duty. There are limited regulatory exemptions authorized by OGE (e.g., an exception for certain financial interests arising from holding stocks up to a certain dollar limit, certain pension investments from a previous job, and a very limited waiver authority).

1. Financial Conflicts of Interest

The conflict of interest provisions of 5 C.F.R. 2635.401-2635.403 implement criminal conflict of interest prohibitions found in 18 U.S.C. § 208. FEMA employees are barred from participating personally and substantially in an official capacity in any particular matter (e.g., a FEMA contract or grant) in which the employee or any person whose interests are imputed to him or her has a financial interest so long as the particular matter has a direct and predictable effect on that financial interest. Certain financial interests are imputed to the employee, meaning that these interests are attributable to the employee. These include the financial interests of the: (1) employee's spouse, (2) minor children, (3) general partner, (4) organization or entity which the employee serves as officer, director, trustee, general partner or employee, or (5) a person with whom the employee is negotiating for or has an arrangement concerning prospective non-federal employment.¹⁸

The dollar amount of the gain or loss is immaterial. In order to avoid such a conflict of interest, an employee should disqualify himself or herself from acting on the matter that could cause a conflict of interest and so notify his or her supervisor and agency ethics officials, divest himself or herself of stock or other holdings that cause a conflict, or seek a waiver from the statute. An employee may request a waiver of the conflict of interest law applying to the situation; the agency, in consultation with OGE, may grant a waiver where the individual disqualifying financial interest in a particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the employee's services to the government.¹⁹

¹⁸ 5 C.F.R. § 2635.402(b)(2).

¹⁹ 5 C.F.R. § 2640.301(a).

Conflict of Interest Examples

Example 1: Negotiating with FEMA Contractor for Employment

Fred is a FEMA Disaster Reservist working as a Task Monitor for a FEMA Public Assistance Technical Assistance Contract (TAC) contractors. Through his work, Fred learns how lucrative it would be for him to work for the TAC contractor instead of FEMA. While he is overseeing this contract, he negotiates for employment with that contractor. If Fred wants to negotiate to work for the contractor, he must first disqualify himself from any work on that contract.

Example 2: Employee Involvement with Volunteer Organizations Active in a Disaster (VOAD)

Sally is a Disaster Reservist on the board of directors of her local American Red Cross chapter. A flood tears through her community, and FEMA deploys her to work on the disaster. The community needs emergency supplies and shelters. Sally knows the American Red Cross has a great program and encourages FEMA to work with the board of directors to write an agreement for the Red Cross to provide supplies and shelter. However, she cannot work on the Red Cross agreement because the financial interests of the Red Cross are imputed to her. Sally must disqualify herself from working on this matter as part of her FEMA duties.

Example 3: Seeking Employment with Contractor While Contract Pending

Ted is a FEMA manager recommending sole source emergency contracts for post-disaster support. He meets with several proposed contractors about post-FEMA employment opportunities while still reviewing their companies for the sole source contracts. Ted must disqualify himself from work with the contractors with whom he is discussing post-FEMA employment.

2. Impartiality and the Appearance of Conflict of Interest

The federal ethics regulations located at 5 C.F.R. 2635.501-503 prohibit a FEMA employee from participating in a particular matter involving specific parties when that employee knows that it is likely to affect that employee's financial interests, or the financial interests of someone with whom that employee has a "covered relationship," and a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter. An employee has a "covered relationship" with:

- A member of one's household, including an unmarried partner, adult child, or a tenant or other relative;
- A relative with whom the employee has a close personal relationship;
- A person with whom the employee has or seeks a business or contractual relationship other than a routine consumer transaction;
- A person for whom the employee's spouse, parent, or minor child is, to the employee's knowledge, serving or is seeking to serve as an officer, director, general partner, agent, attorney, consultant, contractor, or employee; and
- An organization, other than a political party, including nonprofits, in which the employee is an active participant. Active participation includes serving as an organization officer or as a committee chair or spokesperson, or directing the activities of the organization, or fundraising. Just being a paying dues member does not make an employee an active participant.

This is known as the "appearance of conflict of interest" prohibition, and violation of this rule can result in disciplinary action against the offending employee, including suspension without pay and termination. An employee that may have an appearance of conflict situation that does not violate 18 U.S.C. § 208 may request that the agency designee authorize

that employee to work on the matter. The agency designee may authorize the employee to work on the matter when the government’s interest outweighs the concern that a reasonable person may question that employee’s impartiality.²⁰

Appearance of Conflict of Interest Examples

Example 1: Hiring and Supervising Relatives

Katie is a Disaster Reservist working as Public Assistance Task Force Leader. The Public Assistance Branch Director authorizes her to hire two new staff members to assist her with all of the projects that are anticipated following a massive hurricane. Katie knows that Tom, her adult son who lives with her, has the experience she’s looking for, and Katie decides to hire him. Tom may submit his resume to FEMA Human Resources located at the disaster site, but he cannot work directly for Katie, and Katie cannot make the decision to hire him.

Example 2: Participating in Contracting with Relatives

Charlie works as the Individual Assistance Branch Director at a Joint Field Office (JFO) for a major disaster declaration following an outbreak of tornadoes. Charlie assists with making the determination to do a direct housing mission. Charlie advocates to the Operations Section Chief, the Federal Coordinating Officer, and the Contracting Officer (CO) that the haul and install contract should be given out locally and needs to be done as a sole source contract to expedite getting disaster survivors into temporary housing. Charlie works to give this sole source contract to We Haul, a company that Charlie knows is owned by his brother, Stan. Charlie cannot participate in the determination to hire We Haul or in the justification process for a sole source contract. Charlie may, however, show Stan where the request for proposals is located so that Stan’s company may submit a proposal.

Example 3: Dealings with Former Employer

Matthew is a FEMA Project Manager. Carol has been working with Matthew for several years as an employee of a FEMA contractor, Disasters R Us. Matthew decides to hire Carol and assigns her as the Contracting Officer’s Representative (COR) on the contract with

²⁰ 5 C.F.R. § 2635.502(d).

Disasters R Us because of her knowledge of the contract. Carol cannot work as the COR on this contract with Disasters R Us because she was just working for that company, without a waiver approved by her agency designee. Carol may, however, work as a COR but not for the contract with Disasters R Us.

Example 4: Dealing with Spouse's Employer

Martha is a local hire working in logistics. She is assigned to prepare a request for an extension of a current FEMA contract. Her husband, Mike, is an employee of the contractor. Martha cannot accept this assignment.

Example 5: Referring and Hiring In-Laws

Kyle, a FEMA senior manager, seeks to develop a pet friendly disaster policy for FEMA. His son-in-law Taylor is the vice president of the local humane society. Kyle would like to hire Taylor as a FEMA consultant to work on the policy. Kyle cannot, however, hire Taylor but may recommend that a consultant be hired. He may then show Taylor where the job is advertised so that Taylor may apply.

Example 6: Participating in Contracting with Relatives

Steve is a staging area manager for FEMA. Steve's sister Kelly is a partner in a maintenance company. The maintenance company received the FEMA contract for maintenance on the temporary housing units being used in FEMA's direct housing mission at the disaster where Steve is working. Steve does not participate in the decision to award the contract to Kelly's company. Steve recommends that the contract involving Kelly's company be modified to double the contract amount. Steve cannot participate in any decisions or make any recommendations involving FEMA's contractual relationship with Kelly's company.

3. Prohibition on Supplementation of Federal Salary (18 U.S.C. § 209)

This statute prohibits a federal employee from receiving any salary, any contribution to or supplementation of salary, or anything of value from an outside source as compensation for services he or she is expected to perform as a federal employee.

V. Use of Public Office

In accordance with 5 C.F.R. 2635.702, FEMA employees may not use their public office for their own private gain or for the private gain of friends, relatives, business associates, or any other entity. Except as provided by law or regulation, a FEMA employee may not use or permit the use of his or her federal position or title or any authority associated with his or her public office in a manner that could reasonably be construed to imply that FEMA or the federal government sanctions or endorses any of that employee's personal activities or the activities of another person or entity.

A FEMA employee may not use or permit the use of his or her federal position or title or any authority associated with his or her public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to the employee or to friends, relatives, or persons with whom that employee is affiliated in a non-governmental capacity.

A. Endorsements

An executive branch employee shall not, according to 5 C.F.R. 2635.702(c), use or permit the use of his or her federal position, title or any authority associated with his or her public office to endorse any product, service, or enterprise except: (1) in furtherance of statutory authority to promote products, services, or enterprises; (2) as a result of documentation of compliance with agency requirements or standards; or (3) under an agency program in recognition for accomplishment in support of the agency's mission.

A FEMA employee should not sign or agree to appear in FEMA contractor or vendor advertisements or sign FEMA contractor evaluation requests. Any contractor evaluations should be done through the appropriate FEMA Contracting Officer and COR.

A FEMA employee may endorse an outside program in his or her private capacity; however, the FEMA employee's endorsement may not make reference to the employee's official title or position within

FEMA. The FEMA employee can mention that he or she works for FEMA in the body of the letter.

Endorsing Private Entities

Teodoro is a proud member of the Tiger's Club of America. He often participates in its fundraising activities and community parades. While Teodoro can participate in the events of Tiger's Club during his time away from work, he may not do so while wearing FEMA clothing or state or imply that FEMA endorses the organization's activities.

1. Letters of Recommendation

A FEMA employee may only utilize official FEMA letterhead and government title to write a letter of recommendation or character reference based upon personal knowledge of the character or ability for someone with whom the FEMA employee has dealt with in the course of federal employment or when recommending someone for federal employment.

Generally, a FEMA employee may not write letters of recommendation regarding FEMA contractors using their official title and position or using official letterhead, but you (as a FEMA employee) can write a letter of recommendation for a FEMA contractor employee who you worked with and observed their character and ability.

VI. Use of Government Property, Time, and Information

In accordance with 5 C.F.R. 2635.701-2635.705, executive branch employees have an obligation to properly use the government's property, time, and information.

A. Federal Property

Federal employees have an obligation to conserve federal property and shall not use or allow the use of such property for other than authorized purposes.²¹

1. Government Purchase Cards

A FEMA employee may not use government purchasing authority for personal acquisitions (including the employee's agency charge card), even if the employee reimburses the government.

2. Travel Cards

Government-issued travel cards may only be used when an employee is in official travel status and in accordance with the Federal Travel Regulations, and FEMA and DHS policies and procedures.

3. Postage

A FEMA employee is prohibited from using official government envelopes (with or without applied postage) or official letterhead stationery for personal business. This includes mailing resumes and/or applications for federal or private positions. Violation of the prohibition against using franked (postage paid) envelopes may result in a fine and/or disciplinary action.²²

4. Limited Use Policy

DHS has a limited use policy that applies only to personal use of DHS-owned or leased computers (and Internet service), telephones, fax machines, and non-color photocopiers.

This limited personal use policy does not apply to the use of government-owned or leased motor vehicles, or to the use of agency charge cards. The policy applies to government equipment used on government premises.

²¹ 5 C.F.R. § 2635.704(a).

²² 18 U.S.C. § 1719.

Employees may not, without proper authorization, remove government equipment from the office for home use.

a. Use of Computers and the Internet

Employees may use government computers and the Internet for personal use on their personal time (before and after work, during lunch and other breaks) provided there is no additional cost to the government. Employees may make personal purchases over the Internet, provided they have the purchased item sent to a non-government address. The following activities are absolutely prohibited on any government-owned or leased computer:

- Gambling
- Visiting and downloading material from pornographic websites
- Lobbying Congress or any federal agency
- Campaigning – political activity
- Online stock trading activities
- Online real estate activities
- Online activities that are connected with any type of outside work or commercial activity, including day trading
- Endorsements of any products, services, or organizations
- Fundraising for external organizations or purposes (except as required as part of your official duties under applicable statutory authority)
- Any type of continuous audio or video streaming from commercial, private, news, or financial organizations.

b. Use of FEMA Email

DHS does not place any restrictions on incoming email. Under current policy, employees may send out personal email using their FEMA email address provided that:

- Personal use of email does not cause congestion, delay, or disruption of service to any government system or equipment
- Messages are not sent to more than five addresses (no mass mailings)
- The employee does not represent himself or herself as acting in an official capacity
- Messages do not contain partisan political messages

Any email on any FEMA email system may become an official record. Employees have no right to privacy for email transmissions since FEMA is often required to release employee emails pursuant to Inspector General, court, or congressional requests.

c. Use of FEMA Telephones

FEMA employees may use FEMA landline telephones for personal calls when they are necessary, provide a benefit to FEMA, and do not result in any additional costs to the government. Such calls are deemed to be in the interest of the government to the extent they enable employees to remain at their workstations, thereby increasing government efficiency.

Personal phone calls may not adversely affect the performance of official duties or the employee's work performance, must be of reasonable duration and frequency, and could not reasonably have been made during non-duty hours. FEMA cell phones may be used for personal calls only to the extent that such calls would be authorized on a FEMA landline telephone and so long as no additional costs are imposed on the government.

B. Government Time

Each FEMA employee must use official time to put forth an honest effort in the performance of his or her duties.²³ As part of this responsibility, 5 C.F.R. 2635.705 provides that an employee may not ask a subordinate to use official time for other than the performance of his or her official duties or as is authorized by law or regulation.²⁴

C. Government Information

A FEMA employee shall not engage in financial transactions using nonpublic information nor allow the improper use of nonpublic information to further his or her own private interests or the private interests of another, whether through advice or recommendation, or by knowing unauthorized disclosure.²⁵

Example: FEMA tasks Jeannie to work on the selection of a sole-source contractor for emergency housing during Hurricane Zelda. Jeanine learns from the Contracting Officer the name of the sole prime contractor FEMA will select. The day before FEMA announces the selection to the public, Jeannie calls her broker to buy a large amount of stock in the prime contractor company. Jeannie's action is an improper use of nonpublic information.

²³ 5 C.F.R. §§ 2635.101, 2635.705.

²⁴ 5 C.F.R. § 2635.705(b).

²⁵ 5 C.F.R. § 2635.703.

VII. Gifts

FEMA employees may not solicit or accept any gift from a prohibited source or gifts given because of the employee's official position, unless the item is excluded from the definition of a gift or falls within one of the gift exceptions explained in the following text.²⁶

A. Definition of "Gift"

A "gift" is defined in 5 C.F.R. 2635.203 as a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It is not limited to material items; it also includes services. These services are training, transportation, local travel, lodging, and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement.

Certain items, however, are expressly excluded from the definition of gift. Federal employees may accept them pursuant to certain specific regulatory exemptions.²⁷ These items are:

- Snacks (coffee, donuts, other modest food items not offered as part of a meal);
- Greeting cards, plaques, certificates, or trophies (items of little intrinsic value intended solely for presentation);
- Prizes in contests open to the general public (when entry to the contest is not part of official duties);
- Commercial discounts available to the general public or to all government employees, such as for rental car or hotel rooms, that aren't offered or enhanced because of official status;
- Commercial loans, pensions, and similar benefits;

²⁶ 5 C.F.R. § 2635.202.

²⁷ 5 C.F.R. § 2635.203(b).

- Anything for which the employee pays fair market value;
- Anything paid for by the government; and
- Anything accepted by the government pursuant to statutory gift acceptance authority.

B. Gifts from Domestic Sources

As a general rule, federal employees may not, directly or indirectly, solicit or accept a gift:

- From a prohibited source; or
- If it is given because of the employee's official position.²⁸

A prohibited source includes any person, company, or organization that is seeking official action as a result of the employee's actions, has business with the employee's agency, is seeking to do business with that agency, conducts operations regulated by that agency, or has any interests that may be substantially affected by the performance or nonperformance of the employee's official duties.²⁹

²⁸ 5 C.F.R. § 2635.202(a).

²⁹ 5 C.F.R. § 2635.203(d).

Examples of Prohibited Sources

- A. State of _____ (fill in the blank)
- B. _____ Tribe (fill in the blank)
- C. Local government receiving Public Assistance funds to repair flood-damaged buildings
- D. Haul and install contractor for FEMA's temporary housing units
- E. American Red Cross
- F. National Emergency Management Association (NEMA)

For purposes of the gift acceptance rules, “agency” refers to FEMA³⁰

C. Exceptions to the Gift Prohibitions

There are some limited circumstances when a FEMA employee can accept gifts because of that employee's official position or gifts from prohibited sources. Of course, an employee may never solicit such a gift or accept a gift in return for being influenced in the performance of an official act.³¹ And, *it is never inappropriate and frequently prudent to decline a gift even if an exception applies*.³² An employee should always avoid any appearance of impropriety when it comes to accepting gifts.³³

1. Gifts Valued at \$20 or Less

Employees may accept gifts offered from a prohibited source or because of an employee's official position that do not exceed \$20 per occasion, provided that the total value of gifts from a single source does not exceed

³⁰ 5 C.F.R. 2635.203(d).

³¹ 18 U.S.C. § 201. 5 C.F.R. § 2635.204.

³² 5 C.F.R. § 2635.204.

³³ Federal political appointees who signed President Barack Obama's “Ethics Pledge” contained in Executive Order 13490 may have additional gift acceptance restrictions and should consult OCC before accepting a gift pursuant to the gift exceptions. Exec. Order. No.13490 (2009), 3 C.F.R. 13490, 74 Fed. Reg. 4673 (January 26, 2009) prohibits federal political appointees from accepting gifts from registered lobbyists or lobbying organizations and limits federal political appointees' activities after leaving federal employment. Some entities that do business with FEMA are registered lobbying organizations.

\$50 in any given calendar year.³⁴ This exception does not apply to gifts of cash or investment interests (e.g., stocks, bonds, CDs).³⁵ Also, if the gift is valued over \$20, an employee may not pay the difference in order to accept the gift; that employee must pay the full market value of the gift in order to accept it.³⁶ If an employee is presented with severable gifts that together exceed \$20, the employee may accept those individual items that total \$20 or less.³⁷ The market value of a gift may be determined from the price of comparable items, the face value of a ticket, or the retail list price.³⁸

Decline Gift or Pay Fair Market Value

Brenda, a FEMA Individual Assistance Specialist working at FEMA Headquarters, received two tickets valued at \$30 each to attend the symphony in Washington, D.C. from the NEMA as a thank you for her extraordinary presentation at one of its recent events. Brenda cannot accept the tickets from NEMA as they are valued at \$60. She may either pay the fair market value of the tickets (\$60) or politely decline them.

2. Gifts Based on a Personal Relationship

An employee may accept a gift given under circumstances that make it clear that the gift is motivated by a family relationship or personal friendship rather than that employee's government position. Relevant factors in making this determination include the history of the relationship and whether the family member or friend personally pays for the gift. For example, if a close friend takes you to lunch but uses the corporate card to pay, you should decline.³⁹

Gifts Based on Personal Relationships

Jack, a FEMA Hazard Mitigation Specialist, is dating Sarah, who works in Disaster Services at the American Red Cross. The American Red Cross gave tickets to see the play *Wicked* to all of its Disaster Services

³⁴ 5 C.F.R. § 2635.204(a).

³⁵ *Id.*

³⁶ 5 C.F.R. § 2635.204(a).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 5 C.F.R. § 2635.204(b).

employees as a thank you for their hard work after Hurricane Irene. The employees were all invited to bring a guest. Sarah invites Jack to attend. Jack may attend, as Sarah invited him because of their personal relationship and not because of his position at FEMA.

3. Discounts and Similar Benefits

This exception allows federal employees to accept favorable rates offered to all federal employees or to members of a group or class in which membership in that class is unrelated to federal employment.⁴⁰

Additionally, FEMA employees may accept discounts given to a FEMA employee association in which membership is related to federal employee status, if similar discounts are broadly offered to other employee associations of similar size.

FEMA employees may also accept discounts from a group that is not a prohibited source that does not discriminate by rank, rate of pay, or level of official responsibility (e.g., a discount only for Senior Executive Service, or SES, employees).

This exception, does not, however, include benefits to which the federal government is entitled because of the expenditure of federal funds.⁴¹

⁴⁰ 5 C.F.R. § 2635.204(c).

⁴¹ The Code of Federal Regulations specifically allow government employees to keep for their own personal use frequent flyer miles, hotel points, and other similar benefits received when using those services. 41 C.F.R. § 301-53.

Benefits that Belong to FEMA

A FEMA executive officer purchases 50 boxes of paper from a company that offers a free briefcase to anyone who purchases more than 30 boxes of paper. She cannot keep the briefcase for her own use since the paper was purchased with government funds, and the briefcase, if claimed and received, is government property.

4. Awards and Honorary Degrees

A FEMA employee may accept awards and honorary degrees, other than cash or an investment interest, valued at \$200 or less if such gifts are a bona fide award or incident to a bona fide award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties or by an association or other organization the majority of whose members do not have such interests. Gifts with an aggregate value greater than \$200, and awards of cash or investment interests, require prior FEMA Ethics Counselor approval.

5. Gifts Based on Outside Business or Employment Relationships

A FEMA employee may accept gifts resulting from the outside business or employment activities of the employee or the employee's spouse that are not offered or enhanced based on that employee's official position.⁴²

6. Gifts Permitted in Connection with Political Activities Permitted by the Hatch Act

An employee taking an active part in political activity, permitted by the Hatch Act, may accept meals, lodging, transportation, and other benefits,

⁴² 5 C.F.R. § 2635.204(e).

including free attendance at events, when provided by a political organization in connection with such active participation.⁴³

7. Widely Attended Gatherings

Acceptance of free attendance at widely attended gatherings is permissible, in accordance with 5 C.F.R. 2635.204(g)(2), as long as certain prior approval requirements are met. Employees who accept free attendance under this gift exception must attend in a leave status or otherwise in an excused absence from their duties (such as administrative leave). An event is widely attended if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present.

For example, an event may be considered a widely attended gathering if it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter.

If someone other than the sponsor of the event invites the employee and is paying for that employee's attendance (such as if a corporation or friends group invited the employee to sit at their table), the FEMA employee may accept free attendance only if more than 100 persons are expected to attend, the gift of that employee's attendance has a market value of \$390 or less, and the employee's attendance is approved as being in the interest of FEMA. The value threshold may be changed periodically by the OGE; employees should consult an Ethics Counselor if there are any questions on value thresholds under this rule.⁴⁴

Free attendance may include waiver of all or part of a conference or other fee or the provision of food, refreshments, entertainment, instruction, and

⁴³ 5 C.F.R. § 2635.204(f). *See also* 5 U.S.C. §§ 7321-7326.

⁴⁴ *See* OGE Legal Advisory LA 17-07, Increased Gifts and Travel Reimbursements Reporting Threshold for Financial Disclosure Reports and Nonsponsor Widely Attended Gatherings Gift Exception Ceiling, (June 8, 2017).
[https://www.oge.gov/web/OGE.nsf/All%20Documents/2FAF5686A866EC158525813D0052D6DB/\\$FILE/LA-17-07%20Increased%20Gifts%20Threshold%20and%20Nonsponsor%20WAG%20Gift%20Exception%20Ceiling.pdf?open](https://www.oge.gov/web/OGE.nsf/All%20Documents/2FAF5686A866EC158525813D0052D6DB/$FILE/LA-17-07%20Increased%20Gifts%20Threshold%20and%20Nonsponsor%20WAG%20Gift%20Exception%20Ceiling.pdf?open)

materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodging, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees. Under certain circumstances, FEMA may be able to accept travel expenses from outside sources to these events as described in the section on *Travel Expense Acceptance* in this chapter.

8. Speaking Engagements

5 C.F.R. 2635.204(g)(1) provides that a FEMA employee assigned to participate as a speaker or panel participant, or otherwise to present information on behalf of FEMA at a conference or other event may accept free attendance at the event on the day of the presentation if it is provided by the sponsor of the event.

For speaking engagements, free attendance has the same meaning as for widely attended gatherings. As with a widely attended gathering, the FEMA employee must receive approval prior to the event. Unlike widely attended gatherings, employees may attend an event in an official duty status.

If the event is longer than one day, and the employee is offered free attendance for any day(s) on which that employee is not assigned to present information on behalf of FEMA, waiver of the conference fee for those non-speaking days may be acceptable under the widely attended gathering exception to the gift rules, provided the employee is on a leave or an excused absence status, and the employee has prior approval.

9. Statutory Gift Acceptance Authority

If there is no exclusion or exception available for an employee to accept a gift from a third party, FEMA may be able to accept the gift using its statutory gift acceptance authority. Employees should consult with the OCC and the FEMA Ethics Office in such cases, particularly if refusal to accept the gift would cause offense or embarrassment. FEMA's gift acceptance procedures are outlined in the Agency Gift Acceptance and

Solicitation Directive (FD 112-13) issued on July 24, 2012.⁴⁵ This directive excludes certain gifts to the agency (e.g., use of state and local government facilities) and does not apply to gifts to individual agency employees. The directive applies to most gifts to the agency; FEMA employees should follow the gift acceptance procedures outlined in the directive and use the FEMA gift acceptance forms developed to help FEMA track acceptance of such gifts from third parties.

D. Gifts from Foreign Governments

In accordance with the Emoluments Clause⁴⁶ of the U.S. Constitution, an executive branch employee generally may not accept anything of value from a foreign government, including business entities run by the foreign government, unless specifically authorized by Congress.⁴⁷

This rule applies whether the employee is on or off duty. Any unit of a foreign government, whether it is national, state, local, or municipal level, is covered. It also applies to gifts from international or multinational organizations comprised of government representatives.

It also may apply to gifts of honoraria, travel, or *per diem* from foreign universities, which are often considered as part of the foreign government. Spouses and dependent children of federal employees are also banned from accepting gifts from foreign governments.

The following gifts from foreign governments are authorized under the Foreign Gifts and Decorations Act⁴⁸:

- Gifts of minimal value (\$375 or less, as of January 2014, but this amount is revised periodically)⁴⁹

⁴⁵ FD 112-13, (November 20, 2012)

[http://on.fema.net/employee_tools/forms/Documents/FD112-13\(REV\).pdf](http://on.fema.net/employee_tools/forms/Documents/FD112-13(REV).pdf)

⁴⁶ U.S. Constitution, art. I, § 6, cl. 2.

⁴⁷ U.S. Constitution, art. I, § 9, cl. 8.

⁴⁸ 5 U.S.C. § 7342.

⁴⁹ Note: This amount for gifts of minimal value of \$375 or less is only good through calendar year 2016. It will be changed in calendar year 2017. See OGE Legal Advisory LA-14-03, Reporting Foreign Gifts, dated May 23, 2014, and 79 *Fed. Reg.* 18477 (April 2, 2014).

- Transportation taking place entirely outside the U.S.
- Educational scholarships
- Medical treatment

In certain circumstances, particularly if refusal of a gift would cause embarrassment either to the United States or the foreign government offering the gift, the gift may be accepted on behalf of the DHS or FEMA.⁵⁰

E. Gifts Between Employees

Gifts between employees are governed by the federal regulations contained in 5. C.F.R. 2635 subpart C. Generally, a FEMA employee may not: (1) give a gift or make a donation toward a gift for an official superior, (2) solicit donations for a gift for a superior, or (3) accept a gift from an employee that receives less pay than he or she does. There are, however, a few exceptions. Gifts are permissible if:

- There is a personal relationship between the employees that would justify the gift, and there is no subordinate-official superior relationship.
- The gift is personal hospitality provided at a residence, which is of a type and value one would customarily provide to personal friends.
- The gift is given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions (bottle of wine, bouquet of flowers, etc.).
- The gift (other than cash) has an aggregate market value of \$10 or less per occasion and is given on an occasion when gifts are normally exchanged (e.g., Christmas, birthday, housewarming).

⁵⁰ 5 U.S.C. § 7342.

- The gift is leave transferred under an approved agency leave sharing plan (but not to the employee's immediate supervisor).

There is a special and infrequently occurring occasion of personal significance, such as marriage, illness, the birth or adoption of a child; or an occasion that terminates a subordinate-official superior relationship, such as retirement, resignation, or transfer. On such occasions, an employee may give a suitable and appropriate gift and may request donations of nominal amounts within the office for contributions toward the gift. Donations should be entirely voluntary. Employees must be free to contribute a suggested amount, a lesser amount, or nothing at all. Remember that an employee may not solicit contractors working in the office for employee gifts, but they can voluntarily contribute to such gifts.

VIII. Reimbursement of Official Business Travel Expenses

Generally, an employee's official travel must be paid for with appropriated funds. However, under certain circumstances, FEMA may be reimbursed for an employee's travel expenses by a non-federal source. The authorities that permit this are explained in this section.

A. Travel Expense Acceptance (31 U.S.C. § 1353)

This law allows executive branch agencies to accept reimbursement or in-kind donations from non-federal sources for an employee's transportation expenses (including *per diem* and registration costs) to certain functions related to the employee's official duties.

Acceptance of travel expenses from non-federal sources is only permitted when the employee's travel is for attendance at a conference, meeting, seminar, training course, speaking engagement, or similar event that takes place away from the employee's official

duty station.⁵¹ This authority may not be used to fund travel for events required to carry out FEMA's statutory and regulatory functions, such as investigations, inspections, audits, or site visits; it also cannot be used to attend promotional vendor training or other meetings held for the primary purpose of marketing the non-federal sources products or services, or long-term temporary duty or training travel.⁵²

In addition to an approved travel authorization, the employee must also have an approved ethics third party travel form filled out in advance of travel. Approval for accepting travel expenses is also subject to conflict of interest considerations. Acceptance of travel expenses from outside sources will not be approved if it would cause a reasonable person with knowledge of all the relevant facts to question the integrity of the programs or operations of FEMA. It is not permissible for the employee to personally accept reimbursement for travel expenses, meals, or lodging from an outside source. All checks must be made out to FEMA.

Employees may, however, accept "in-kind" items such as airline tickets, meals, or hotel accommodations. In addition to accepting travel expenses for an employee, FEMA may, in certain circumstances, accept travel for a spouse to accompany the employee to the same event where the spouse's presence is in the interest of FEMA. Prior approval by FEMA is required for spousal travel.

B. Other Authorities to Accept Travel Expenses

The preferred authority to use if reimbursement or in-kind donation of travel expenses to a meeting or similar function is offered by an outside source is 31 U.S.C. § 1353. Additional statutes authorize acceptance of employees' travel expenses for other than meetings or similar functions.

⁵¹ 41 C.F.R. § 304-2.1 (defining the term "Meeting(s) or similar functions" for purpose of implementing 31 U.S.C. § 1353).

⁵² *Id.*

The authority under 5 U.S.C. § 4111 to accept travel expenses from nonprofit organizations described by 501(c)(3) of the Internal Revenue Code (with the approval of the designated agency ethics official or FEMA Ethics Counselor), is available when it is impractical for the agency to accept travel under 31 U.S.C. § 1353.

Other provisions that remain in effect are (1) the authority under 5 U.S.C. § 3343 for employees to accept travel expenses in connection with details to foreign governments and public international organizations, (2) the authority under 5 U.S.C. § 5751 for employees and agencies to accept travel expenses when summoned or assigned to provide official testimony on behalf of parties other than the United States, and (3) the authority under 15 U.S.C. § 3710a to carry out agreements under the Federal Technology Transfer Act.⁵³

IX. Outside Work, Activities, Fundraising, and Teaching

Outside work or activities are permitted under 5 C.F.R. §§ 2635.801-809, unless prohibited by statute or regulation or those that would require (to avoid a conflict of interest) the employee's disqualification from matters central or critical to the performance of his or her official FEMA duties. Also, certain political appointees may be limited to the amount of outside income they can earn while a FEMA appointee.⁵⁴ All outside work must take place outside official duty hours or while an employee is on authorized leave.

The DHS supplemental agency ethics regulation requires employees to obtain prior written permission for certain outside activities and employment. This new regulation also prohibits FEMA employees from working for a FEMA contractor, subject to a waiver process.⁵⁵ FEMA employees should seek advice from agency ethics officials before accepting any outside employment with FEMA contractors.

⁵³ Federal Technology Transfer Act, Pub. L. 99-502 (1986); 15 U.S.C. § 3701, *et seq.*

⁵⁴ See 5 C.F.R. Part 2636 and 5 C.F.R. § 2635.804.

⁵⁵ See 5 C.F.R. Part 4601.

A. Serving as an Officer or Member of a Board of Directors of an Outside Organization

Service as an officer or member of a board of directors of a non-federal entity that conducts business with FEMA (e.g., contracts or grants) has the potential to undermine the fairness of FEMA's programs, and otherwise call into question the integrity of FEMA. Before entering into such a relationship, the employee should consult with a FEMA Ethics Counselor.

1. Service in an Official Capacity

Service as an officer or member of a board of directors of a non-federal entity that does or seeks to do business with FEMA in one's official capacity is generally prohibited, as it can create a conflict of interest or the appearance of a conflict of interest.⁵⁶

As an alternative to serving as an officer or member of a board of directors in the capacity of a FEMA employee, a FEMA employee may be appointed to serve as a FEMA liaison to a non-federal entity.

Liaisons serve as part of their official duties and represent FEMA interests to the non-federal entity in an advisory non-voting capacity only. Appointment as a liaison requires a written determination by the employee's supervisor that there is a significant and continuing FEMA interest to be served by such representation, that potential embarrassment is not likely to result from the participation, and that the participant is not involved in formulating recommendations or standards which would later have an effect on the regulatory authority or responsibilities of the federal government. It also requires the approval of the employee's servicing Ethics Counselor.

⁵⁶ Memorandum of Deputy Assistant Attorney General, Office of Legal Counsel, for General Counsel, Federal Bureau of Investigation, June 11, 1997, (concluding that 18 U.S.C. § 208 generally prohibits an employee from serving, in an official capacity, as an officer, director or trustee of a private nonprofit organization); *See also* DHS M.D. 2300, pg. 9 (Participation by DHS Personnel on Non-Department-Sponsored Government Committees) (employees may participate in non-federal entities when there is a determination that the participation is "justified, is in the public interest, and does not constitute a conflict of interest for the Department or the employee.")

A liaison may not be involved in matters of management or control of the non-federal entity and generally may not vote on such boards.

A liaison may officially represent FEMA in discussions of matters of mutual interest with non-federal entities, provided it is made clear to the non-federal entities that the opinions expressed by the liaison do not bind FEMA to any action.

2. Service in a Personal Capacity

A FEMA employee serving as an officer or member of a board of directors or as an advisor to a non-federal entity in his or her personal capacity must obtain prior approval pursuant to the supplemental ethics regulation and also adhere to all conflict of interest statutes and standards of ethical conduct regulations.

Personnel may not accept such a position in their personal capacity if it is offered to them because of their official FEMA position. Such service in a personal capacity also increases the risk that FEMA personnel may inadvertently violate, or appear to violate, the Standards of Ethical Conduct or engage in conduct that calls into question the employee's impartiality. Political appointees may only serve if they are not compensated for their work as an officer or member of the board.⁵⁷

⁵⁷ 5 C.F.R. § 2636.306.

Serving on Board of Directors

Daniel serves on the board of directors for the local chapter of the American Red Cross, where he's been a volunteer for the past three years. Daniel gets a job working in a FEMA regional office in Individual Assistance as a Voluntary Agency Liaison. One of Daniel's principal duties is interacting with voluntary organizations, including the American Red Cross. Daniel cannot continue to serve on the American Red Cross board of directors because it would be a conflict of interest for him to be on the Board while interacting with the Red Cross as an employee of FEMA. Therefore, Daniel must discontinue his service on the Red Cross board of directors.

B. Fundraising

The rules governing acceptable fundraising activities by federal employees are described in 5 C.F.R. 2635.808. Fundraising in the federal workplace is only permitted when the solicitation is approved by the Office of Personnel Management (OPM).⁵⁸ The only authorized solicitation of employees in the federal workplace on behalf of charitable organizations is the Combined Federal Campaign (CFC).⁵⁹ Generally, CFC fundraising activities that can be considered "gambling" are prohibited in government-owned or leased buildings. Raffles and lotteries are prohibited in federally owned or leased buildings and facilities except for very limited CFC activities permitted by 5 C.F.R. § 950.602(b).

An employee may generally engage in fundraising in a personal capacity outside of the workplace and on personal (non-duty) time, provided he or she does not:

- Personally solicit funds or other support from a subordinate or from any person the employee knows is a

⁵⁸ 5 C.F.R. § 2635.808.

⁵⁹ 5 C.F.R. § 950.102(a). 5 C.F.R. Part 950 implements the rules for the Combined Federal Campaign.

prohibited source (*see* section on *Gifts from Domestic and Private Sources* in this chapter for definition of prohibited source);

- Use or permit the use of his or her official title, position, or any authority associated with his or her public office to further the fundraising effort; or
- Engage in any action that would otherwise violate the ethics laws or regulations.

Employees and other persons are generally prohibited from fundraising solicitations for non-governmental organizations within any building or on any lands occupied or used by FEMA during the duty day. Exception is granted for DHS authorized operations, including but not limited to the FEMA Employee Recreation Association or Regional Office or National Processing Service Center Employee Recreation Associations, and for cafeteria, newsstand, snack bar, and vending machine operations authorized by FEMA for the benefit of employees or the public.

Fundraising Examples

Example 1: Prohibited Solicitations on the Job

Sergio is a FEMA Disaster Reservist working as a Flood Insurance Specialist. Sergio raises money for one of the local charities in his hometown. His hometown was badly flooded, and Sergio was asked to help FEMA with the disaster recovery. Sergio wants to invite his FEMA colleagues to a pizza night that he organized at a local restaurant to benefit the local charity. Sergio cannot send out anything to his FEMA colleagues via the FEMA email system or solicit donations to the local charity. He also cannot solicit donations in the FEMA workplace, including in government-owned or leased buildings.

Example 2: OPM-Approved Fundraising

Debbie works in a regional office in external affairs. She volunteers each year as a coordinator for the CFC. Because the CFC is permitted by the OPM, all employees may voluntarily participate in CFC fundraising events and drives.

Example 3: Handling Charity Drives

Todd is a regional FEMA employee working at a JFO. Since winter is approaching, Todd wants to collect winter coats and other clothing to give to the local homeless shelter. With Federal Coordinating Officer approval, Todd may have a bin set up in a public area to collect clothing. Todd may not, however, directly solicit other FEMA employees to donate to the clothing drive.

C. Teaching, Speaking, and Writing

Generally, a FEMA employee may not receive compensation, other than travel expenses, for outside teaching, speaking, or writing that relates to his or her official duties.⁶⁰

For purposes of 5 C.F.R. § 2635.807, a teaching, speaking, or writing activity relates to the employee's official duties if:

⁶⁰ 5 C.F.R. § 2635.807.

- The activity is undertaken as part of that employee's official duties;
- The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of the employee's official position rather than that employee's expertise on the particular subject matter;
- The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties;
- The information conveyed through the activity draws substantially on nonpublic information; or
- The subject of the activity deals in significant part with:
 - A matter to which the employee is presently assigned or to which the employee has been assigned during the previous year;
 - Any ongoing announced policy, program, or operation of FEMA; or
 - In the case of certain political appointees, the general subject matter area primarily affected by the programs and operations of FEMA.

1. Exception for Teaching Certain Courses

Even if the subject matter deals with an employee's official duties, an employee may accept compensation for teaching a course requiring multiple presentations offered as the regularly established curriculum of an accredited institution of higher education, a secondary school, an elementary school, or a program of education sponsored and funded by the federal government or by a state or local government.⁶¹ An employee

⁶¹ 5 C.F.R. § 2635.807(a)(3).

may only receive compensation under these circumstances for outside teaching—not for teaching carried out as part of that employee’s official responsibilities. If the class involves providing services to prohibited sources, prior approval is required. There are additional restrictions for non-career employees on such outside employment, teaching, speaking, and writing.⁶²

2. Reference to Official Position

A FEMA employee engaged in teaching, speaking, or writing as an outside activity may not use or permit the use of his or her official title or position except:

- The employee may include his or her title or position as one of several biographical details when such information is given to identify the employee, provided that it is not given more prominence than other significant biographical details;
- The employee may use his or her title or position in connection with an article published in a scientific or professional journal, provided that it is accompanied by a disclaimer that the views expressed do not necessarily represent the views of FEMA, DHS, or the United States government; and,
- If the employee is ordinarily addressed using a general term of address such as “The Honorable,” or a rank, such as a military or ambassadorial rank, the employee may use that term of address or rank.⁶³

⁶² See 5 C.F.R. Part 2636.

⁶³ 5 C.F.R. § 2635.807(b).

X. Political Activity

The tension between a politically neutral, efficiently run government and the First Amendment rights of federal employees has been present since this country's infancy. The Hatch Act of 1939, with its amendments, is Congress' most recent attempt to shield the civil service from the influence of party politics by delineating those activities in which federal employees can and cannot participate.⁶⁴

The Hatch Act restricts federal employee involvement in partisan political activities.⁶⁵ "Political activity" means activity directed toward the success or failure of a political party, candidate for public office in a partisan election, or partisan political group.⁶⁶

The Hatch Act's restrictions are based on three classes of employees.⁶⁷ They are:

- Further restricted: career SES employees, administrative law judges, administrative appeals judges, and those who serve on the Contract Appeals Board;
- Less restricted: non-career SES, Schedule C, and most other employees. This includes the majority of FEMA employees, including Reservists when deployed.⁶⁸ This group may participate in certain partisan political activity but only in a purely private capacity;

⁶⁴ *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565-66 (1973) (upholding constitutional challenges to the Hatch Act and noting that Congress' goal was to prevent the federal workforce from becoming a "corrupt political machine" where political views determine advancement). See also *United Public Workers of America v. Mitchell*, 330 U.S. 75, 98, 101 (1947).

⁶⁵ 5 U.S.C. §§ 7321-7326. 5 C.F.R. Part 734. Federal employees are divided into several types for purposes of the Hatch Act.

⁶⁶ 5 C.F.R. § 734.101.

⁶⁷ As the Hatch Act relates to FEMA, a fourth category covering reservists (formerly Disaster Assistance Employees) should be considered. Because reservists work intermittently, they are subject to the Hatch Act's provisions only when on duty. See 5 C.F.R. § 734.601.

⁶⁸ *Id.*

- Least restricted: presidentially appointed, Senate confirmed personnel, or Presidential Appointment with Senate Confirmation (PAS) employees are subject to some restrictions, but they are less constrained in terms of where and when they can engage in political activity because of their 24-hour duty status. However, DHS policy does limit the political activity of non-career employees beyond that required by the Hatch Act and they should consult agency ethics officials for clarification before conducting any partisan political activity.

Violations of the Hatch Act may result in penalties ranging from reprimand to removal from federal employment, depending upon the situation.⁶⁹

A. Permitted Activities

While the Hatch Act's restrictions vary based on type of federal employee, *all* federal employees may do the following:

- Register and vote as they please;
- Contribute money to political organizations;
- Join political clubs or parties;
- Express opinions about candidates and issues⁷⁰;
- Sign nominating petitions;
- Attend political rallies and conventions; and
- Participate in non-partisan activities.

⁶⁹ 5 U.S.C. § 7326.

⁷⁰ The Hatch Act prohibits federal employees from advocating for the success or failure of a political party or partisan group. This means employees cannot wear or display items showing support, either before or after Election Day. So-called “water cooler” language is generally okay. Email and web-surfing while at work, however, is not.

B. Prohibited Activities

A federal employee may not:

- Solicit, accept, or receive a political contribution;
- Use official authority or influence for the purpose of interfering with or affecting the result of an election;
- Run for the nomination or as a candidate in a partisan political office, with the express exception of FEMA Reservists while not on official duty;
- Engage in political activity while on duty (including while teleworking);
- Engage in political activity in a federal building;
- Engage in political activity while wearing a uniform or official insignia identifying himself or herself as a federal employee;
- Engage in political activity while in a federally owned or leased vehicle; or
- Solicit or discourage political activity by anyone with business before his or her agency.⁷¹

C. Social Media and the Hatch Act

On November 12, 2015, the Office of Special Counsel updated its guidance concerning application of the Hatch Act to use of social media and email.

⁷¹ 5 U.S.C. §§ 7323-7324. PAS employees may engage in political activity during work hours, but the campaign must pay for all expenses. The U.S. Department of Homeland Security, by departmental policy, treats all non-career political appointees, including PAS, non-career SES, and Schedule C employees, as further restricted employees.

Hatch Act Examples

Example 1: Displaying Support of a Candidate at the Office

Mary Sue is neither a career SES nor a PAS FEMA employee and is a lifelong friend of one of the candidates for United States Senate. She works in a regional office and wants to display campaign buttons for her friend in her office and have multiple bumper stickers on her car that she drives to work every day. Mary Sue may not display the campaign buttons in her office but may have a picture with her friend in her office, so long as the picture is personal and non-political. She may also have political bumper stickers on her car.

Example 2: Assisting with a Campaign while Deployed

Fred is a FEMA Disaster Reservist working in a JFO located in the state where he lives, and he has always been active in politics to encourage people to vote. He especially likes one of the candidates for U.S. President and was assisting with the campaign prior to getting called to work by FEMA. Fred may still assist with the campaign but must do it on his own time away from the FEMA office. He may not solicit, accept, or receive contributions for the campaign; wear his FEMA uniform while campaigning; or mention to potential voters that he works for FEMA.

XI. Nepotism/Preferential Treatment to Relatives

Nepotism, or showing favoritism on the basis of family relationships, is prohibited.⁷² FEMA employees may not appoint, employ, promote, advance, or advocate for the appointment, employment, promotion, or advancement of a relative in or to any civilian position in the agency in which the employee serves or over which he or she exercises jurisdiction or control. Even recommending a relative for appointment or promotion is barred.⁷³ An individual appointed, employed, promoted, or advanced in violation of the nepotism law is not entitled to pay.⁷⁴

⁷² 5 U.S.C. § 3110.

⁷³ 5 U.S.C. § 3110(b).

⁷⁴ 5 U.S.C. § 3110(c).

Also, supervisors showing favoritism to members of their household (unmarried partner), relatives, or friends not listed in 5 U.S.C. § 3110 may also be violating appearance of conflict of interest ethics rules.⁷⁵

A. Exceptions

When necessary to meet urgent needs resulting from an emergency posing an immediate threat to life or property, or a national emergency as defined in 5 C.F.R. § 230.402(a)(1), a public official may employ relatives to meet those needs without regard to the restrictions in 5 U.S.C. § 3110.⁷⁶ Such appointments are temporary and may not exceed 30 days, but the agency may extend such an appointment for one additional 30-day period if the emergency need still exists at the time of the extension.

Nepotism Examples

Example 1: Advocating to Hire Relatives

Mario works as an Individual Assistance Branch Director. His nephew, Mike, just finished college and wants to join FEMA in Public Assistance. Mario is currently deployed to a disaster where he knows that Public Assistance is hiring a few new people. The job is posted on the USAJobs website. Mario may tell his nephew that there are Public Assistance positions on the USAJobs website and encourage him to apply. Mario may not, however, tell the Public Assistance Branch Director that his nephew is applying and advocate for him to be hired, nor may Mario give the Public Assistance Branch Director Mike's resume so that Mike will have a better chance of being hired.

⁷⁵ 18 U.S.C. § 208.

⁷⁶ The Office of Personnel Management prescribes regulations to authorize the temporary employment. 5 U.S.C. § 3110(d).

Example 2: Supervising Relatives in the Chain of Command

Henry is a Disaster Survivor Assistance Team (DSAT) reports writer. In a recent disaster, he was assigned to work out of the JFO collecting the reports from the lead DSAT staff in the field and evaluating the work they and their staff did each day. Two of the lead DSAT staff were relatives of Henry; one was his daughter Mayra and the other was his nephew Carlos. OCC attorneys advised Henry that the nepotism laws do not forbid family members from working in the same office; however, they could not supervise each other's work. Because Henry was evaluating the work done by his relatives Mayra and Carlos, he was reassigned to another position in the JFO that did not involve supervising his relatives directly or indirectly.

Example 3: Notifying Supervisors of Shared Household

Kelly-Marie and Larry met while working for FEMA on a disaster in the U.S. Virgin Islands. Although they are not a couple, they live together and have shared the same household for the past 10 years. They now work in the same office but do not supervise one another. They have put their supervisors on notice regarding their shared household so that they are not assigned to work supervising one another. This arrangement does not violate the nepotism or preferential treatment prohibitions.

Example 4: Supervising Unmarried Cohabiting Employees

Francine and Abigail met while working in Public Assistance and became romantically involved. They now live together and continue to work at the same disasters all the time. They have been advised that they can continue to work in the same program and at the same disasters, but one cannot supervise the other.

XII. Gambling, Raffles, Lotteries, and Betting Pools

Unless authorized by statute or regulation, all forms of gambling activities are prohibited at all times in facilities owned or leased by the federal government.⁷⁷ Federal employees may not engage in gambling activities while on duty. Prohibited gambling activities include but are not limited to raffles, lotteries, numbers (games), and sporting pools.⁷⁸

March Madness Pool

Dave is a Public Assistance Task Force Leader in a JFO following a major disaster declaration. He is really excited because March Madness (the big NCAA basketball tournament) is coming up, and he's always good at picking the teams that will go to the finals. He wants to set up a March Madness pool with his friends and colleagues in Public Assistance where everyone will pay \$5, and whoever wins gets all the money. Dave cannot set up this pool with his coworkers at the office; it is prohibited because it is a game of chance where something of value (money) is risked to win something (more money) in a federal facility on official time.

XIII. Serving as an Expert Witness

Executive branch employees are restricted from serving as expert witnesses in proceedings before courts or agencies of the United States when the United States is a party or has a direct and substantial interest. This restriction applies even when an employee is serving in his or her personal capacity and regardless of whether the service is compensated or not. An employee seeking to serve or one subpoenaed as an expert witness must obtain prior approval from a DHS-

⁷⁷ After Katrina, General Services Administration (GSA) helped FEMA lease office space in a hotel-casino to set up its Initial Operating Facility (IOF) in Gulfport, Mississippi. However, the casino was closed at the time.

⁷⁸ 5 C.F.R. § 735.201; 41 C.F.R. §§ 102-74.395.

designated agency ethics official.⁷⁹ This restriction does not apply to an employee subpoenaed to testify as a fact witness.⁸⁰

XIV. Procurement Integrity Act

The Procurement Integrity Act⁸¹ restricts disclosure of contractor bid proposal or source selection information, prohibits contact between offerors and employees regarding future employment, and disallows former FEMA employees from working for contractors when the employees participated in certain procurement decisions. Violations of the Procurement Integrity Act may result in disciplinary action and/or criminal penalties.⁸²

A. Prohibition on Disclosure of Contractor Information

The Procurement Integrity Act and its implementing regulations prohibit federal employees from knowingly disclosing “contractor bid or proposal information or source selection information” prior to FEMA’s award of the contract unless disclosure is allowable by law.⁸³ “Contractor bid or proposal information” includes cost and pricing data, indirect costs, direct labor rates, and proprietary information. It also includes information that the contractor designates as contractor bid or proposal information.⁸⁴ “Source selection information” includes information prepared for the agency for purposes of evaluating the bid proposal if that information has not been previously been made available publicly.⁸⁵

B. Contacts Regarding Employment

In addition to the non-disclosure requirements, the Procurement Integrity Act also contains prohibitions on contact between an agency

⁷⁹ 5 C.F.R. § 2635.805.

⁸⁰ 5 C.F.R. § 2635.805(d).

⁸¹ 41 U.S.C. § 423; Federal Acquisition Regulations (FAR) 3.104.

⁸² 41 U.S.C. § 423(e).

⁸³ 41 U.S.C. § 423. The Procurement Integrity Act also prohibits obtaining the contract information before an agency awards the contract. 28 C.F.R. § 3.104-3.

⁸⁴ 41 U.S.C. § 423(f).

⁸⁵ 41 U.S.C. § 423(f).

official (employee) and an offeror regarding possible employment.⁸⁶ An agency official participating personally and substantially in a procurement that is in excess of the simplified acquisition threshold (\$150,000 as of April 2014), must notify his or her supervisor and the agency ethics official of that contact. The agency official must also either reject the possibility of employment with the offeror or disqualify himself or herself from working on that procurement and other procurements involving that particular offeror.⁸⁷ The agency official may continue working on the procurement only if that individual receives approval from a FEMA Ethics Counselor.

C. Restrictions for Former FEMA Employees

A former FEMA employee may not accept compensation from a contractor when that former employee participated in certain procurement actions or made certain procurement decisions for procurements in excess of \$10,000,000.⁸⁸ This restriction on accepting compensation lasts for one year after that official participated in the procurement actions or decisions. These procurement actions include serving as the procuring Contracting Officer (CO); the source selection authority; a member of the source selection board; the chief of a technical or financial evaluation team; or the program manager, deputy program manager, or administrative CO for a contract in excess of \$10,000,000.⁸⁹

A former FEMA employee cannot accept compensation from a contractor when that employee made certain procurement decisions in contracts above \$10,000,000. The procurement decisions include awarding a contract, establishing overhead rates, or approving issuance of a payment, or a decision to settle a claim with the contractor in excess of \$10,000,000.⁹⁰

⁸⁶ 41 U.S.C. § 423(c). 28 C.F.R. 3.104-3.

⁸⁷ 28 C.F.R. § 3.104-3.

⁸⁸ 41 U.S.C. § 423(d).

⁸⁹ 41 U.S.C. § 423(d).

⁹⁰ *Id.*

Post-Employment Restrictions for Procurements

Chad worked as a CO for FEMA for several years. Chad is now on his own as a consultant. One of the contracts he awarded while working for FEMA was to Disasters, Inc. for \$25,000,000 to ship goods to disaster locations on an emergency basis. The representatives from Disasters, Inc. were so impressed with Chad's skills that they asked him to do some consulting work for Disasters, Inc. Chad is prohibited from accepting compensation from Disasters, Inc. for one year after he worked on the procurement involving Disasters, Inc.

XV. Working with Contractors in the FEMA Workplace

Contractors provide a wide variety of services to FEMA during disaster response and recovery operations. The employees of these contractors are not subject to the federal ethics rules since they are not federal employees.⁹¹ It is important, however, for contractor employees to have a familiarity with the federal ethics rules so that federal employees do not violate ethics laws and regulations.

A. Inherently Governmental Function

Federal contractors are prohibited from doing any activity that is considered to be an "inherently governmental function."⁹² As a matter of policy, inherently governmental functions are those that are so intimately related to the public interest that they must be performed by government employees. Inherently governmental functions include those activities involving the interpretation and execution of United States laws to: (1) bind the government to take or not take an action; (2) advance the government's interests; (3) significantly affect the life, liberty, or property interests of private persons; (4) commission, appoint, direct, or control officers or employees of the United States; or (5) exert ultimate control over the acquisition, use, or disposition of property, whether real or personal,

⁹¹ Federal contractors are required to have their own ethics rules and internal controls set up for accountability. Contractors are also encouraged to report government waste, fraud, and abuse. See FAR 48 C.F.R., subpart 3.10, § 3.1002.

⁹² See Office of Management and Budget (OMB) Policy Letter 32-1 (Sept. 18, 1994).

tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated or other federal funds.⁹³

Therefore, the employees of FEMA contractors may provide advice, opinions, recommendations, or ideas to federal officials but should not make policy, speak to the media, or participate in acquisition planning as those actions are inherently governmental in nature.⁹⁴ Additionally, a FEMA contractor’s employees do not have the authority to hire, fire, evaluate, assign work, or supervise federal employees, unless specifically authorized by the contract with FEMA as “personal services.

Contractors Supervising FEMA Employees

Haley works for ABC Corporation, a company that provides Public Assistance staff to FEMA during disaster operations. Max, the Public Assistance Branch Director at the disaster operation, worked with Haley on multiple disasters in the past and values her judgment and work ethic. Max wants Haley to work as his Deputy Branch Director. As an employee of ABC, one of FEMA’s contractors, Haley cannot work as Max’s Deputy Branch Director because she cannot supervise FEMA employees. Therefore, Max will need to choose a FEMA employee as his Deputy Branch Director.

B. Oversight of Contractor Employees

Oversight of a FEMA contractor’s employees is done by the contractor itself. This includes determining work schedule, time off, and general supervision. The contractor assigns one of its employees to be a Contract Administrator. The contractor's Contract Administrator will work with FEMA’s CO and COR to ensure compliance with the terms of the contract and that any work done by the contractor’s employees is within the scope of the contract.

⁹³ See *Id.*, section 5.

⁹⁴ A contractor’s employees may only participate in acquisition meetings if that is part of the contract’s scope of work.

C. Identifying Contractors

Employees of contractors must always identify themselves as contractors when dealing with members of the public and with FEMA employees. FEMA contractors are identified by: (1) distinctive FEMA badges that indicate contractor status; (2) business cards without the DHS or FEMA seals; (3) no use of apparel with the FEMA logo; and (4) statements in emails and on phone calls that the individual is an employee of a FEMA contractor and not a FEMA employee.

Contractor Identification

Randy works as an engineer for Disaster Specialty, Inc., a FEMA contractor. His business cards have his title of Engineer and the company name Disaster Specialty, Inc. on them but no FEMA logos. Additionally, as the Contract Administrator for Disaster Specialty, Inc., he ensures that the other employees of Disaster Specialty, Inc. are complying with the work requirements of the FEMA contract and fulfilling the FEMA CO's expectations on the contract.

D. Contractors and Gifts

Under federal ethics rules, FEMA contractors and their employees are “prohibited sources” of gifts.⁹⁵ A FEMA employee may not accept a gift from a prohibited source unless it falls within one of the gift exceptions. The *de minimis* exception allows FEMA employees to accept a gift from an agency contractor with a value of up to \$20 per occasion, or up to \$50 in a calendar year.⁹⁶

⁹⁵ 5 C.F.R. § 2635.201-2635.205.

⁹⁶ 5 C.F.R. § 2635.204(a).

Contractors and Gifts Examples

Example 1: Gifts Based on Personal Relationships

Zach works as a FEMA CO in the JFO following a major disaster declaration. Zach is responsible for the procurement of the maintenance and deactivation contractor for the 1,500 temporary housing units put in after the hurricane. Multiple proposals were received; Zach awards the contract and continues to oversee the contractor's work. While overseeing the contractor's work to ensure it complies with the contract, Zach and Steve, the company's representative, discover that they have many things in common. Steve offers to take Zach with him on a fishing trip to a nearby lake that he and some friends are going on over the upcoming weekend. Zach may accept the gift of the fishing trip if it is paid for by Steve and not the contractor and if it is given because of Steve and Zach's personal friendship rather than because of Zach's official position. Zach needs to be careful in this situation, though, because going on the fishing trip could be construed as a conflict of interest.

Example 2: Soliciting Donations from Contractors

Following the retirement of the Regional Administrator, Kate collects voluntary donations for a gift from the regional staff. Greg works as a FEMA contractor in the regional office. Kate may not solicit Greg for a donation for the retirement gift for the Regional Administrator because Greg is a FEMA contractor, and the Regional Administrator is a FEMA employee.

E. Awards to Contractors

FEMA employees may not provide monetary or non-monetary awards to FEMA contractors or their personnel. Incentive awards for contractor superior performance are normally addressed in the contract between the contractor and FEMA.

XVI. Seeking Other Employment

A FEMA employee considering employment outside the federal government must comply with the seeking employment rules found in 5 C.F.R. 2635.601-2635.606 and the negotiating for employment restriction included in 18 U.S.C. § 208 (see section on *Criminal Ethics Laws*, for discussion of section 208).⁹⁷ “Seeking employment” is defined as negotiating for employment, making an unsolicited communication to any person regarding possible employment, or a response to a person regarding employment other than a rejection of the offer of employment. Seeking employment does not include requesting a job application.⁹⁸ The definition of “employment” for this section not only includes employment with a non-federal entity, but also provision of personal services by the employee to a non-federal entity, whether undertaken at the same time as or subsequent to federal employment, and would include consulting services, or service on a private or nonprofit entity board of directors, with or without compensation. Uncompensated volunteer services are not considered employment or a business relationships.⁹⁹

Public filers, when negotiating for or have agreements of future employment or compensation, pursuant to the requirements of section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act)¹⁰⁰, must submit a written statement identifying the entity involved in the negotiations or agreement within three business days after commencement of such negotiations or agreement and must submit a notification of recusal whenever there is a conflict of interest or an appearance of conflict of interest.¹⁰¹ The notification statement must be signed and dated by the public filer and must

⁹⁷ See also 18 U.S.C. § 208(a); 5 C.F.R. §§ 2635.802-2635.803 and 5 C.F.R. §§ 2635.401-2635.403.

⁹⁸ 5 C.F.R. § 2635.603(b).

⁹⁹ 5 C.F.R. § 2635.603 (a).

¹⁰⁰ Public Law 112-105, 126 Stat. 303, 5 U.S.C. app. 101 note.

¹⁰¹ 5 C.F.R. §§ 2635.601 and .607. See also OGE Legal Advisories 12-01, Post-Employment Negotiation and Recusal Requirements under the STOCK Act, (April 6, 2012), and OGE Legal Advisory 13-06, Notification of Negotiations for Post-Government Compensation Under Section 17 of the STOCK Act, and OGE Recommended Notification of Post-Government Employment or Compensation Negotiation or Agreement and Recusal Statement form.

include the name of the non-Federal entity involved in such negotiations or employment agreement and the date on which the negotiations or agreement commenced.¹⁰²

An employee who is seeking employment must disqualify himself or herself from participating personally and substantially in particular matters that have a direct and predictable effect on the financial interests of a prospective employer.¹⁰³ Disqualification requires an employee to take whatever steps are necessary to ensure that he or she no longer participates in the matter.¹⁰⁴ Particular matters could include a FEMA grant, contract, or other FEMA aid being provided or which the employer is seeking from FEMA.

A public filer who negotiates for or has an agreement of future employment or compensation for personal services must comply with the STOCK Act notification requirements in § 2635.607. An employee who is seeking employment with a person whose financial interests are not, to the employee's knowledge, affected directly and predictably by particular matters in which the employee participates personally and substantially has no obligation to recuse themselves. Furthermore, nothing in this subpart of the regulations requires an employee, other than a public filer, to notify anyone that they are seeking non-federal future employment unless such a notification is necessary to implement a recusal pursuant to 5 C.F.R. § 2635.604(b). A federal employee involved with procurement matters may however, be subject to additional statutes that impose requirements on non-federal employment contacts or discussions regarding federal procurement matters.

If a federal employee has any concerns about whether they can speak about their current federal job with a prospective non-federal employer, they should contact their agency ethics officials. Furthermore, federal ethics officials are under no obligation to inform employee supervisors that their employees are seeking post-federal

¹⁰² 5 C.F.R. § 2635.607.

¹⁰³ 5 C.F.R. § 2635.602. *See also* 18 U.S.C. § 208(a), which provides for criminal penalties for participating in a matter while negotiating for employment.

¹⁰⁴ 5 C.F.R. § 2635.604.

employment. Also, if a current federal employee is not working on federal grant matters involving a potential private or nonprofit employer, but could be assigned to such matters, they must immediately notify their ethics official if they are assigned to such a grant while negotiating with a grantee about a non-federal job.¹⁰⁵

An employee is no longer seeking employment when the employee or the prospective employer rejects the possibility of employment and the discussions of prospective employment have terminated. An employee is also no longer seeking employment when two months have passed after the unsolicited communication from the employee and the employee has not received a response from the prospective employer. A response deferring discussions regarding prospective employment does not terminate seeking employment restrictions.¹⁰⁶

Pursuant to Section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), an employee that is required to file a U.S. Office of Government Ethics (OGE) public financial disclosure form (OGE 278e) may not directly negotiate or sign any agreement of future non-federal government employment or other outside compensation unless the employee, within three business days of commencing post-federal government employment or other compensation negotiations, files with his or her agency ethics office a written notification regarding the negotiations or agreement.¹⁰⁷

An employee, subject to the STOCK Act notice requirements, who files a notification statement regarding the negotiation or agreement also must file a notification regarding recusal whenever there is a conflict of interest or appearance of a conflict of interest with respect to the non-federal entity identified in the notification.¹⁰⁸

¹⁰⁵ 5 C.F.R. § 2635.602(a).

¹⁰⁶ 5 C.F.R. 2635.603.

¹⁰⁷ See Pub. L. No. 112-178, 126 Stat. 291, 303-304 (2012) See also references to OGE Legal Advisories 12-01 and 13-06 fn. 94.

¹⁰⁸ See Federal Register, Vol. 81, No. 143, p. 48691, July 26, 2016, to be codified as Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation. 5 C.F.R. §§2635.607 (b) and (c).

Furthermore, a nonpublic financial disclosure form (OGE Form 450) filing employee who becomes aware of the need to recuse themselves from participation in a particular matter to which they are assigned must take whatever steps are necessary to ensure they do not work on that matter while seeking non-federal employment or compensation that could create a conflict of interest. Such notification can be oral or written to their supervisor, agency ethics officials, and/or coworkers to ensure an effective recusal of the affected employee.

Such notice provided by an OGE Form 450 filer does not need to be in writing in most cases, however, written or email notice is often prudent to prevent confusion. Public financial disclosure form (OGE 278e) filers, must file a written notice in such situations, pursuant to the STOCK Act and 5 C.F.R. § 2635.607.¹⁰⁹

The Office of Government Ethics seeking post-federal employment regulations also provide for an “Agency Determination of Substantial Conflict”.¹¹⁰ Where a federal agency determines that the employee’s seeking non-federal employment with a particular entity will require the employee’s recusal “from matters so central to the performance of their official duties that the employee’s position would be materially impaired”, the agency can encourage the employee to take annual leave or leave without pay while seeking non-federal employment, or may take other “appropriate action”.¹¹¹

¹⁰⁹ See 5 C.F.R. § 2635.604(c).

¹¹⁰ 5 C.F.R § 2635.604(d), Agency determination of substantial conflict.

¹¹¹ See 5 C.F.R. § 2635.604(d).

Seeking Employment Examples

Example 1: Effect of Rejecting a Job Offer

Corey is a FEMA COR working on a contract with XYZ Corp. Corey is complimented by a representative of XYZ Corp., who tells Corey that she is impressed with his work and he should consider XYZ if he ever decides to leave federal service. He thanks her for the compliment and says he's not interested in leaving FEMA at this time, but he'll remember their conversation if he ever decides to leave federal employment. Corey has not begun seeking employment.¹¹²

Example 2: Disqualification Notice Required

Helen, who is FEMA's Deputy Chief Procurement Officer and an SES employee, is thinking about leaving FEMA. She works with several contractors who frequently indicate that they enjoy working with her, appreciate her strong work ethic, and her federal contracting experience. Helen sends one of the contractors a resume and meets with the company's representatives regarding future employment. Helen can no longer work on the contract with that contractor and must provide a written notice disqualifying herself from working on this contract to both her supervisor, the FEMA Chief Procurement Officer, and the FEMA Ethics Office, pursuant to the STOCK Act.¹¹³

Example 3: Need for Waiver of Disqualification¹¹⁴

Anna works as a CO on specific Individual Assistance housing contracts. Her supervisor values her expertise on these contracts. Although she likes working for FEMA, Anna is considering leaving FEMA. One of the FEMA contractors has been trying to get Anna to come work for their company. Anna refused these offers until the last proposal, which Anna decides to consider and she notified her supervisor. Anna and her supervisor both want Anna to continue working on the contract because of her technical expertise. Anna may only continue to work on the contract with a written disqualification waiver from the FEMA Ethics Office. Otherwise, Anna must disqualify herself from work on the contract.¹¹⁵

¹¹² See 5 C.F.R. § 2635.603(b).

¹¹³ See 5 C.F.R. §§ 2635.603(b) and 604.

¹¹⁴ 5 C.F.R. 2635.605(a). Waiver or authorization permitting participation while seeking employment.

¹¹⁵ 5 C.F.R. § 2635.605(a) and Example 1 to paragraph (a).

XVII. Post-Government Restrictions

While the ethics rules do not limit the entities for which a federal employee may work, they may limit the type of work an employee may do for a certain period of time after that employee leaves his or her federal government position. Two statutes impose these limitations on former federal employees.¹¹⁶ The first is the Procurement Integrity Act,¹¹⁷ discussed in the section on the *Procurement Integrity Act* in this chapter. The second is 18 U.S.C. § 207, a criminal statute that prohibits certain representational activities of former federal employees, briefly discussed in the section on *Criminal Ethics Laws, Post-Government Restrictions* in this chapter.

A. Representational Restrictions (18 U.S.C. § 207)

Depending on an employee's level of involvement with a particular matter, the employee may be barred for one year, two years, or permanently from working on that matter following his or her federal employment.¹¹⁸ Individuals may work "behind the scenes" for such an entity provided they do not appear or represent their new employer back to the federal government during their restricted period. They may not divulge information to their new employer that is prohibited by law to be disclosed, even in a "behind the scenes" post-FEMA employment status.

1. Lifetime Restriction

An executive branch employee that participated personally and substantially in a particular matter involving specific parties may not represent that party before any federal department, agency, or court after

¹¹⁶ 18 U.S.C. § 207. 41 U.S.C. § 423. *See also* Exec. Order. No.13490 (2009), 3 C.F.R. 13490, 74 Fed. Reg. 4673 (January 26, 2009), which imposes additional post-employment restrictions for political appointees.

¹¹⁷ 41 U.S.C. § 423(e).

¹¹⁸ 18 U.S.C. § 207. This statute also prohibits a former federal employee from aiding or advising any entity (other than the United States) in any ongoing trade or treaty negotiations that the employee participated in personally and substantially during the last year of the employee's federal service. This aiding or advising restriction lasts for one year following the termination of federal employment.

leaving federal employment for the life of the particular matter.¹¹⁹ Representation includes both communications and appearances on behalf of the specific party with the intent to influence the federal government regarding that particular matter.¹²⁰

Restricted Representations

Sam served as a FEMA Public Assistance Task Force Leader at a JFO in Kentucky. Sam decided to leave FEMA and go to work for one of the public entities that he decided not to approve for Public Assistance funding, the Kentucky Housing Authority. The Kentucky Housing Authority appeals this decision and wants Sam to attend a meeting with FEMA. Sam may help the Kentucky Housing Authority behind the scenes with its FEMA Public Assistance appeal but may not have any direct contact with FEMA where he tries to influence FEMA's decision.

2. Two-Year Restriction

An employee is restricted, for the two years following the end of his or her federal employment, from communicating or appearing on behalf of a specific party with regard to a particular matter.¹²¹ This two-year restriction applies to particular matters pending under the employee's official responsibility during the last year of the employee's federal service. "Official responsibility" is "direct or administrative authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government action."¹²²

3. One Year Restriction for Senior Employees

Certain senior employees have additional restrictions that last for one year after leaving senior service. Former senior employees¹²³ may not make, with the intent to influence, any communication or appearance before the

¹¹⁹ 18 U.S.C. § 207(a) and 5 C.F.R. § 2641.201.

¹²⁰ 18 U.S.C. § 207(a) and 5 C.F.R. § 2641.201.

¹²¹ 18 U.S.C. § 207 and 5 C.F.R. § 2641.202.

¹²² 18 U.S.C. § 202(b).

¹²³ 5 C.F.R. § 2641.104, defines "former senior employee" as an employee in a position for which the rate of pay is specified or fixed according to 5 U.S.C. §§ 5311-5318.

department or agency in which they served in the one-year period prior to termination from senior service.¹²⁴ This restriction is regarding any contact with their old agency representing their new employer back to their old agency regarding contracts, grants, or other transfers of federal funds to an identifiable entity (“particular matter involving specific parties”); this is often referred to as the SES “one-year cooling off period.” This provision does allow for such a former employee to “work behind the scenes” with a former agency contractor, but the former SES may not personally appear before or contact any employees of his or her old agency during this one-year period.¹²⁵ A former senior employee is also restricted for one year after leaving federal service from knowingly aiding, advising, or representing a foreign entity, with the intent to influence the official actions of any employee of any U.S. agency or department.¹²⁶ The statutory annual income threshold to determine if an employee must comply with the one-year cooling off period is 86.5% of the annual rate of basic pay for Level II, Executive Schedule.¹²⁷

XVIII. Disclosure of Financial Interests

All FEMA employees, including special federal employees, are subject to conflict of interest restrictions and may be required to file either a public or confidential financial disclosure report. These reports are among the primary tools used by ethics personnel to determine whether employees are in compliance with the ethics and standards of conduct provisions covering a particular position. Depending on an employee’s official position, grade, and employment status, he or she may be required to file

¹²⁴ 18 U.S.C. § 207(c) and 5 C.F.R. § 2641.204.

¹²⁵ 5 C.F.R. § 2641.201(d) (3).

¹²⁶ 18 U.S.C. § 207(f) and 5 C.F.R. § 2641.206.

¹²⁷ 18 U.S.C. § 207(c)(2)(ii).

either a public financial disclosure report (OGE Form 278)¹²⁸ or a confidential financial disclosure report (OGE Form 450).¹²⁹

Generally, FEMA employees who are newly appointed to covered positions must file the required public or confidential financial disclosure reports not later than 30 days after assuming the new position or office.¹³⁰

A filer who performs the duties of his or her position or office in excess of 60 days during the calendar year shall file, as appropriate, an OGE Form 450 on or before February 15 of the following year or an OGE Form 278 on or before May 15 of the following year.¹³¹

An employee who files his or her public disclosure report (OGE Form 278) after the statutory deadline (plus additional time for any extensions) is subject to a late filing fee required by statute and OGE regulation.¹³² An employee who files a confidential financial disclosure report late may be subject to administrative action.¹³³

An employee who falsifies his or her report may be subject to civil penalties and/or criminal prosecution by the Department of Justice.¹³⁴

Compliance with financial disclosure requirements is a condition of employment. Employees who are required to file and fail to do so in a timely manner may be subject to disciplinary action up to and including removal from federal service.¹³⁵

¹²⁸ 5 C.F.R. § 2634.202 defines who must file a public financial disclosure form as a “public filer.” Pursuant to the STOCK Act of 2012, Pub. L. 112-105 (2012) and Pub. L. 113-7 (2013), as amended, SES employees and Intergovernmental Personnel Act employees (such as detailees and temporary non-career appointees) have additional reporting requirements for periodic financial transactions involving stocks, bonds, and other financial holdings, with short reporting deadlines and website publications of this additional information.

¹²⁹ 5 C.F.R. § 2634.904 defines who must file a confidential financial disclosure form as a “confidential filer.”

¹³⁰ 5 C.F.R. § 2634.201(b), “New Entrants”; 5 C.F.R. § 2634.903(b), “New Entrants.”

¹³¹ 5 C.F.R. § 2634.201(a), “Incumbents”; 5 C.F.R. § 2634.903 (a), “Incumbents.”

¹¹⁰ 5 C.F.R. § 2634.704, “Late filing fee.”

¹³³ 5 C.F.R. § 2634.701(d).

¹³⁴ 18 U.S.C. §§ 1001 and 3571. Also, 5 C.F.R. § 2634.701(b) and (c).

¹³⁵ 5 C.F.R. § 2634.701(d).

A. Additional Requirements for Public Disclosure Filers (OGE 278)

The STOCK Act of 2012¹³⁶ requires employees who file public disclosure reports (OGE Form 278) to also file periodic reports (OGE Form 278-T) after engaging in certain financial transactions. These transactions include any purchase, sale, or exchange of stocks, bonds, commodities, futures, or other forms of securities owned or acquired by the employee that exceeds \$1,000. A transaction must be reported the earlier of (1) 30 days after receiving notification of the transaction required to be reported or (2) not later than 45 days after such a transaction.

Certain transactions are excluded from this reporting requirement. These exempted transactions include: (1) real property; (2) mutual funds, exchange traded funds, and other “excepted investment funds;” (3) underlying holdings in an “excepted investment fund,” a qualified blind or diversified trust, or an excepted trust; (4) assets owned by the employee’s spouse or dependent child, if the employee does not also own the asset; (5) securities issued by the United States Treasury; (6) life insurance and annuities; (7) cash accounts, including money market mutual funds; (8) assets in a retirement system under Title 5 of the U.S. Code (including the Thrift Savings Plan); and (9) assets in any other retirement system maintained by the United States for officers or employees of the United States, and for members of the uniformed services.

Public filers should note, however, that they must continue to report financial transactions related to these assets on Schedule B of their next annual or termination OGE 278 report.¹³⁷ Failure to timely file these Transaction Reports can result in a late filing fee, in disciplinary action, in civil fines, and/or in possible criminal prosecution.

On April 15, 2013, President Obama signed into law Pub. L. 113-7,¹³⁸ which eliminates the requirement in the STOCK Act to make

¹³⁶ Pub. L. 112-105 (2012), as amended, § 5 U.S.C. app 105 *note*.

¹³⁷ Pub. L. 112-105 (2012).

¹³⁸ Pub. L. 113-7 (2013), 5 U.S.C. § 105 *note*.

available on official websites the financial disclosure forms of employees of the executive and legislative branches other than the President, the Vice President, members of and candidates for Congress, and several specified presidentially nominated and Senate-confirmed officers.¹³⁹

XIX. Summary

This chapter focused on the laws and regulations that help FEMA employees maintain the highest ethical standards. As federal employees, FEMA employees have obligations to the citizens of the United States to act impartially and ethically in awarding contracts and grants, providing disaster assistance, and conducting all other activities on behalf of the agency. Failure to maintain these high ethical standards may result in civil and/or criminal penalties.

Disciplinary action will not be taken against an employee who engages in conduct in good faith reliance upon the advice of an agency ethics official, provided the employee made full disclosure of all relevant circumstances.¹⁴⁰ Accordingly, all FEMA employees are encouraged to seek advice and counsel from the certified Ethics Counselors.

¹³⁹ *Id*; See also, *Statement by the Press Secretary on S. 716*, <http://www.whitehouse.gov/the-press-office/2013/04/15/statement-press-secretary-s-716>.

¹⁴⁰ 5 C.F.R. § 2635.107(b).

Advice in Crisis: Towards Best Practices for Providing Legal Advice under Disaster Conditions

Why Should You Read This Chapter?

The practice of emergency management law at FEMA, particularly during Stafford Act disaster operations, often entails involvement in highly consequential decisions and negotiations under extremely demanding conditions.¹ FEMA lawyers in the past have had mixed success in performing under these conditions and meeting the expectations of FEMA leaders and other clients.² This chapter provides a collection of best practices culled from a review of relevant literature and over 60 interviews with experienced emergency managers and their lawyers, both inside and outside of FEMA.³ We have distilled the lessons learned from that effort into an organized, cohesive model called “Advice in Crisis” aimed at providing you with a framework for the effective delivery of legal services during disaster operations.

¹ See Keith Bea, CONG. RESEARCH SERV., RL 33053, FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING (2010) (providing an overview of Stafford Act Disaster Assistance).

² In the spring of 2010, OCC conducted a web-based survey distributed to 366 FEMA clients and 130 FEMA OCC employees in the field and at headquarters. FEMA clients reported the five attributes they valued most in their law firm are (in order of importance): 1) law-related knowledge; 2) accessibility; 3) solution orientation; 4) knowledge of FEMA mission and strategy; and 5) quality of legal work. Clients reported significant misalignment with OCC on risk tolerance and solution orientation. Based on client reporting, OCC staff tended to overrate its effectiveness for the attributes of accessibility, law-related knowledge, risk tolerance, solution orientation, quality of Alternative Dispute Resolution work, and quality of legal work. Similarly, the survey indicated that OCC staff tended to underrate the importance of the following attributes when compared to the importance ratings provided by FEMA clients: providing client self-service tools; risk tolerance; solution orientation; agency coordination; understanding of non-legal risk; and knowledge of mission and strategy.

³ See “Advice in Crisis Interviews (Phase 1),” *infra* pages 35-37.

Disasters are Different

The Advice in Crisis interviews revealed six consistent challenges for lawyers providing advice during Stafford Act major disasters and emergencies (collectively called “disasters” in this chapter):

1. Crisis conditions
2. Cultural clashes (for example between headquarters [HQ]/region/Joint Field Office [JFO] as well as across professions)
3. The FEMA staffing (and deployment) system
4. Finding the right “weight” for legal advice (in relation to other relevant aspects of the decision calculus)
5. Coordinating opinions cumulatively across the organization and cases (in the absence of an effective knowledge management system)
6. Promoting “heedful interrelating” across functions and professions

Disaster operations require advice and decision-making processes to function at a high level under very difficult circumstances. It is useful to conceptualize disasters like other crises in terms of three subjective criteria: threat, uncertainty, and urgency.⁴ Let us consider these in turn, as they are not only helpful in distinguishing crises from other types of situations, but also provide a means for probing and preparing to act in them.

First, crises are associated with threats to (and often potential opportunities to promote) core values cherished by decision-makers and/or their constituencies. These include human life; public health and welfare; democracy; civil liberties and the rule of law; economic viability;

⁴ See Arjen Boin, Paul 't Hart, Eric Stern, and Bengt Sundelius, *THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE* (2005).

and public confidence in leaders and institutions. Emergency managers and their lawyers must also be prepared to cope with distinct ways of thinking about, and conflicts among, such values.⁵ For example, one way to approach disaster decisions “involves looking back at a disaster after it has occurred and deciding what to do about it or how to clean it up”—this perspective is called *ex post*.⁶ Another approach “involves looking forward and asking what effects the decisions we make during this disaster will have in the future—on parties who are entering similar situations and [have not] yet decided what to do, and whose choices may be influenced by the consequences” of our decisions—this perspective is called *ex ante*.⁷

Second, crises exhibit high degrees of uncertainty regarding the nature of the threat, the contours of an appropriate response, and/or the possible ramifications of various courses of action. One can imagine the effects of uncertainty in the aftermath of the 2011 Japan earthquake, tsunami, and nuclear disaster as decision-makers attempted to account for aftershocks and the probability of radiological release. Another type of uncertainty has to do with media and public reactions to potential interventions or policy choices.

Third, crises are associated with a sense of urgency. Those in crisis perceive events as moving quickly, and there are fleeting windows of opportunity to influence their course. Additional time pressure stems from the relentless pace of the 24-hour news cycle. Decision-makers and their organizations must cultivate the capacity to diagnose situations and formulate responses under severe time pressure. Thus, crises force decision-makers to make some of the most consequential decisions in public life under extremely trying circumstances.

Fortunately, these criteria provide the basis for a practical diagnostic tool that can help crisis managers find their way in crisis.⁸ Confronted with a

⁵ See Arjen Boin, Paul 't Hart, Eric Stern, and Bengt Sundelius, *THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE* (2005).

⁶ See Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law* (2007).

⁷ *Id.*

⁸ See Eric K. Stern, *Crisis Navigation: Lessons from History for the New Crisis Manager-in-Chief*, 22(2):1 Governance 89-202 (2009).

threatening situation, it is useful to turn the components of this crisis definition into diagnostic questions:

What core values are at stake in this situation? This question helps crisis managers and their lawyers identify threats and opportunity embedded in the contingency at hand, and encourages them to design solutions that attend to these situations in a consciously balanced and measured way.⁹ It also helps them minimize the risk of a so-called type III error—deploying the “right” solution to the wrong problem.¹⁰

What are the key uncertainties associated with the situation and how can they be reduced? This question enables decision-makers and their lawyers to identify key variables and parameters and better prioritize intelligence and analytical resources.

How much time is available or can be provided (through interim measures or proactive scheduling of interagency/intra-agency stakeholder, or other meetings, press conferences etc.)?

How can the decision-making process be optimized in light of the circumstances? Effective and legitimate crisis decision-making and communication processes may look very different depending upon whether the time frame is measured in minutes, hours, days, weeks, or months. As the time frame widens, there is increasing room for consultative and coalition building processes.¹¹ As one moves through the phases of a disaster and as the operative and political situation

⁹ See Ralph L. Keeney, *VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING* (1992).

¹⁰ See Ian I. Mitroff and Abraham Silvers, *DIRTY ROTTEN STRATEGIES: HOW WE TRICK OURSELVES AND OTHERS INTO SOLVING THE WRONG PROBLEMS PRECISELY* (2010). In the discipline of statistics, a type I error occurs when one rejects the null hypothesis when it is true. For example, in criminal justice, a type I error occurs when a jury makes an error and sends an innocent person to jail. Conversely, a type II error occurs when one rejects the alternative hypothesis (that is, one fails to reject the null hypothesis) when the alternative hypothesis is true. Using a criminal justice example again, a jury commits a type two error when it sets a guilty person free. *Id.*

¹¹ See, e.g., Alexander L. George, *PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE* (1980).

evolves, conditions for making decisions and providing advice tend to change.

Normal modes of developing, providing, communicating, and receiving advice may be inappropriate or even counterproductive under disaster conditions. Indeed, even under more normal conditions, many government managers and officials reported seeing “agency lawyers as essentially ‘nay-sayers,’ who were quick to point out the legal risks in various courses of action but less quick to array the legal risks or recommend feasible options.”¹² A special task force created in 1993 under the direction of Vice President Al Gore, known as the National Performance Review, “took the view that government lawyers were insufficiently innovative and operated in a ‘culture laden with red tape.’”¹³ The milieu of disaster operations often further exacerbates the perception of lawyers as impediments. As one Incident Commander put it, “You lawyers never want to let us get on with things. I’m trying to save lives and protect property, and all you want to do is tie us up with legalisms. I don’t have time for the law when lives and property are at stake.”¹⁴

Taken together, the characteristics of crises (core values at stake, uncertainty, and time compression) coupled with traditional perceptions of government lawyers as obstacles, even under optimal conditions, can result in severe role conflict within and across professions.¹⁵ As one experienced practitioner observed:

Emergency responders and managers attempting to save lives and protect property must be action oriented as they deal with fluid, very dangerous situations. Due to the extreme danger posed by hazardous substances that may

¹² See Gary J. Edles, *Assessing "Who is the Client" in the Government Context*, 31-FALL ADMIN. & REG. L. NEWS 10, 10 (2005).

¹³ *Id.*

¹⁴ See William C. Nicholson, Building Community Legal Capabilities for Post 9-11 Terrorism Preparedness, Address before the FEMA Higher Education Conference (May 30-31, 2002), available at <http://www.training.fema.gov/EMIWeb/downloads/WilliamNicholson.doc> (last visited Sept. 15, 2011).

¹⁵ See George, *supra* note 12; cf. Irving L. Janis, CRUCIAL DECISIONS: LEADERSHIP IN POLICYMAKING AND CRISIS MANAGEMENT (1989).

well be weaponized, terrorism HAZMAT events in particular require prompt, correct action. In such a situation, professionals often perceive the lawyer who gets in the way of timely action as an obstacle to dealing with the event. Attorneys may find themselves literally locked out of emergency operations centers unless they have taken the pains to become a part of the team during the early stages of emergency management.¹⁶

A. What Do Clients Want and Need from Their Lawyers during Disaster Operations?

We learned from the Advice in Crisis interviews with FEMA Federal Coordinating Officers (FCOs) and other disaster managers that effective inter-professional communication—that is, effective communication between emergency managers and their lawyers—is essential for crisis management but often difficult to achieve.

B. Why Is This?

First, without detailed knowledge of emergency management law—that requires thoughtful and ongoing preparation for crises across a wide range of legal disciplines—lawyers see events unfold as they labor to learn the law. Law schools provide little or no training in the law of emergency management or crisis decision-making, and most FEMA lawyers in the past have learned by doing. Many emergency managers have likewise learned by doing and are well versed in program-specific policies and practices. Unfortunately for those emergency managers, “some attorneys do not react well when their clients know more about the law than they do.”¹⁷ It can be disconcerting for attorneys, inexperienced or seasoned, to be able to recognize this and proceed authoritatively without the mantle of being the expert on the law in question in a room of laypeople.

Second is the problem of ‘parachuting’ into a team. FEMA emergency managers have often worked together for a long time in steady state operations or in past disasters. If the lawyer has not been part of the team

¹⁶ See Nicholson, *supra* note 15.

¹⁷ *Id.*

before, it is possible, even likely, that he or she may be unwelcome during response and recovery. Furthermore, without a degree of shared contextual, social (see GAIN later in this appendix), and situational awareness stemming from participation in the early stages of a mission, lawyers may be at a disadvantage in their interactions with other team members, who may well be better informed and connected. It is crucial for the attorney to understand the context of the issues and the overall situation and not just focus on the pure legal questions.

Third, traditional law practice and the emergency management profession often have diametrically different perspectives on risk. Lawyers in most situations seek to minimize risk for the client—that is, they gravitate towards risk avoidance. What emergency managers need and want, however, is rapid advice on matters that may entail a high potential of legal liability and adverse media reactions, like evacuations, emergency contracting, and property loss that traditional lawyers in non-disaster settings would otherwise counsel against. The emergency manager often cannot “afford” to avoid risk, so what they need are knowledgeable and accessible legal advisors who can innovate, mitigate, and focus on mission accomplishment in which the traditional legal view of success may morph in order to reduce the loss of life and property. As one FCO put it in an Advice in Crisis interview, “I do not want my lawyer to keep me out of court. I want my lawyer to keep me out of jail.”

Effective inter-professional communications begin with understanding what senior emergency managers want their lawyers to be and to do. During the Advice in Crisis interviews, senior FEMA emergency managers told us they wanted lawyers in the field to be prepared and competent; indeed, most said they would rather reach back to the HQ Office of Chief Counsel (OCC) than have an embedded attorney in the field who was not prepared and competent to handle the rigors of providing legal services in an emergency operations center (EOC) or JFO. FEMA emergency managers value continuity—once they have a lawyer on the team aligned with their style and expectation, they found turnover to be disruptive. Some of the characteristics valued by a majority of those interviewed include:

- Being a “team player”
- Loyalty
- Responsiveness
- Can do attitude (not bias towards “no”)
- Integrity (want the emergency brake pulled if really necessary)
- The ability to keep up with the pace
- The ability to clearly distinguish between “law” and “policy” when delivering options and advice in crisis

Unfortunately, during the Advice in Crisis interviews, FEMA emergency managers reported experiencing uneven delivery of legal services. They reported large variability in:

- Attitude
- Competence
- Responsiveness
- Trust and “loyalty”
- Judgment
- Integration (in team)
- Empathy
- Influence/persuasiveness

Sometimes, faced with lawyers they perceived as “part of the problem, not part of the solution,” FEMA emergency managers adopted a number of coping strategies that most lawyers would view as inimical to a climate where they could provide legal advice effectively. Eight sometimes

mutually exclusive coping strategies emerged consistently during the interviews:

1. Avoidance (e.g., “better to keep the lawyers out of the response phase altogether”)
2. Forgiveness (count on latitude for irregularity associated with response phase)
3. Isolation (e.g., “I put the lawyer in an office as far away from me as possible”)
4. Cherry-picking (e.g., “Use favorite lawyers, avoid others”)
5. Go to the top (Contact Chief Counsel personally)
6. Lay down the law (Make expectations explicit)
7. Request to be copied on all emails to HQ OCC
8. Send home “poor performers”

Finally, a key finding of the Advice in Crisis leader interviews was that FEMA decision-makers’ preferences coincided with the SALT performance standard recently adopted by OCC. SALT is a set of individual performance criteria linked to OCC’s Mission Statement that mandates that legal advice produced by OCC shall be:

Solution Oriented –

Where others see obstacles, we focus on legally viable solutions and outcomes. We are open to ideas of others and provide options, constructive alternatives, and creative solutions to legal problems. We support continuous learning and collaborative environments that foster new ideas, understanding, and better ways to execute FEMA’s mission. We help resolve conflicts and eliminate needless barriers that interfere with the Agency’s efforts to achieve its mission. We assess what is valuable from current and past activity in our practice, document it, and share with those who need to know.

Articulate –

We express our positions and explain law and policy in an organized, well-reasoned, and persuasive manner, both orally and in writing. We use language that is appropriate to the client-partner, without use of undue “legalese” that might confuse or distort the message.

Legally Sufficient –

*To the extent operational conditions permit, we apply the aphorism “Salt away the facts, the law will keep.”¹⁸ This means we aggressively develop the facts before applying the law to arrive at legal conclusions and options. When we render a legal opinion, in any form, we cite to legal authorities (using *The Bluebook* for all written work) to demonstrate that our opinion substantially satisfies applicable statutory, regulatory, and federal executive branch requirements so that our client-partners and those who may later review our opinions understand our reasoning. We are professionally responsible and uphold our duties to our clients, courts, and the legal profession.*

Timely –

We deliver advice and counsel on demand, where and when our client-partners need it, and aggressively anticipate issues and obstacles to mission accomplishment. By being proactive, responsive, and accessible, we prevent problems. We meet the timelines required to support critical or urgent Agency operations and communicate with our clients to establish appropriately prioritized timelines for routine matters. To the extent operations permit, we provide our colleagues

¹⁸ See *Erickson v. Starling*, 71 S.E.2d 384, 395-96 (N.C. 1952) (Then North Carolina Supreme Court Justice Sam Ervin delivered this anecdote, wherefrom we derive the concept of “salt away the facts, the law will keep.” The unfortunate turn taken by this case in the court calls to mind a bit of advice received by the writer of this opinion from his father, who was a member of the North Carolina bar for 65 years. When the writer embarked on the practice of law, his father gave him this admonition: “Always salt down the facts first; the law will keep.” The trial bench and bar would do well to heed this counsel. In the very nature of things, it is impossible for a court to enter a valid judgment declaring the rights of parties to litigation until the facts on which those rights depend have been “salted down” in a manner sanctioned by law.).

*with sufficient time in which to review, consult, and coordinate on complex issues.*¹⁹

C. What Approach Worked for the Most Effective Disaster Operations Lawyers?

Successful FCOs and lawyers identified two distinct conditions for successful delivery of legal services during disaster operations. First is pre-mission preparation, which consists of a combination of physical (e.g., bag packed, electronic files ready, rested and mentally prepared for duty) and intellectual (e.g., extensive professional development, emergency management law expertise) readiness activities. Second is a “get in early” approach to the client relationship. Most emergency managers and lawyers were emphatic that attorney presence during the response phase is essential to both the physical and interpersonal orientation necessary to place attorneys in position of “heedful interrelating” in times of greatest pressure and tension.

What is heedful interrelating? In plain English, heedful interrelating, in this context, means lawyers adapting and integrating into an emergency management team in a manner that fully supports mission accomplishment. “People act heedfully when they act more or less carefully, critically, consistently, purposefully, attentively, studiously, vigilantly, conscientiously, and pertinaciously.”²⁰ Heedful performance is different from habitual performance—habitual performance is consistently replicating the last performance and usually the outcome of drill and repetition, while heedful performance involves constant learning and modification based on training and shared experience. Heedful interrelating in disaster operations involves the recognition (by lawyers and their clients) that JFO lawyers are emergency managers, too, and must structure their contributions with the understanding that they are part of a broader emergency management system consisting of connected, interdependent actions.

¹⁹ FEMA OCC SALT individual performance review criteria document.

²⁰ See Karl E. Weick and Karlene H. Roberts, *Collective Mind in Organizations: Heedful Interrelating on Flight Decks*, 38 ADMIN. SCI. Q. 357-81 (1993).

Heedful interrelationships are particularly vital for government attorneys providing advice in disaster operations. In contrast to the private bar's concept of "client," which flows from the fundamental and long-standing ethical principle that a lawyer cannot represent conflicting interests, the "relationship among agency officials, managers, and lawyers is inherently complex, and the identity of the 'client' may vary according to the nature or stage of the matter."²¹ In fact, some lawyer-skeptical FCOs indicated that the lack of a definitive privilege (i.e., attorney-client) for communications between the FEMA lawyer and the FCO was a major obstacle to including lawyers in the decision-making process and expressed a desire for such protection. Another FCO felt that attorney reporting requirements 'up the line' to HQ OCC were a potential source of distrust and indicated that a standard practice in that FCO's JFO was to order the lawyer to copy the FCO on correspondence with HQ OCC on matters of significance to the FCO leadership. Successful lawyers, however, can turn what might be considered a hindrance—i.e., organizational ties to HQ—into a strength by 1) providing valuable situational awareness and intelligence on HQ's perspective or leanings on particular issues, 2) providing advice based on personal experience and knowledge on how to deal with or approach certain decision-makers in HQ, and 3) marshalling the best case and advocating for the field perspective.

A multi-jurisdictional disaster (and, by definition, every time FEMA is involved, the disaster is multi-jurisdictional) further complicates the "lawyer-client" model for government lawyers at all levels. Accordingly, government lawyers supporting disaster operations need to concentrate on management and communication structures and tools like those described in the Advice in Crisis model to overcome both the perception and reality that lawyers are obstacles to, rather than enablers of, solutions.

Highly successful disaster operations attorneys reported that the following practices contributed to heedful interrelating within emergency management teams:

²¹ See Edles, *supra* note 13, at 12.

“Look before you leap.” When first arriving at the EOC or JFO, keep a relatively low profile, get a feel for the local environment (e.g., culture/personalities), and do not get in the way. Indeed, find ways you can help even if it does not involve the practice of law.

“Manage risk, don’t avoid it.” In every encounter, focus on solutions and options for mission accomplishment, not traditional, liability-centric risk avoidance. Remember that saying no may answer the legal question posed but does not solve the underlying problem. Find another way to approach the problem if necessary.

“Build trust relationships.” Provide advice by walking around. Be visible and do not just sit at your desk all day—make “house calls.” Make yourself useful when you are not engaged in practicing law. Build and use your network of local resources. Adapt your communication to context and personalities, including thoughtful choices about the venues for providing advice (e.g., groups, one-on-one, etc.). Be proactive—anticipate! Above all: deliver.

A precondition of heedful interrelating is understanding the demands placed on others on the team. A deeper understanding of some of the core tasks of leadership under crisis conditions promises to help lawyers support their leaders (and contribute to team leadership) more effectively.

D. Leadership Tasks

Before unpacking the Advice in Crisis model, we will review the five tasks of crisis leadership,²² which define the responsibilities of all emergency managers and provide a consistent context for the delivery of legal services during disaster (and other crisis) operations.

Several decades of intensive empirical research on crisis has suggested that leaders face typical and recurring challenges when confronted with crises. A recent synthetic overview of the crisis studies field²³ suggested that

²² See *Boin, supra*.

²³ *Id.*

leaders face a series of tasks that tend to emerge in facing a wide variety of crisis types. These are:

1. Sense-making;
2. Decision-making;
3. Meaning-making;
4. Terminating; and
5. Learning.

These tasks are germane not only to effective crisis leadership in a particular incident, but also to creating better preconditions for future incidents.

Sense-making

Sense-making in crisis refers to the challenging task of developing adequate interpretations of what are often complex, dynamic, and ambiguous situations.²⁴ This entails not only developing a picture of what is happening, but also understanding the implications of the situation from one's own vantage point and that of other salient stakeholders. "Sense-making is much more than sharing information and identifying patterns. It goes beyond what is happening and what may happen to what can be done about it."²⁵ In fact, the diagnostic questions presented previously are a useful point of departure for crisis sense-making. Note that the sense-making problem takes a somewhat different form depending upon whether the consequences of the emerging situation are latent or manifest. For example, on September 10, 2001, the sense-making problem regarding the terrorism threat to the United States was largely one of detecting relatively faint signals in a cacophonous background, a problem that had been exacerbated by political inattention

²⁴ Cf. Karl E. Weick, *Enacted Sense-making in Crisis Situations*, 25 J. MGMT. STUD. 305–17 (1988); Stern forthcoming).

²⁵ See David S. Alberts and Richard E. Hayes, DOD Command and Control Research Program, *POWER TO THE EDGE: COMMAND AND CONTROL IN THE INFORMATION AGE* (2003), at 102.

and organizational fragmentation.²⁶ On September 11, 2001, suddenly the signals became very loud indeed—ushering in a completely new set of sense-making challenges associated with value, complexity, uncertainty, and acute time pressure, accompanied by paradoxical combinations of information shortage and overload.

Decision-making

Decision-making refers to the fact that crises tend to be experienced by leaders (and those who follow them) as a series of ‘what do we do now’ problems triggered by the flow of events, emerging either simultaneously or in succession. Complex crisis events may entail a considerable number of these decision-making occasions associated with different aspects of an emerging and evolving situation. Crisis decision-makers tend to (but do not always) operate on different time frames depending upon their proximity to the scene or stage upon which the crisis unfolds. During the last 20 years or so, scholars of crisis decision-making have gained important insights into the ways in which civilian and military crisis decision-makers operate at both strategic and operational levels.²⁷ Effective crisis decision-makers rely not only upon experience-based intuition, but also know how to get the best out of their crisis teams by facilitating functional group dynamics.

Meaning-making

Meaning-making refers to the fact that leaders must attend not only to the operational challenges associated with a contingency, but also to the ways in which various stakeholders and constituencies perceive and understand the event. Because of the emotional charge associated with disruptive events, followers look to leaders to help them understand the meaning of what has happened and place it in a broader context. Every crisis develops its own dramaturgy in which participants are assigned roles: hero, victim,

²⁶ See Charles F. Parker and Eric K. Stern, Bolt from the Blue or Avoidable Failure: Revisiting September 11 and the Origins of Strategic Surprise, 1 FOREIGN POL’Y ANALYSIS 301-31 (2005).

²⁷ See Eric K. Stern, CRISIS DECISIONMAKING: A COGNITIVE-INSTITUTIONAL APPROACH (Swedish National Defense College 1999); See also Gary Klein, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (2001); NATURALISTIC DECISION MAKING AND MACROCOGNITION (Jan Maarten Schraagen *et al.* eds., 2008); Boin, *supra* note 5.

villain, fool, etc. This is not only done through words—rhetoric—but also through actions and body language that often speaks louder, and in a more compelling fashion, than words. By their words and deeds, leaders can convey images of competence, control, stability, sincerity, decisiveness, vision—or their very opposites. Through their communication, leaders may influence—i.e., raise or lower—expectations, as well as reinforce or undermine their own personal and organizational credibility. Note that different forms of protection strategies (such as evacuate or shelter in place) are associated with different advantages and disadvantages in terms of their communicative dramaturgy.

Terminating

Terminating refers to the non-trivial task of finding the appropriate timing and means to end the crisis and return to normalcy. For example, in anticipation of a major hurricane affecting multiple states, numerous command centers, operations centers, and emergency teams spool up to their highest levels of readiness. While that pace of operations may be necessary as the storm approaches and strikes, and in the immediate aftermath, such a tempo of operations is simply unsustainable. Hence, it is imperative to find the right time and the right way to begin the process of ratcheting down and even demobilizing. Attempting to end a crisis prematurely, however, can endanger or alienate constituencies who may still be in harm's way, traumatized, or otherwise emotionally invested in the crisis. It may also raise expectations and set the stage for disappointment. External crisis interventions or aid provision may create dependencies on that intervention and knock out or inhibit the recovery of local resources and productive systems. Finally, a crisis may be particularly difficult to terminate if the operational challenges lead to a so-called crisis after the crisis, during which recriminations against those who failed to prevent, respond effectively to, or orchestrate recovery after a negative event challenge the legitimacy and viability of affected individuals and organizations.

Learning

The final leadership task we will describe is learning. Learning entails examining the genesis of and/or the response to a crisis in order to

identify lessons for the future about how to prevent, respond to, or recover from a disruptive event. Effective learning requires an active, critical process that recreates, analyzes, and evaluates key processes, tactics, techniques, and procedures in a manner designed to identify best (and lesser) practices and formulate reform suggestions in a manner conducive to enhanced performance, safety, and capability. The learning process begins when a “lessons learned” document is produced. In order to bring the learning process to fruition, change management/implementation must take place in a fashion that leaves the organization with improved prospects for future success.²⁸

The Advice in Crisis Model



Figure 1. The SALT Performance Standard

A. Mission Preparation and Readiness (PREP)

Leaders and top lawyers at FEMA agree that a key prerequisite for success is being prepared for the rigors of practicing law in crisis or disaster

²⁸ See Boin, *supra* note 5; See also Eric K. Stern, *Crisis and Learning: A Conceptual Balance Sheet*, J. CONTINGENCIES & CRISIS MGMT. (1997); Edward Deverell and Eva-Karin Olsson, *Learning from Crisis: A Framework of Management, Learning and Implementation in Response to Crises*, 6-1 J. HOMELAND SEC. & EMERGENCY MGMT. (ART. 85 2009).

environments. The pace is fast, and disaster lawyers must hit the ground running. The following section outlines four key categories of preparation that may be helpful in improving the likelihood of a successful performance. While they do not guarantee success, they clearly improve the odds. Furthermore, failure to prepare will stack the deck towards failure. Former White House Chief of Staff and Secretary of State James Baker was reportedly fond of reminding his staff of the 5 Ps: Prior Preparation Prevents Poor Performance.²⁹

Four Categories of Preparation

1. Personal Commitment and Contact
2. (Mission) Reconnaissance
3. Emergency/Disaster Legal Resources
4. Packing Lists for Field Deployments

Personal Commitment and Contact

Preparation enables lawyers to connect with their clients, other team members, and partners at an early stage by establishing relationships and providing communications links that can help improve the lawyer's situational awareness going into a situation. The following points summarize some ways to prepare oneself for deployment and pave the way for good collaborative relationships with colleagues (*see the GAIN model*):

Prepare for availability and extended absence: Two of the factors most emphasized by FEMA leaders and top-performing lawyers interviewed by Advice in Crisis researchers are availability and commitment. Clients want lawyers to be readily available and prepared to commit to longer deployments. Though the minimum commitment for field deployments is 30 days, leaders often want and expect their lawyers

²⁹ See David D. Pearce, *Wary Partners: Diplomats and the Media* (1995); James Baker, III, *Work Hard, Study, and Keep Out of Politics* (2006).

to stay longer to avoid disrupting key advisory relationships in periods of intense activity.

Establish pre-departure communication by phone and/or email with:

- i) Relevant OCC/program specialists at HQ or regional offices;
- ii) JFO leadership (including the Deputy FCO and/or Chief of Staff);
- iii) The FCO (by sending at least a courtesy email);
- iv) Regional, state, county, local, or other partner organization counsel or officials/stakeholders, as appropriate; and
- v) Regional counsel – to get background information on the current state of affairs for both the Regional Office and the state, including challenges, new leadership, and other important issues.

Meet and greet FCO and team broadly on arrival: Lawyers should follow up with pre-deployment contacts, and complement these contacts with additional personnel introductions, once on site. By doing so, lawyers not only signal sociability, but also approachability and willingness to be a part of the team. Find out if the FCO has any particular concerns, and determine how the FCO runs his or her office and who the gatekeeper is (e.g., the Executive Assistant or Chief of Staff). Be sure to get to know the gatekeeper.

Know your redlines: In engineering, “redline” refers to the maximum engine speed at which an engine or motor and its components are designed to operate without causing damage to the components themselves or other parts of the engine. For emergency management lawyers, “knowing your redlines” means having a clear understanding of your ethical duties and the limits of the law (and your personal knowledge of the law), and how each of those bounding factors might present themselves in a disaster setting before you are in the thick of providing advice in crisis. As a practical matter, you will learn and develop your own sense of redlines through professional development, exercises, and experiences, which is one reason that it is imperative for all federal emergency management lawyers to learn the business (that is, develop expertise in the FEMA disaster programs and

operations), as well as the Stafford Act, fiscal law, emergency acquisition law, ethics, and grants law before you are confronted with challenging interdisciplinary issues during disaster operations.

(Mission) Reconnaissance

The prospects for providing successful advice improve if lawyers do not wait for field deployment or first meetings of dedicated crisis/disaster teams at HQ to begin mission reconnaissance. Once assigned, lawyers should immediately begin informing themselves about the situation, context, and role they will be assuming. There are many ways to do this kind of mission reconnaissance. Some suggestions formulated by top FEMA disaster lawyers include:

- Consult <http://www.fema.gov>
- Review the current declaration information and the state's disaster history <http://www.fema.gov/news/disasters.fema>
- Review the FEMA Qualification System Task Book (Legal Adviser)
- Review Incident Management Assistance Team (IMAT)/situation reports
- Scan open source intelligence (local and national media/social media) including the FEMA compiled daily clips <http://www.fema.gov/news/recentnews.fema>
- Review event type (expected consequences/complications/policies) <http://www.fema.gov/hazard/index.shtm>
- Review context (historical, geographic, cultural, jurisdictional, political)

Emergency/Disaster Legal Resources

Gather/secure access to general and specialized legal resources in paper and/or electronic form. This is particularly relevant for field deployments but also can facilitate the development of timely and legally sufficient advice at HQ or in interagency environments.

Research and compile resources for anticipated issues such as:

- Authorities (for FEMA and collaborating agencies)
- Regulations
- Guidelines
- Policy
- Opinions
- Precedents
- New or recent initiatives or changes in policy or guidance
- Relevant local law

Packing Lists for Field Deployments

The following suggestions are more practically oriented and designed to make lawyers more self-sufficient, sustainable, and easily integrated in potentially austere and often hectic field environments.

Travel light: Be able to manage your own luggage in the field. One does not want to unnecessarily burden or inconvenience colleagues who may be under a great deal of stress. Think low-maintenance clothes, shoes, boots, and other personal items for fair and foul weather, including field visits.

Develop and bring a **field kit**, including items such as:

- Flashlight and reserve batteries

- Water purification tablets (if traveling overseas, or to disasters where water contamination may occur)
- Portable radio
- Small amount of detergent
- GPS and cell phone with charger/extra batteries
- Computer/tablet with chargers/extra batteries
- Power strip
- Pack personal items, such as books, music, or DVDs.

B. Social-Behavioral Elements Required for Effective Advice in Crisis (GAIN)

From a social-behavioral perspective, the FEMA attorney faces challenges that are unusual, if not unique, within the legal profession. The first challenge is linked to the very identity of the agency. Simply put, to be effective, FEMA attorneys must embrace the fact that “emergency” is their middle name. The second challenge is that within these emergencies, whether they involve response or recovery, the FEMA attorney is like a traffic cop at a busy intersection at rush hour, facing people who must share the crisis road on their way to specific agency-specified destinations. The competition for the road reveals tensions: between field units and headquarters; FEMA and DHS (including the Inspector General); FEMA and the interagency process, state and federal government; and not least between OCC and clients. The FEMA attorney must know the law and be fair but must also expect to face myriad stakeholders coming from various directions.

One cannot read this discussion about best practices without being struck by the abrupt nature of crises in general, and disasters in particular, and the active engagement required by FEMA attorneys from the moment that they “parachute into the team.” The vernacular of crisis can easily become win-lose or succeed-fail. Expressions like “team player,” “responsiveness,” “integration into the team,” “avoidance,” and

“isolation” speak to just a few of the behavioral caveats specific to the very tricky business of providing advice in crisis.

In the process of interviewing crisis leaders, FCOs, and attorneys for this Advice in Crisis project, it became clear that the process of advice—how it is developed and delivered—was as important to effectiveness as the content of the advice. Although knowing the law well is necessary, it is clearly not sufficient when dealing with crisis advice during the response and recovery phases. FEMA attorneys must attend to the dynamics of communication as they stand with Regional Administrators, FCOs, or other leaders under the difficult conditions associated with disaster response and recovery.

Based upon the collective experience of crisis leaders and some of their finest attorneys, we developed the GAIN model of the social-behavioral elements of advice in crisis. The elements of GAIN include: 1) Group Dynamics; 2) Active Engagement; 3) Individual Requirements; and 4) Negotiation.

Group Dynamics

FEMA attorneys work within a crisis team and must not only be aware of the group dynamics of the team, but also must be prepared to adapt to and try to shape them. Large-scale disaster response and recovery requires a rapid deployment of professionals from federal, state, and local arenas. These players meet in group constellations within and outside of FEMA that can initially be daunting, particularly for the inexperienced crisis attorney. It is within these group settings that the attorney’s ability to connect and function effectively with others is tested in a public arena.

The Crisis Team: To appreciate the power of group dynamics in the days and months following the onset of a disaster (or other form of crisis) it is important to be aware of the critical role of group development as a factor impacting on group performance. Often, at the outset, groups may be rapidly constituted, with many players that do not know one another well. In such situations, an effective group leader—such as an FCO—can provide form, structure, and constructive accountability to group members, minimizing individual uncertainty that might otherwise inhibit

engagement and performance.³⁰ Leaders can clarify the rules of the game, coordinate and motivate (and support) members, and thus leverage their energy and commitment. As groups develop over time and stronger bonds emerge among the members, they may be more prone to other conformity-based group dynamics such as ‘groupthink,’ especially in highly stressful circumstances.³¹

An effective crisis team is greater than the sum of its parts and requires that the crisis attorney become an integral member of that group. If the attorney has successfully joined, real engagement and meaningful communicative interaction will occur. If not, the attorney may become irrelevant and isolated. How does an attorney become an effective member of the crisis team? First, the attorney must value the team identity and seek a role as an integral member. The attorney must also understand two of the most important elements of successful group integration: Time and Timing.

Time and Timing: Shared experience of dramatic, traumatic effects is a powerful connective force, and bonding within crisis groups may occur rapidly. The initial response phase can have a searing effect on a crisis team. When led by an effective FCO, the charged atmosphere of the first few days can lead to a sealing or a bonding of a group that quickly becomes not only cohesive, but also potentially exclusive. Therefore, it is advantageous for the attorney to get in early and stay for as long as possible. Hours and days matter, and once that bonding has occurred, it is more difficult for a latecomer to bond with others in the crisis team.

Group dynamics evolve over time, and this is not always to the advantage of an attorney who parachutes in and is then called away to another disaster. The group may actually feel offended if it experiences the attorney’s departure as elective in nature. While *timing* is important, the correlate to effective crisis team integration is *time* itself. Any positive effect of early bonding will be lost if an attorney announces, “In two

³⁰ See Stern, *supra* note 28; See also Stephen Worchel, Dawna Coutant-Sassic and Michele Grossman, *A Developmental Approach to Group Dynamics*, in GROUP PROCESS AND PRODUCTIVITY, 181 (Stephen Worchel et al. eds., 1992).

³¹ See Janis, *supra* note 16; Paul ‘t Hart, BEYOND GROUPTHINK: POLITICAL GROUP DYNAMICS AND FOREIGN POLICYMAKING (Eric Stern and Bengt Sundelius eds., 1997).

weeks I will be taking annual leave, so please get your questions to me while I am still here.” Groups mature, and as time passes, the bonds become stronger. Although the initial phase is important, the attorney who arrives early and departs early has abandoned an opportunity to develop within an integrated team. If the attorney’s actions suggest the calendar is more important than membership within the crisis team, then that membership will quickly lapse.

The attorney must not be perceived of as “high maintenance.” This includes being overly demanding or being unreasonable about the workspace assigned to the attorney.

- One attorney was almost sent home after 9/11 for being rude and demanding on prioritizing the setup of the cubicles for the attorney staff. This was a very large operation with many top-level staff taking operational roles. Everyone had to make do.
- Another attorney complained about being in an office in the basement level of a building. The FCO had decided to place the attorneys in this office instead of in an open space on the main floor as an interim measure until the operations stabilized. It was the FCO’s intention to move the attorneys closer to the FCO as part of the FCO’s command staff in a large enclosed area as soon as possible.
- One attorney had to make do with a picnic table her first day on the scene because there was no space in the Emergency Operations Vehicle. She had a laptop but no Internet access, cell phone, or printing capabilities. She did have, however, a legal pad, her Stafford Act and regulations, and her computer files, and was able to set up shop and get to work.
- Another trio of attorneys had to share a data cable for email access for the first week or so after Hurricane Katrina. Each attorney had 20 minutes each hour for email and Internet access. They were seated at lunch tables with all the other FEMA staff in the cafeteria of the National Guard.

Attorneys need to be flexible on workspace issues in the field. If an enclosed office is not feasible, then is there an office or private area for consultations or phone conversations available when needed? If a dedicated fax machine cannot be arranged, can the attorney use the FCO's fax machine? Is the attorney space near the FCO and other command staff and sufficiently apart from the state staff and more open areas as a safeguard? Attorneys should adhere to the office hours of the field office and not their normal routines. If the command staff is in by 7:00 a.m., the attorney should also follow that schedule. This is particularly important for the lead attorney. Being unavailable or having a subordinate attend early morning command staff meetings will be duly noted by the command staff and will undercut the lead attorney's authority. In fact, the lead attorney may be considered the lead in name only, as folks gravitate to the attorney staff that is there for them outside of "banker's hours."

The attorney must continue to foster the relationships made as part of the crisis team after the crisis has ended and the team has disbanded until the next event. When crisis team members reach out to the attorney from their home base or from another disaster with an issue or question, the attorney needs to prioritize this inquiry whenever possible. As fellow team members, they are not just clients but colleagues who have faced adversity together.

Challenges to the Group: Not all crisis teams are created equal. Depending upon the leadership and chemistry, some groups can evolve in unhealthy and even destructive ways. A skilled crisis attorney should be aware of the dangers of the unhealthy group, which can devolve quickly into a destructive process characterized by either excessive conformity (i.e., 'groupthink') or excessive conflict.³² Effective disaster attorneys maintain an understanding of the importance of ethics, consistency, and adherence to professional boundaries. When a group is allowed or encouraged to breach boundaries or behave in an unethical manner, or when inadequate leadership is shown, members, the agency, and other stakeholders will suffer. The attorney who maintains professional boundaries and behaves in an ethical manner not only safeguards his/her own reputation, but also serves as a model for others in the group, which can help serve as a course

³² See Hart, *supra* note 32.

correction for the group. With skilled leadership from FCOs, unhealthy groups are the exception and not the rule. Even unhealthy groups can be well served by attorneys who consistently adhere to professional boundaries and ethics—this is why one of the PREP activities is to know your redlines. In fact, in crisis, as in other settings, lawyers have an opportunity—even a duty—to exercise this form of leadership.³³

Attorney’s Role within the Team: Certainly, the attorney’s role within the team is to provide legal advice to clients during the response and recovery phases. That is not as simple as it sounds and in fact requires a thoughtful situational awareness. What are the needs of the moment? What will the team require next week? Is there a legal issue that has not been addressed that will be certain to unravel unless identified by the attorney and addressed by the FCO and the team? It is not enough to bond early and integrate well into the team. Continued integration into the team requires situational awareness in order to address present legal needs while, at the same time, identifying future legal landmines.

Within the group, the crisis attorney must maintain a balance between outsider and insider status—a team player who must at times shift gears and serve as a kind of referee. This is a challenge, because the two roles must often be played more or less simultaneously. Ideally, the crisis attorney maintains the trust of individual crisis team members and relates to the group as a whole. At the same time, the crisis attorney’s role is distinct from any other. Unlike the FCO, the crisis attorney does not maintain a leadership role within the group. At the same time, the attorney’s distinctive skill sets are unique from any other in the group.

Active Engagement

In order to bond with the team, experienced crisis attorneys must also be actively engaged in the process. That activity provides opportunities to demonstrate commitment, purpose, and competence—potentially enhancing the status of the attorney in the group. In fact, many leaders would like their crisis attorneys not only to serve as technical experts on matters of the law, but also as wise counselors supporting the leader and

³³ Cf. Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L. J. POCKET PART 266, 266-71 (2007).

the decision-making process in a broader sense. A leader, such as an FCO, can benefit greatly from a partnership with an effective attorney. Through active listening, attorneys can acquire knowledge of the event and the concerns of the leader and other team members—thus achieving better, productive, and seamless integration into the fabric of the team.

Active engagement is a process that requires all of the intellectual and interpersonal skills required of a fine attorney. Active engagement is antithetical to a passive or static approach. If crisis is similar to a contact sport played on a field, the attorney should be with the action on the field as a player/referee and not in the stands watching or in the press box opining. While some discussions (and the attorney's contribution to them) in the disaster arena will be very public, other discussions with leaders and team members are best kept private (*see also* the discussion of **provision of advice** later in this appendix).

This pressure-filled environment demands attention and focus throughout the response and recovery phases when legal counsel is required. Active engagement is therefore a process that:

- *Begins* with accessing relevant documents even before arrival at the crisis site;
- *Continues* through phone, Internet, and face-to-face access of the attorney's collegial network both on-site and off-site; and
- *Leads to* team interactions that are sensitive to the needs of individual team members and the group as a whole.

Individual Requirements

The attorney's role within the crisis team represents a paradox of sorts: To be a great team member, one must remain distinct. Because most FCO-led response and recovery teams in FEMA contain only one attorney, attorneys must resist the potential to become submerged into the larger group process, if it would risk diluting the attorney's professional identity and integrity in the process. This speaks to the conundrum of being both a player on the team as well as referee. In such a scenario, the FCO may take

the role of coach—not always readily embracing the calls of the referee but always appreciating the need for an experienced interpreter of the rules of the game. The one major difference is that in the game of FEMA crisis (in the JFO setting, for example), the FCO coach can ultimately overrule the attorney referee. Whether one is a player-referee or traffic cop at a busy intersection, these important roles require knowledge of the rules and sensitivity to the situation at hand. Without an appreciation for the group process, active engagement, and individual requirements, a crisis attorney is not in a position to provide the most effective counsel.

There is a need for the attorney to absorb and deal with the natural tensions that exist within any crisis team. Even when the attorney has bonded with the group and been embraced by the team, there will be conflicts among those who are dedicated to the mission. When these current or budding conflicts are legal, the crisis attorney will experience the singular brunt of the tensions that require counsel rather than judgment. How does the crisis attorney approach these situations? The best approach is through a process that attorneys are uniquely experienced and trained to deploy: negotiation.

Negotiation

Negotiation is a crucial challenge of providing advice in crisis. Speaking literally, various forms of negotiations take place in both intra-agency and interagency contexts associated with disasters. Lawyers may play a key role in guiding and facilitating these negotiations in order to support fulfillment of mission and other obligations within the context of the law. However, the notion of negotiation also provides insights into the lawyer's predicament in another sense. As we have already pointed out, the social, political, psychological, ethical, and legal terrain of a major disaster is complex and fraught with tensions and pitfalls that must be successfully negotiated by lawyers and leaders alike.

Our emphasis on a negotiation mindset may at first surprise new FEMA attorneys who approach advice in crisis with an FCO-led team. After all, doesn't advice in crisis involve interpretation of the Stafford Act? The Stafford Act is settled law and requires interpretation, not negotiation. So, if interpretation is the necessary skill, why is negotiation relevant?

While the Stafford Act is the critical piece of legislation that serves as the legal foundation for FEMA's response and recovery-related actions, it is written in such a way that it can be applied to disparate and often unforeseen disaster events—and the client is typically well aware of the potential for flexibility in interpretation. The crisis attorney must therefore be adept at both interpreting and translating the Stafford Act in a wide variety of situations. The attorney who wants to be persuasive and effective must also recognize that successful delivery of a legal interpretation may require a negotiation with the client who has preconceived expectations, contrary views on the scope of his or her authority, or misplaced perceptions that the legal interpretation will thwart an operational need.

Crises generate questions, and the most important sense for crisis attorneys is auditory. Hearing alone, however, is not sufficient; Listening is the real key. Crisis negotiators who deal with life and death issues are adamant about the obligation to listen prior to beginning a negotiation. In the life and death of disaster, crisis attorneys maintain that same obligation. Before rushing to an answer, one must first appreciate not only the content, but also the nature of the question. The temptation to speak too quickly, whether it is due to hubris, anxiety, or naiveté, must be resisted. This is particularly difficult since the time frame for listening and processing is severely compressed in the crisis scenario. A dearth of time however does not mean that these crucial steps are skipped but rather that they occur in rapid fashion. Before responding, the successful crisis attorney runs the issue through an almost instantaneous mental checklist of broad statutory authorities and bright line prohibitions.

In order to listen, the crisis attorney who is actively engaged realizes that the negotiation is in part a translation of the crisis into words that the client can understand. Negotiation provides a useful mind-set for the crisis attorney strategically placed in multiple agency, interagency, intergovernmental (federal, state, local, tribal) and (public, private, nonprofit) cross-sectoral processes. The delivery of a legal interpretation, even for attorneys, often requires consensus building, especially in a crisis environment.

Negotiation during crisis requires both the content of knowledge and the process of interpersonal engagement under extreme time and resource

constraints and competing interests. Negotiation between the needs of the group versus individual stakeholders can fulfill a critical role in serving and supporting the FCO's leadership of the crisis team. Whether that translation process occurs between individuals or within a crisis team or an agency, the effective crisis attorney is in a position to shed light during the heat of crisis.

C. Producing Substantive Advice in Crisis (SOAP)

Sense-making

The first step toward effective substantive advising in a disaster is to make sense of the situation (see **Leadership Tasks** in previous subsection). This may seem obvious, but it is a non-trivial and ongoing task as the disaster and post-disaster contexts tend to be complex and dynamic. Just as you feel you are getting your bearings and have a good understanding of the situation and problems to be faced by you, the client, and the broader team in which you are embedded, new developments will necessitate updating and rethinking. It is an iterative process and one that may require abandoning previously held views and priorities³⁴ as the 'operating picture' evolves.

While sense-making is in part an intuitive activity,³⁵ it can be improved and facilitated by using a set of core questions to challenge the environment and improve contextual and situational awareness. This is not only a way of combating the phenomenon of stress-induced tunnel vision noted previously, but also a good practice for lawyering and decision-making under more normal situations.

Asking the following questions can help lawyers (and leaders) better make sense of the situations facing them and improve performance in disasters and crises.

³⁴ Cf. John R. Boyd, *Destruction and Creation*, (unpublished 1976), available at [http://www.goalsys.com/books/documents/DESTRUCTION AND CREATION.pdf](http://www.goalsys.com/books/documents/DESTRUCTION_AND_CREATION.pdf) (last visited Aug. 23, 2011).

³⁵ Cf. Malcolm Gladwell, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

- Which values are at stake in this situation and for whom?³⁶
- What are the key uncertainties in this situation (and how might information gathering, analysis, consultation, etc., reduce them)?
- What is the time frame for developing and delivering advice (which is in turn related to the client's or team's time frame for action)? Are there ways of 'buying time' without compromising the mission or public affairs messaging, or otherwise delaying the workflow in the team?

Example:

There was a critical housing shortage in Florida due to extensive hurricane damages to residences. Families were living with friends and relatives, staying in shelters, and, it was reported that in dire circumstances, living in their cars because they could not go back to their damaged/destroyed homes. It was imperative to provide housing immediately.

FEMA contracting staff had secured all available and suitable commercial pad sites for placement of FEMA temporary housing units; however, this did not meet the critical housing needs. FEMA was working feverishly on dozens of projects concurrently throughout Florida with the General Services Administration (GSA) to lease land to develop group sites and with the U.S. Army Corps of Engineers (USACE) to plan and develop the group sites. OCC staff worked with GSA and USACE on executing necessary agreements.

FEMA had an opportunity to rent a semi-developed site from a commercial developer that could cut construction time dramatically. However, the GSA leasing agent was concerned that the developer was requesting a lease payment amount that far exceeded what was fair and reasonable and would not execute a lease without a cost justification from

³⁶ See Ralph L. Keeney, *VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING* (1992); Ian I. Mitroff and J.R. Emshoff, *On Strategic Assumption-Making: A Dialectical Approach to Policy and Planning*, 4 ACAD. MGMT. REV. 1-12 (1979).

FEMA. There was also concern about whether (a) the price could be negotiated down, (b) the commercial developer was gaining an unfair profit at the government's expense and that FEMA would be paying to complete the developer's project, and (c) the facts actually justified paying a perceived premium price for the land.

At first impression, OCC staff doubted that a cost justification could be made for the proposed action; however, it was clear that the command staff was very concerned about letting this opportunity go without an analysis of the facts: timelines, development costs, and alternatives. In one day, OCC staff obtained the relevant information from GSA, USACE, and the FEMA housing and contracting staff and then analyzed the data and prepared a cost justification memo for the FCO for the following day, which found that the lease and construction costs for the proposed action would help meet FEMA's housing mission for these disasters in a cost-effective and timely manner; that FEMA would actually realize substantial cost and time savings by utilizing the semi-developed land at the proposed lease cost amounts; and that the proposed activity was authorized under the Stafford Act.

Effective sense-making, a key part of problem solving, is facilitated by contextual awareness.³⁷ A very common source of failure in disaster management is building solutions around underdeveloped or inappropriate specifications of the problem.³⁸

Options

In providing advice to leaders and other clients in disaster operations, lawyers will engage at different stages of the problem solving process. In some cases, a decision-maker will have a preferred option. For example, in one disaster in a remote Alaskan village, the FCO strongly preferred partnering with voluntary agencies to leverage assistance resources to provide replacement housing. Accordingly, FEMA attorneys developed a transactional framework allowing the Agency to provide funds for log house kits for displaced households, which were constructed under the

³⁷ See Mary Ellen Martinet interview.

³⁸ See Ian I. Mitroff and Abraham Silvers, *DIRTY ROTTEN STRATEGIES: HOW WE TRICK OURSELVES AND OTHERS INTO SOLVING THE WRONG PROBLEMS PRECISELY* (2010).

supervision of the Mennonite Disaster Service and furnished by Samaritan's Purse.

The attorney is likely to face questions of the following nature:

- Are we authorized (or can you find me the authority) to do X?
- Are we prohibited from doing X?
- What are the legal (and possibly ethical, practical, political, or other) risks associated with doing X?
- How can we manage the legal and other risks associated with doing X?
- Is there a better (e.g., faster, cheaper, more effective, and/or less risky) way than X to achieve the goal?
- What were the lessons learned the last time we did X?

It is also possible that clients will identify a short list of two or more options under serious consideration and ask for a relative analysis of the costs, risks, and/or benefits associated with them. If there is a single or limited number of favored options on the table, proceed to assessment in this section.

In other situations, and especially if the lawyer is brought into the process at an earlier stage, lawyers may be asked to be a part of the process of identifying or developing options. This may involve drawing upon historical or organizational memory or the current set of procedures to help generate options or may entail a creative process of coming up with a novel approach. The latter is more likely to be necessary when FEMA is facing a situation that is qualitatively or quantitatively different and differs significantly from those faced in the past that have shaped the frame of reference and established action repertoire.³⁹ It is crucial in such

³⁹ See Henry Mintzberg et al, *The Structure of 'Unstructured' Decision Processes*, 21 ADMIN. SCI. Q. 246-75 (1976).

circumstances for the attorney to understand the delicate interface of law and policy and the need to work in partnership with program staff in developing novel approaches. Failure to involve and integrate the subject matter program experts can lead to perfectly legal plans on paper that are not executable on the ground. Program staff must have buy-in on the suggested solution, as they will actually have to execute the plan and deal with the consequences.

Again, once an option or limited set of options has been produced, shift to assessment.

Assessment

The assessment process is critical to producing high quality advice in crisis. While assessment should be seen as a broad process, drawing upon multiple perspectives on the option or options under examination, many lawyers focus explicitly on only one or two of these perspectives (and perhaps treat some of them in a more intuitive or explicit fashion). The best disaster lawyers analyze options in a systematic and comprehensive fashion, drawing upon four dimensions of assessment, and have the ability to weigh and integrate the results of this process in the advice they give to their clients and teams.

Dimensions of Assessment:

- Authorization
- Prohibition
- Risk
- Judgment

Authorization

Does the option appear to be authorized by the Stafford Act or supplementary authority? Disaster lawyers should keep in mind that Stafford was deliberately formulated to be a broad and flexible instrument and is subject to alternative and evolving opinions. The authorities

available under the Stafford Act may be interpreted broadly or narrowly, in part according to the policies and priorities set by FEMA's leadership (and the White House), as well as the zeitgeist of the times.

While the Stafford Act tends to loom large in the assortment of authorities at the disposal of FEMA, it is critical to keep in mind that other supplementary authorities may be available and provide authorization for actions that clients deem necessary or useful in addressing the needs of responding organizations, survivors, and other parties. Should these authorities not be directly available to FEMA, at times they may be borrowed from other agencies through cooperative agreements.

For example, FEMA assisted the United States Agency for International Development (USAID) after the 2010 Haiti Earthquake with assets and personnel to support the response efforts. These assets included Mobile Emergency Response Support personnel and equipment, the IMAT West, and an Incident Response Vehicle to help establish communications for relief efforts on the ground and to provide subject matter expertise and technical support. These activities were undertaken pursuant to an Interagency Agreement with USAID under the authorities of the Foreign Assistance Act of 1961.⁴⁰

Part of being solution oriented (and getting to yes) is about being creative in developing (and arguing) defensible rationales for authorizing practically necessary action under extreme circumstances.

Prohibition

When examining prohibitions and other forms of potentially prohibitive constraints, it is critical to distinguish between prohibitions and whether they stem from the Constitution, statutes (including appropriations law), regulations, executive orders, policies, tactical guidelines (e.g., FEMA letter from the Administrator), and/or past agency policy and/or practice. Is there a specific legal or policy-based prohibition, and from what does it derive?

⁴⁰ Pub. L. 87-195, 74 Stat. 424 (1961), as amended (current version at 22 U.S.C. §§ 2151- 2431k (2011)).

Note that lesser order prohibitions (especially those stemming from past agency policy) may well be amenable to change or dispensation in consultation with leaders within or outside of FEMA, especially if in tune with broader trends and shifts in policy and or political/operational imperatives. Situational and contextual factors will determine the viability and appropriateness of such courses of action.

When communicating to clients that certain prohibitions appear to be insurmountable obstacles to a particular course of action, be specific about the source and nature of those prohibitions. It is important to work with the clients on formulating a plan B or C if the favored course of action appears impossible to implement. It is also important to store these non-starter options for future reference in case there are calls for post-crisis legislative proposals.

Risk

What are the legal (and other) risks associated with this option in relation to other alternative courses of action or inaction? Disaster management is fraught with risk, and disaster managers are aware and often willing to accept a degree of, and in extreme situations more than a little, risk. Many of the leaders interviewed strongly emphasized their desire “to do the right thing,” despite potential legal exposure. Lawyers who seek to avoid legal risk completely will be perceived as obstacles to effective disaster management and are likely to be marginalized within their teams. Furthermore, legal risks must be weighed against other forms of risk (to life, property, FEMA reputation, political viability, ethics in the broader sense of the word, etc.), when giving advice. The old adage ‘desperate times call for desperate measures’ captures the balancing act that FEMA leaders are called upon to undertake when making crucial decisions during and in the aftermath of disasters.

When it is, or may be, necessary to embark upon a course of action fraught with legal risk, part of the lawyer’s task is to look for ways of managing or minimizing these risks. For example, contemporaneous documentation (not only of the legal opinion, but also of the situational imperatives and deliberative process behind the measure in question) may help protect the leaders and lawyers involved. Formulating a viable exit

strategy should also be part of the implementation plan. What are the metrics? Are there objective standards in place? How will this be conveyed to the state, the applicants, the public, and Congress?

Judgment (Practical and Ethical)

Last, but not least, is the imperative to exercise and apply judgment to the matter in question.⁴¹ Leaders (and other clients) told the Advice in Crisis investigators of their strong motivations to “do the right thing” during and after disasters. Leaders of good character, judgment, and intention often have an intuitive sense of what needs to be done in critical situations like disasters. Bases for such normative determinations may have to do with meeting urgent needs of survivors, preventing disproportionate direct or collateral damage, or living up to fundamental norms of fairness. As formulated by one veteran disaster lawyer (Mary Ellen Martinet) interviewed by the Advice in Crisis team: “Is this for the greater good?”

As in other areas of the law, it is necessary to address that question in two ways:

- Is this for the greater good *in this situation*?
- Is this for the greater good in terms of the precedent it would set and/or the incentive structure it would create?⁴²

One aspect of exercising judgment is knowing when to seek different perspectives, consult more experienced attorneys, or elevate a decision. Further complicating this exercise in judgment is the sense of urgency and attendant time compression associated with crises. As we discussed earlier, crises force decision-makers to make some of the most consequential decisions in public life under extremely trying circumstances. Hence, one important and recurring role decision-makers will ask you to play as an emergency management lawyer is helping to decide when to ask permission and when to seek forgiveness. It is unlikely you will have the

⁴¹ See GOOD JUDGMENT IN FOREIGN POLICY (Deborah W. Larson and Stanley A. Renshon eds., 2003), at 6 (“Good . . . judgment entails integrating and balancing competing values to come up with a practical course of action.”).

⁴² Cf. Farnsworth, *supra* note 7.

time and information necessary to consider thoroughly all of the potential options and consequences associated with a particular decision in crisis operations. This combination of core values, uncertainty, and time compression makes it imperative for the emergency management lawyer to come to the table with knowledge, a strong ethical compass, and a readily accessible network for technical reach back (OCC)—without these capabilities, the lawyer will not be prepared to exercise and apply judgment effectively in crises.

Another critical aspect of judgment—and this dimension emergency management lawyers share with emergency department doctors—is finding the “unmade decision.” As one recent study of emergency medicine organizations reported, “Emergency physicians typically focus on finding the pathology, but the demands of surge force the [emergency department] to find the ‘unmade’ decision.”⁴³ Pathology is the diagnosis of disease. Like our medical counterparts, emergency management lawyers often focus on the process of defining and addressing issues or problems (legal pathology, if you will). Yet, in crisis operations (as in medical surge operations), emergency management lawyers can exercise their judgment, experience, and listening skills to help leaders expose and attend to unmade decisions that may trip them up down the line. In this regard, we share here the advice of senior medical clinicians, which we think emergency management lawyers might consider applying by analogy.

Recommended Clinical Work Practices in Surge Settings ⁴⁴	Analogous Practices for Emergency Management Lawyers Providing Advice in Crisis
Do not interrupt the expression of the chief complaint.	Do not interrupt the client’s expression of the issue or concern.
Chart as you listen.	Take notes as you listen.
Order laboratory investigations necessary to make a	Ask questions and conduct sufficient preliminary research to determine whether an issue needs

⁴³ David A. Bradt, Peter Aitken, Gerry FitzGerald, Roger Swift, Gerard O’Reilly, and Bruce Bartley, *Emergency Department Surge Capacity: Recommendations of the Australasian Surge Strategy Working Group*, 16 ACADEMIC EMERGENCY MEDICINE, 1350, 1355 (2009).

⁴⁴ *Id.* at 1356.

Recommended Clinical Work Practices in Surge Settings ⁴⁴	Analogous Practices for Emergency Management Lawyers Providing Advice in Crisis
disposition, not necessarily to make a diagnosis.	to be elevated or dealt with immediately, not necessarily to solve the problem on the spot.
Limit imaging, particularly contrast imaging, as much as possible.	Don't get wrapped up in complex legal research during a crisis—delegate that work to subordinates, peers, or headquarters.
Put selected patients with a clear diagnosis and limited care needs (IV fluid, analgesia, antibiotics) under the care of a junior doctor.	Let junior attorneys, paralegals, and program specialists handle issues with simple or repetitive legal issues—the senior emergency management attorney needs to maintain the “big picture” with the senior emergency manager.
Make a disposition plan with a key family member present to optimize understanding and minimize redundant conversations.	Work directly with program clients and intergovernmental colleagues in developing and executing plans to resolve or avoid crisis-related legal issues—don't do this alone in your office.

Finally, one of the most important dimensions of judgment is determining whether a particular solution is practically viable and can be implemented. While the lawyer may not be the only one around the table who can weigh in on the practicality or mechanics of implementation, lawyers may have highly relevant input to contribute on this point because of their legal expertise, general knowledge, and experience. Ultimately, disaster management, like politics, is the art of the possible.

Provision of Advice

Once the previous steps have been completed, lawyers need to communicate the advice produced to clients and/or to the disaster management teams in which they are embedded. Doing so effectively requires adapting and packaging the advice in ways that are appropriate to the situation and the context in which the advice is being delivered, as noted in the discussion of the socio-behavioral (GAIN) dimension. In so doing, it is important to consider the following factors:

- *Situation:* Is the work taking place under crisis-like conditions, and what is the time frame involved? How much pressure is on the disaster management team and its leaders?

- *Organizational context:* What is the nature of the organizational context (headquarters, regional office, JFO, etc.) and the local culture?
- *Venue and form:* Is it most appropriate to convey this advice to a leader or other client in a one-on-one situation, at a senior staff meeting, at an all-hands meeting (generally not!), at a meeting with state and local officials, etc.? Should one deliver an oral or a written opinion? If written, will an informal email suffice, or is a more formal written document necessary?
- *Risk picture:* Generally, it is better to package advice in terms of alternative levels of risk associated with the option or options in question, rather than binary black and white (you can or cannot go forward with a particular course of action). However, in cases characterized by unacceptably high levels of legal risk (and not least when other compensating humanitarian imperatives are not part of the picture), leaders want their lawyers to be prepared to ‘pull the emergency brake’ and express their objections in the strongest possible terms.
- *Leader/collaborator personalities:* Clients vary greatly in their approach to processing information, open versus closed mindedness, big picture versus detail orientation, familiarity/expertise with the relevant legal issues and modes of legal reasoning, ability to function in stressful environments, etc. The most effective disaster lawyers cultivate the ability to adapt to the personalities and (leadership) styles of their clients. Given the same problem and assessment of options, a lawyer might choose to do a three-minute nutshell brief to a ‘big picture’ and action-oriented leader, while presenting the same material and results in a 15-minute briefing to another more detail-oriented, reflective, and ‘legally interested’ leader.⁴⁵ In this sense, being articulate in a

⁴⁵ See George, *supra* note 12; Thomas Preston, *THE PRESIDENT AND HIS INNER CIRCLE* (2001); Paul A. Kowert, *GROUPTHINK OR DEADLOCK: WHEN DO LEADERS LEARN FROM THEIR ADVISORS?* (2002).

“SALTy” manner is partly in relation to the person or persons to whom the advice is being delivered.

As noted, provision of advice should be consistent with the SALT performance standard and be: **Solution Oriented**, **Articulate**, **Legally Sufficient**, and **Timely**. In addition, as noted previously, it is advisable to prepare to mitigate risk and defend potentially controversial measures through the production of contemporaneous documentation.

Finally, lawyers can and often should play a role in developing or reviewing communications to the public or media and/or external affairs guidance both pre- and post-decision.

For example, in response to the devastating April 2011 tornados that struck Alabama and Mississippi, FEMA OCC worked in conjunction with the White House, FEMA leadership at HQ and in the field, and with program staff on developing a streamlined private property debris removal plan called Operation Clean Sweep. OCC also assisted the External Affairs staff and program staff on press releases and fact sheets. OCC is also engaged in gathering data for lessons learned from the project.

Conclusion: Advice in Crisis

We call the interaction between lawyers and decision-makers in the context of disaster operations Advice in Crisis. The double entendre is intentional. In the first and straightforward meaning, advice in crisis connotes the provision of legal advice during unstable and dangerous situations. In the second and ironic meaning, advice in crisis describes what happens when lawyers attempting to advise emergency managers and other crisis leaders are *not* prepared to deliver legal services in conditions where core values are threatened, uncertainty is pervasive, and time is of the essence. These lawyers, who may be very capable in steady-state transactional or litigation settings, find themselves in a crisis within a crisis as they fumble or muddle through their interactions with decision-makers. Both situations invoke the term “advice in crisis.” This paper provided you with a framework to achieve the former connotation while avoiding the latter. We based that framework on data culled from specialized literature; case studies; and interviews/focus groups with FEMA veterans, and government and non-government stakeholders. Our

exploration of this subject remains a work in progress, and we invite our readers to share their advice in crisis experiences and recommendations any time. You can send your thoughts to brad.kieserman@fema.dhs.gov.

REFERENCES

BOOKS

Alexander L. George, PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE (1980).

Arjen Boin, Paul 't Hart, Eric Stern, and Bengt Sundelius, THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE (2005).

Barbara R. Farnham, ROOSEVELT AND THE MUNICH CRISIS: A STUDY OF POLITICAL DECISION-MAKING (1997).

David S. Alberts and Richard E. Hayes, DOD Command and Control Research Program, POWER TO THE EDGE: COMMAND AND CONTROL IN THE INFORMATION AGE (2003).

David D. Pearce, WARY PARTNERS: DIPLOMATS AND THE MEDIA (1995).

Eric K. Stern, CRISIS DECISIONMAKING: A COGNITIVE-INSTITUTIONAL APPROACH (Swedish National Defense College 1999).

Gary Klein, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (2001).

GOOD JUDGMENT IN FOREIGN POLICY (Deborah W. Larson and Stanley A. Renshon eds., 2003).

Ian I. Mitroff and Abraham Silvers, DIRTY ROTTEN STRATEGIES: HOW WE TRICK OURSELVES AND OTHERS INTO SOLVING THE WRONG PROBLEMS PRECISELY (2010).

Irving L. Janis, CRUCIAL DECISIONS: LEADERSHIP IN POLICYMAKING AND CRISIS MANAGEMENT (1989).

James Baker, III, WORK HARD, STUDY, AND KEEP OUT OF POLITICS (2006).

Malcolm Gladwell, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

NATURALISTIC DECISION MAKING AND MACROCOGNITION (Jan Maarten Schraagen *et al.* eds., 2008).

Paul 't Hart, BEYOND GROUPTHINK: POLITICAL GROUP DYNAMICS AND FOREIGN POLICYMAKING (Eric Stern and Bengt Sundelius eds., 1997).

Paul A. Kowert, GROUPTHINK OR DEADLOCK: WHEN DO LEADERS LEARN FROM THEIR ADVISORS? (2002).

Ralph L. Keeney, VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING (1992).

Stephen Worchel, Dawna Coutant-Sassic and Michele Grossman, *A Developmental Approach to Group Dynamics*, in GROUP PROCESS AND PRODUCTIVITY, 181 (Stephen Worchel *et al.* eds., 1992).

Thomas Preston, THE PRESIDENT AND HIS INNER CIRCLE (2001).

Ward Farnsworth, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW (2007).

PERIODICALS

Keith Bea, Cong. RESEARCH SERV., RL 33053, FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING (2010).

Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L. J. POCKET PART 266, 266-71 (2007).

Charles F. Parker and Eric K. Stern, *Bolt from the Blue or Avoidable Failure: Revisiting September 11 and the Origins of Strategic Surprise*, 1 FOREIGN POL'Y ANALYSIS 301-31 (2005).

Edward Deverell and Eva-Karin Olsson, *Learning from Crisis: A Framework of Management, Learning and Implementation in Response to Crises*, 6-1 J. HOMELAND SEC. & EMERGENCY MGMT. (ART. 85 2009).

Eric K. Stern, *Crisis and Learning: A Conceptual Balance Sheet*, J. CONTINGENCIES & CRISIS MGMT. (1997).

Eric K. Stern, *Crisis Navigation: Lessons from History for the New Crisis Manager-in-Chief*, 22(2):1 GOVERNANCE 89-202 (2009).

FEMA OCC SALT individual performance review criteria document.

Gary J. Edles, *Assessing "Who is the Client" in the Government Context*, 31-FALL ADMIN. & REG. L. NEWS 10, 10-13 (2005).

Henry Mintzberg et. al, *The Structure of 'Unstructured' Decision Processes*, 21 ADMIN. SCI. Q. 246-75 (1976).

Ian I. Mitroff and J.R. Emshoff, *On Strategic Assumption-Making: A Dialectical Approach to Policy and Planning*, 4 ACAD. MGMT. REV. 1-12 (1979).

John R. Boyd, *Destruction and Creation*, (unpublished 1976), available at [http://www.goalsys.com/books/documents/DESTRUCTION AND CREATION.pdf](http://www.goalsys.com/books/documents/DESTRUCTION_AND_CREATION.pdf) (last visited Aug. 23, 2011).

Karl E. Weick, *Enacted Sense-making in Crisis Situations*, 25 J. MGMT. STUD. 305-17 (1988).

Karl E. Weick and Karlene H. Roberts, *Collective Mind in Organizations: Heedful Interrelating on Flight Decks*, 38 ADMIN. SCI. Q. 357-81 (1993).

William C. Nicholson, Building Community Legal Capabilities for Post 9-11 Terrorism Preparedness, Address before the FEMA Higher Education Conference (May 30-31, 2002), available at <http://www.training.fema.gov/EMIWeb/downloads/WilliamNicholson.doc> (last visited Sept. 15, 2011).

ADVICE IN CRISIS INTERVIEWS (PHASE 1)

Thad Allen – Former Commandant, U.S. Coast Guard

Josie Arcurio – Director, Southern California Area Field Office, FEMA

Karen Armes – Deputy Regional Administrator, Region IX, FEMA

Marty Bahamonde – External Affairs Senior Policy Advisor, FEMA

Tom Balint – Associate Chief Counsel, Protection and National Preparedness, FEMA

Sally Brice-O'Hara – Vice Commandant, U.S. Coast Guard

Pauline Campbell – Director, Office of Equal Rights, FEMA

Nancy Casper – Federal Coordinating Officer, FEMA

Luletha Cheatham – Director, Hazard Mitigation, FEMA

Sandy Coachman – Federal Coordinating Officer, FEMA

Linda Davis – Director, Professional Development, Office of Chief Counsel, FEMA

Steve DeBlasio – Federal Coordinating Officer, FEMA

Justin Dombrowski – Director, Disaster Operations Division, Region IX, FEMA

Diane Donley – Deputy Chief of Staff, Office of Chief Counsel, FEMA

Greg Eaton – Federal Coordinating Officer, FEMA

David Garratt – Associate Administrator, Mission Support, FEMA

Lee Hamilton – Co-Chairman, Iraq Study Group (2006); U.S. Congressman (1965-1999)

Brad Harris – Federal Coordinating Officer, FEMA

Bob Haywood – Long-Term Community Recovery Officer, FEMA

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Mike Hill – Legal Counsel, FEMA

Matt Jadacki – Deputy Inspector General, Office of Emergency
Management Oversight, Office of Inspector General, DHS

Mike Karl – Federal Coordinating Officer, FEMA

Lisa Katchka – Chief of Staff for Legal Policy, Office of Chief Counsel,
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Don Keldsen – Federal Coordinating Officer, FEMA

Brad Kieserman – Chief Counsel, FEMA

Cal Lederer – Deputy Judge Advocate General, U.S. Coast Guard

Albie Lewis – Federal Coordinating Officer, FEMA

Lynda Lowe – Branch Director, Individual Assistance, FEMA

Ron Mackert – Equal Rights Officer, FEMA

Mary Ellen Martinet – Associate Chief Counsel, Response and Recovery,
FEMA

Phil May – Regional Administrator, Region IX, FEMA

Doug Mayne – Federal Coordinating Officer, FEMA

Cindy Mazur – Director, Alternative Dispute Resolution, FEMA

Bryan McCreary – Branch Chief, Acquisition Operations, FEMA

Dennis McKeown – Planning Branch Chief, Disaster Operations Division, Region IX, FEMA

Jason McNamara – Chief of Staff, FEMA

Edwin Meese – Chairman, Center for Legal and Judicial Studies, Heritage Foundation; U.S. Attorney General (1985-1988)

Ted Monette – Director, Office of Federal Coordinating Officer Operations, FEMA

Mark Neveau – Federal Coordinating Officer, FEMA

Mike Parker – Federal Coordinating Officer, FEMA

Phil Parr – Federal Coordinating Officer, FEMA

Mike Rizzo – Regional Counsel, Region III, FEMA

Charles Robb – U.S. Senator (1989-2001); Governor of Virginia (1982-1986)

Bill Roche – Infrastructure Branch Chief, Disaster Assistance Division, Region IX, FEMA

Rich Serino – Deputy Administrator, FEMA

Adrian Sevier – Deputy Chief Counsel, FEMA

Marty Shoffner – Deputy Branch Director, Public Assistance, FEMA

Gerard Stoler – Federal Coordinating Officer, FEMA

Tom Stufano – Federal Coordinating Officer, FEMA

Joel Sullivan – Regional CEO, Nashville Area Chapter, American National Red Cross

Gracia Szczech – Federal Coordinating Officer, FEMA

Terry Tanner – Public Assistance Officer, Tennessee EMA

Nancy Ward – Regional Administrator, Region IX, FEMA

Ann Winterman – Deputy Regional Counsel, Region IX, FEMA

David Zocchetti – Chief Counsel, California EMA

Terrie Zuiderhoek – Director, Disaster Assistance Division, Region IX,
FEMA

Disaster Operations Legal Analysis Checklist

I. FACT GATHERING AND ISSUE DEFINITION

A. What?

What do we want to do or are we being asked to do?

What makes this important?

What makes this difficult or controversial?

B. Why?

Why are we doing this? (Purpose of the assistance/activity)

To provide:

1. **Logistics support:** equipment, transportation, commodities, base camps, personnel
2. **Subject matter Expertise:** technical assistance, federal agency expertise
3. **Operations Assistance:**
 - a. Response: short term, immediate assistance that is life-saving/sustaining; protects property, health, and safety; and is for the general public welfare.
 - b. Recovery: longer-term, focused (individualized) assistance to recover from the incident and to mitigate damages in the future.

C. Why Not?

Are there limiting factors or special considerations that need to be addressed?

1. Scope of applicable authority
2. Political
3. Fiscal
4. Liability concerns
5. Special needs
6. Public interest
7. Time constraints
8. Policy concerns
9. Long-term effects
10. Environmental
11. Contracting
12. Insular
13. Tribal
14. Other federal law limitations

D. Who?

1. Who is asking for this?
2. Who is this for?
3. Who is responsible for this?
4. Who needs to be consulted on this?
 - a. State(s)
 - b. Tribe(s)
 - c. Local government
 - d. PNP

- e. Individuals
- f. Voluntary agency
- g. OFA
- h. Private sector
- i. FEMA
 - 1) Headquarters (HQ)
 - 2) Region
 - 3) Joint Field Office (JFO)
- j. Department of Homeland Security (DHS)

II. CONTEXT

A. When:

Is this before or after a declaration has been issued?

Is there a declaration or likely to be a declaration?

1. No Declaration-none likely (foreign assistance, non-Stafford Act domestic event, Other Federal Authority triggered, readiness/ steady state):

- a. Stafford Act Title II: Disaster Preparedness and Mitigation
- b. Stafford Act Title VI Emergency Preparedness
- c. Flood Insurance Program Authority
- d. Homeland Security Act (HSA) Authorities

6 U.S.C., Chapter 1—Homeland Security Organization Subchapter V—National Emergency Management, §§311-321n:

- § 313 Federal Emergency Management Agency.
Administrator - Principal advisor on emergency management
- § 314 Authority and responsibilities

- Federal leadership
- All-hazards approach

- § 317 Regional offices
- § 318 National Advisory Council
Applicability of Federal Advisory Committee Act (FACA)
- § 319 National Integration Center
National Response Framework (NRF) (successor to the National Response Plan)
National Incident Management System (NIMS)
Incident Management
- § 320 Credentialing and typing
- § 321b Disability Coordinator
- § 321f Nuclear incident response
- § 321e Chief Medical Officer
- § 321h Use of national private sector networks in emergency response
- § 321n Acceptance of gifts

Chapter 2—National Emergency Management, 6 U.S.C. §§ 701-811

- § 701 Definitions

Subchapter I—Personnel Provisions, §§ 711-728

- § 711 Surge Capacity Force
- § 721 Evacuation preparedness technical assistance
- § 722 Urban Search and Rescue Response System
- § 723 Metropolitan Medical Response Grant Program
- § 724 Logistics
- § 725 Pre-positioned equipment program
- § 728 Disclosure of certain information to law enforcement agencies

Subchapter II—Comprehensive Preparedness System, §§ 741-811

Part A—National Preparedness System, §§ 741-760

Part B—Additional Preparedness, §§ 761-764

Part C—Miscellaneous Authorities, §§ 771-777

§ 771 National Disaster Recovery Strategy

§ 772 National Disaster Housing Strategy

§ 773 Individuals with disabilities guidelines

§ 774 Reunification

§ 775 National Emergency Family Registry and Locator System

Part D—Prevention of Fraud, Waste, and Abuse, §§ 778-797

§ 791 Advance contracting

§ 792 Limitations on tiering of subcontractors

§ 793 Oversight and accountability of Federal disaster expenditures

§ 794 Limitation on length of certain noncompetitive contracts

§ 795 Fraud, waste, and abuse controls

§ 796 Registry of disaster response contractors

§ 797 Fraud prevention training program

Part E—Authorization of Appropriations, §811

- a. National Response Framework
- b. Other Federal Agency (OFA) Authority and Responsibility
 - 1) No FEMA action
 - 2) Coordination with OFAs
 - 3) Servicing agency under an Interagency Agreement (IAA)
- c. Readiness type activities
 - 1) Establishment and training of teams and cadres
 - 2) Federal agency authority to loan/sell commodities

- 3) Memorandums of Understanding (MOUs) with OFAs and Voluntary Agencies: coordination of activities

2. Pre-Declaration: declaration likely/imminent

- a. Stafford Act Title II: Disaster Preparedness and Mitigation
- b. Stafford Act Title VI Emergency Preparedness
- c. Flood Insurance Program Authority
- d. Homeland Security Act (*see* HSA shown previously)
- e. Readiness type activities
 - 1) Federal agency authority to loan/sell commodities
 - 2) Necessary Expense pre-positioning of equipment, commodities and personnel
- f. OFA Authority and Responsibility
 - 1) No FEMA action
 - 2) Coordination with OFA

3. Declaration Issued

a. Emergency Declaration Assistance Authorities

Stafford Act Emergency Declaration Assistance Authorities

- §502 Includes General Federal Assistance and Public Assistance (PA) Emergency Work
- §407 Debris removal per §502(a)(5)
- §408 Individuals and Households Program per §502(a)(6)
- §418 Emergency Communications (Direct Federal Assistance only)
- §425 Transportation for Individuals and Households

Additional Stafford Act Emergency Declaration Assistance Authorities (provided by/in coordination with another agency/organization)

- § 413 Food Commodities- U.S. Department of Agriculture (USDA)

Stafford Act Process Authorities

- §§401/501 Procedure for Declaration (401-Disasters, 501-Emergencies)
- §422 Simplified Procedures (for PA Small Projects)
- §305 Non-liability of Federal Government
- §318 Audits and Investigations
- §321 Rules and Regulations
- §325 Public Notice, Comment, and Consultation Requirements (for PA projects)
- §326 Designation of Small State/Rural Advocate

Other Stafford Act and Homeland Security Act Operational Authorities

- §302 Coordinating Officers
- §303 Emergency Support and Response Teams
- §306 Performance of Services (Use of State/Local Facilities and Disaster Assistance Employee (DAE)/ Cadre of On-Call Response Employees (CORE) hiring)
- §309 Use and Coordination of Relief Organizations (Voluntary Agency coordination coupled with Title V for logistical support)
- §323 Minimum Standards for Public and Private Structures

Stafford Act Title VI Emergency Preparedness

§701(b) Gift Authority

See HSA authorities previously shown

Limiting Stafford Act and Related Authorities

- §503 Amount of Assistance
- §102 Definitions
- §307 Use of Local Firms and Individuals
- §308 Nondiscrimination in Disaster Assistance

42 U.S.C. §5154a Prohibited Flood Disaster Assistance (non-Stafford Act)

§312 Duplication of Benefits

§316 NEPA Statutory Exclusion

§320 Sliding Scale

§324 Management Costs

§427 Utility Company Access

§705 Grant Closeout

§706 Firearms

Executive Order (E.O.) 11988 Floodplain Management

E.O. 11990 Wetland Protection

Coastal Barriers Resources Act, (16 U.S.C. §3501, *et seq.*)

National Flood Insurance Act, (42 U.S.C. § 4001, *et seq.*)

See HSA authorities previously shown

Other Stafford Act Authorities

§ 101 Congressional Findings and Declarations

Title II Disaster Preparedness and Mitigation Authorities

§ 304 Reimbursement of Federal Agencies

§ 314 Penalties (Fraud actions)

§ 317 Recovery of Assistance

b. Major Disaster Declaration (DR) Assistance Authorities

Stafford Act DR Assistance Authorities

§ 402 General Federal Assistance

§ 403 Essential Assistance (Public Assistance (PA) Emergency Work)

§ 404 Hazard Mitigation

- § 406 Repair, Restoration, and Replacement of Damaged Facilities (PA Permanent Repair)
- § 407 Debris removal
- § 408 Federal Assistance to Individuals and Households (IHP)
- § 417 Community Disaster Loans
- § 418 Emergency Communications (Direct Federal Assistance only)
- § 419 Emergency Public Transportation (Direct Federal Assistance only)
- § 425 Transportation Assistance to Individuals and Households

Additional Stafford Act DR Assistance Authorities (provided by/in coordination w/ another agency/organization)

- § 410 Disaster Unemployment Assistance- (U.S. Department of Labor)
- 42 U.S.C. §5177a: Grants to Assist Low-Income Migrant and Seasonal Farmworkers- (USDA (non-Stafford Act))
- § 412 Food Benefits and Distribution-(USDA)
- § 413 Food Commodities-(USDA)
- § 415 Legal Services-(American Bar Association (ABA) MOU)
- § 416 Crisis Counseling assistance and Training (U.S. Department of Health and Human Services (HHS) tech support for state grant)
- § 421 Timber Sales-USDA
- § 426 Case Management-Services (HHS Direct Federal Assistance and/state grant)

Process Related Stafford Act Authorities

- §401 Procedure for Declaration
- §422 Simplified Procedure (for small PA projects)
- §423 Appeals of Assistance Decisions
- §305 Non-liability

- §310 Priority to Certain Applications for Public Facility and Public Housing Assistance (non-Stafford Act programs)
- §318 Audits and Investigations
- §321 Rules and Regulations
- §325 Public Notice Requirements
- §326 Small State/Rural advocate

Eligibility Related Stafford Act DR Authorities

- §424 Date of Eligibility; Expenses Incurred Before Date of Disaster

Other Stafford Act and HSA Operational Authorities

- §301 Waiver of Administrative Conditions
- §302 Coordinating Officers
- §303 Emergency Support and Response Teams
- §306 Performance of Services-(Use of State Facilities and DAE/CORE hiring)
- §309 Use and Coordination of Relief Organizations (coupled with Title IV for logistical support).
- §315 Availability of Materials (survey/allocation)
- §319 Advance of Non-Federal Share
- §323 Minimum Standards for Public and Private Structures

Title VI Emergency Preparedness

- §701 Gift authority

See HSA authorities previously shown

Limiting Stafford Act and Related Authorities

- §102 Definitions
- §307 Local Firms
- §308 Nondiscrimination in Disaster Assistance

§311 Insurance

42 U.S.C. §5154a Prohibited flood disaster assistance (non-Stafford Act)

§312 Duplication of Benefits

§316 Protection of Environment (NEPA Statutory Exclusion)

§320 Limitation on Sliding Scales

§322 Mitigation Planning (cross ref §404 refunding)

§324 Management Costs

§427 Essential Service Providers (Utility Company access)

§705 Disaster Grant Closeout Procedures

§706 Firearms Policies

E.O. 11988: Floodplain Management

E.O. 11990: Wetland Protection

Coastal Barriers Resources Act, (16 U.S.C. §3501, *et seq.*)

National Flood Insurance Act, (42 U.S.C. §4001, *et seq.*)

See HSA authorities previously shown

Other Stafford Act Authorities

§101 Congressional Findings and Declarations Title II Disaster Preparedness and Mitigation Authorities

§304 Federal agency reimbursement

§314 Fraud actions

§317 Recovery actions

§405 Federal facility repair

§414 Relocation eligibility

c. **Fire Management Assistance Grant (FMAG) Authorities**

FMAG Assistance Authorities

§420 Fire Management Assistance (which also authorizes 403 assistance as warranted)

Process Related Stafford Act Authorities

§422 Appeals of Assistance Decisions

§305 Non-liability of Federal Government

§321 Rules and Regulations

Other Operational Authorities

§306 Performance of Services – (Use of State Facilities and DAE/CORE hiring)

§318 Audits and Investigations

Title VI Emergency Preparedness

§701(b) Gift Authority

See HSA Authorities previously shown

Limiting Stafford Act and HSA Authorities

§102 Definitions

§307 Use of Local Firms and Individuals

§308 Nondiscrimination in Disaster Assistance

§312 Duplication of benefits

§316 Protection of Environment ((NEPA) Statutory Exclusion

§705 Disaster Grant Closeout Procedures

§706 Firearms Policies

See HSA authorities previously shown

Other Stafford Act Authorities

§101 Findings

Title II Disaster Preparedness and Mitigation

§304 Reimbursement of Federal Agencies

§314 Penalties (Fraud actions)

§317 Recovery of Assistance

III. Proposed Action

How:

A. How will we provide assistance?

1. Financial assistance is provided under:

- a. Stafford Act Authority
 - 1) Disaster Declaration(DR)/Emergency (EM) Authority
 - a) Individual Assistance (IA) (DR/EM rare)
 - b) PA
 - i. Emergency Work (DR/EM)
 - ii. Permanent Work (DR)
 - c) Hazard Mitigation Grants Program (HMGP) (DR)
 - d) FMAG

- 2) Other Stafford Act Authority
 - a) Title II
 - b) Title VI
- 3) Flood Insurance Program Authority
- 4) Homeland Security Authority

2. Direct assistance considerations:

- a. Determine who is going to do it and pay for it.
 - 1) Authority – May I?
 - 2) Capability – Knowledge/skills (mental) – Can I?
 - 3) Capacity – Time/staff/resources (physical and fiscal) – Can I?
- b. Determine what the underlying authority is for the action.
Is there FEMA/OFA Authority? (Review relevant MOUs and OFA authorities as part of analysis.)
 - 1) If no federal authority: decline/refer as appropriate.
 - 2) If both have authority, determine which is more specific.
 - 3) If OFA has sole or more specific authority, refer to OFA for action.
 - a) However, if FEMA has capability/capacity, an IAA with FEMA as servicing agency may be appropriate.
 - 4) If FEMA has sole or more specific authority for the proposed action:
 - a) Determine if appropriate for internal action first if we have the Capacity and Capability (Logistics).
 - b) If we do not have the Capability and Capacity, *then* we:
 - i. Contract with the private sector (Acquisitions)
 - ii. Task OFA via Mission Assignment (MA)/ Interagency Agreement (IAA)

- (a) MA (Response)
 - (i) Direct Federal Assistance (DFA)
 - (ii) Technical Assistance (TA)
 - (iii) Federal Operations Support (FOS)
- (b) IAA: including MA transition (Response/Recovery and Acquisitions)
 - (i) DR authority
 - (ii) Other Stafford Act authority
 - (iii) Economy Act
- i. Voluntary Agency: Capability/Capacity? Contract or partner with a Voluntary Agency
 - (a) MOU (Recovery)
 - (b) Contract (Acquisitions)
 - (c) Logistics Support (Recovery and Logistics)
 - (i) Transportation of personnel/goods
 - (ii) Space
 - (iii) Equipment
 - (d) Invitational Travel (Recovery and Office of Chief Financial Officer (OCFO))

B. How do we pay for it?

1. Disaster Relief Fund
2. Other FEMA appropriations
3. OFA funds
4. Cost shared

C. How do we determine when we are done and how to end it?

1. Deadlines
2. Objective factors
3. Messaging
4. Exit strategy/termination
5. Enforcement

Appendix C

Key to Significant Stafford Act and Regulatory Provisions

Title of Stafford Act	Statute Citation 42 U.S.C. §	C.F.R. * Citation 44 C.F.R. §	Summary of Areas Covered in Each Title and Stafford Act Section Number
Title I	42 U.S.C. §§ 5121 – 5123	206.1 – 206.3	• Purpose of statute: supplemental assistance to state and local governments • Discretionary statute – eligible, but not entitled to assistance • Lists program authorities – preparedness; insurance; hazard mitigation; federal assistance programs • Definitions • Indian tribal government references.
Title II	42 U.S.C. §§ 5131 – 5134	300.1 – 300.3	• In the absence of a major disaster or an emergency • Preparedness includes being ready for initial response and mitigation, which ensures a long-term reduction of damage • Pre-disaster mitigation – § 203
Title of Stafford Act	Statute Citation 42 U.S.C. §	C.F.R. * Citation 44 C.F.R. §	Summary of Areas Covered in Each Title and Stafford Act Section Number
Title III			• Applies to implementation of Title IV and V declarations

Title of Stafford Act	Statute Citation 42 U.S.C. §	C.F.R. * Citation 44 C.F.R. §	Summary of Areas Covered in Each Title and Stafford Act Section Number
	42 U.S.C. §§ 5141 – 5165d	206.41 – 206.43 208.1 – 208.66	• Federal Coordinating Officer (FCO)/State Coordinating Officer (SCO)/Emergency Support Team (EST) authorities – §§ 302, 303 • Urban Search and Rescue
		206.41 – 206.43 208.1 – 208.66	• FCO/SCO/EST authorities – §§ 302, 303 • Urban Search and Rescue
		206.8 206.9 206.10	• Reimbursing federal agencies – § 304 • Non-liability of federal government – § 305 • Authority to hire temporary personnel without regard to competitive service requirements – § 306 • Use of local firms and individuals – § 307
		206.11	• Nondiscrimination in Disaster Assistance – § 308
		206.12	• Use and Coordination of Relief Organizations – § 309
		206.191	• Duplication of Benefits – § 312
		10.8	• Limited NEPA exception – § 316
		206.430 – 206.439	• Hazard Mitigation Planning – § 322 (state/local plans and HMGP 20%)
		206.400 – 206.402	• Standards and codes for reconstruction or repair – § 323
		206.207	• Management Costs – § 324 • Public notice requirements for public assistance changes – § 325

Title of Stafford Act	Statute Citation 42 U.S.C. §	C.F.R. * Citation 44 C.F.R. §	Summary of Areas Covered in Each Title and Stafford Act Section Number
Title IV – Major Disaster Assistance Programs	42 U.S.C. §§ 5170 – 5189g	Generally, 206.31 – 206.48	• Declaration for major disasters – § 401 (note parallel to § 501)
		206.36, 206.37	• Process – Governor requests declaration
		206.44	• FEMA-State Agreement
		206.40	• Designating counties • Response General Authorities - § 402 (note parallel to § 502) (mission assignment authority)
		206.200 – 206.228	• Public Assistance – §§ 403, 407
		206.224 – 206.225	• Essential “emergency” assistance (immediate needs)/ debris removal – §§ 403, 407
		206.430 – 206.440	• HMGP - § 404
			• Federal facility – § 405 (Authority remains with the President; has not been delegated to FEMA)
		206.226	• Permanent repair and construction of public and certain nonprofit entities – § 406
		206.224	• Debris removal – § 407
		206.110 – 206.118	• Individual and Households Assistance – § 408
		206.119 – 206.120	• Other Needs Assistance – § 408(e)
		206.141	• Unemployment Assistance – § 410 • Food Coupons – § 412
		206.151	• Food Commodities – § 413
		206.161	• Relocation Assistance – § 414

Title of Stafford Act	Statute Citation 42 U.S.C. §	C.F.R. * Citation 44 C.F.R. §	Summary of Areas Covered in Each Title and Stafford Act Section Number
		206.164	• Legal Services – § 415
		206.171	• Crisis Counseling – § 416
		206.225	• Emergency Communications – § 418
		206.225	• Emergency Public Transportation – § 419 • Transportation Assistance – § 425 • Case management – § 426
		206.46, 206.115, 206.206	• Appeals – § 423 • Meaning of Essential Service Provider – § 427 • Alternative Procedures - § 428 (no regulations promulgated yet)
Title V – Emergency Assistance Programs	42 U.S.C. §§ 5191 – 5193	206.61 – 206.67	• Declaration based on a state request in § 501(a) or as a result of primary federal responsibility in § 501(b) • Assistance § 502 (similar to § 403 immediate needs – main difference is <i>major disaster</i> declaration can provide assistance for physical damage, see § 406) • Amount of Assistance – § 503
Title VI – Emergency Preparedness	42 U.S.C. §§ 5195 – 5197g		• Declaration of policy – vests in federal and states and localities • Definitions – applicable only to this Title VI • Authority to deal with immediate emergency conditions – in preparation for hazards; during a hazard; following a hazard • Detailed functions of Administrator Title VI

Title of Stafford Act	Statute Citation 42 U.S.C. §	C.F.R. * Citation 44 C.F.R. §	Summary of Areas Covered in Each Title and Stafford Act Section Number
	42 U.S.C. §§ 5195 – 5197g		• Preparedness compacts • Financial contribution to states and for personnel and administration expenses
Title VII – Miscellaneous	42 U.S.C. §§ 5201 – 5207	206.181	• Donations and gifts – § 701(b) • Grant Close Out Procedures – § 705 • Firearms – § 706

Electric Power Restoration Primer

What is the Grid?

The North American electric system, “the grid,” is comprised of a complex interconnected network of generating plants, transmission lines, and distribution facilities. There are three regional grids: one in the east that connects the eastern seaboard, the plains states, and Canadian provinces; another in the west that connects the Pacific coast, the mountain states, and Canadian provinces; and another that operates in most of Texas. There are very limited connections between the three grids to help minimize the impact of disruptions to the system.

Key Terms

Transmission lines. Transmission lines serve two primary purposes: They move electricity from generation sites to customers and they interconnect systems. Voltages in the transmission system are high, which makes it possible to carry electric power efficiently over long distances and deliver it to substations near customers.

Transmission and distribution substations. Substations are located at the ends of transmission lines. A transmission substation located near a power plant uses large transformers to increase the voltage. At the other end of a transmission line, a substation uses transformers to step transmission voltages back down so the electricity can be distributed to customers.

Distribution lines. Distribution lines carry electricity from substations to end users.

Control centers. Control centers have sophisticated monitoring and control systems and are staffed by operators 24 hours per day, 365 days per year. These operators are responsible for several key functions, including balancing power generation and demand, monitoring flows over transmission lines to avoid overloading, planning and configuring systems

to operate reliably, maintaining system stability, preparing for emergencies, placing equipment in and out of service for maintenance, and operating power during emergencies.

Control systems. Supervisory Control and Data Acquisition Systems (SCADA) and Distributed Control Systems (DCS) monitor the flow of electricity from generators through transmission and distribution lines. These electronic systems enable efficient operation and management of electric systems through the use of automated data collection and equipment control.

Smart Grid Technologies. Under the American Recovery and Reinvestment Act (ARRA) of 2009, funds have been made available to utilities to incorporate “smart technologies” into electricity distribution systems.

How Does the Grid Work?

The process begins with production facilities (power plants) which generate electricity through a variety of means, including coal, hydro, and nuclear. When electricity leaves a power plant, its voltage is increased or “stepped-up” at a substation near the plant to make it readily transmittable. Next, transmitters send the high-voltage energy along electrical transmission lines, to substations near where it is needed. At the substation, the voltage is decreased or “stepped-down” so it can be readily distributable commercially. Finally, a distributor transfers the electricity to a power line which carries the electricity until it reaches a home or business. Electricity travels at nearly the speed of light, arriving at a destination at almost the same moment it is produced.

The process is extremely complex because electricity cannot be easily or economically stored, and demand constantly fluctuates. To coordinate power flow, and ensure the right amount of power is sent where it is needed, control areas have been formed. Control areas consisting of one or several transmission operators, or power companies, ensure that there is always a balance between electricity generation and the amount of electricity needed at any given moment to meet demand. A margin of capacity beyond the actual load is needed to ensure reliability at times of peak demand and to provide for maintenance down times. Independent system operator or regional transmission organizations (ISOs and RTOs)

use computerized systems to exercise minute-by-minute control over the network and to ensure that power transfers occur during specified times in pre-arranged amounts. They monitor system loads and voltage profiles, operate transmission facilities and direct generation, define operating limits, develop contingency plans, and implement emergency procedures.

Electric companies have interconnected their transmission systems so that they may buy and sell power from each other and from other power suppliers, and to ensure reliability of service. Redundancy is built into the transmission system to provide electric companies with alternative power paths in emergencies.

Who Owns the Grid?

The primary types of electric power suppliers include:

Private, shareholder-owned electric companies, which serve nearly 70% of all customers, are tax-paying businesses that are highly regulated at the federal, state, and local levels.

Electric cooperatives are private companies owned by their customer members; they are eligible for subsidized financing from the Rural Utilities Service (part of the U.S. Department of Agriculture), and are generally unregulated. Significant energy infrastructure is owned by cooperatives, especially in the electric distribution sector. These assets can include generation, transmission, and distribution.

State and municipal-owned electric utilities include municipal systems, public power districts, and state projects. Municipal utilities are owned by the municipality in which they operate and are financed through municipal bonds. Government-owned utilities generally are unregulated.

Federal government-owned utilities. The federal government is a major owner of energy assets and critical infrastructure throughout the United States and its territories. Examples include Tennessee Valley Authority (TVA), a major owner of hydroelectric dams, nuclear and fossil power generation stations, and high-voltage transmission; Bureau of Reclamation (BOR), a major dam owner; the Department of Energy (DOE), which oversees the Strategic Petroleum Reserve (SPR) and the Northeast Home

Heating Oil Reserve; and power administrations such as the Western Area Power Administration and the Bonneville Power Administration. Federally owned utilities are involved in the generation and/or transmission of electricity, most of which is sold at wholesale prices to local government-owned utilities and electric cooperatives.

How is the Grid Regulated?

1. Federal Energy Regulatory Commission (FERC)

The Federal Power Act (FPA), 16 U.S.C. §§ 791a-825r, enacted in 1935, is the primary federal law that regulates the shareholder-owned segment of the electric power industry. The FPA created the Federal Power Commission (FPC), which ensured that electricity rates were “reasonable, nondiscriminatory, and just to the consumer.” In 1970, the FPC’s functions were transferred to FERC and the newly created Department of Energy.

Today, FERC regulates the transmission and sale of electricity in interstate wholesale electricity markets, utility sales of assets, mergers and acquisitions, interconnections of certain facilities, and oversight of grid reliability. Additionally, FERC regulates interstate transmission and interstate wholesale power transactions, which involve shareholder-owned electric companies buying or selling electricity from one another or from other power suppliers for resale to the ultimate customer. FERC has the authority to regulate the prices, terms, and conditions of these wholesale power sales and transmission services.

FERC helps to protect the reliability of the high-voltage interstate transmission system with oversight authority for mandatory electric reliability standards, which include cyber security. In 2008, FERC conditionally approved the industry’s first mandatory cyber security standards for the grid. The standards require users, owners, and operators of the Nation’s electricity grid to implement training, physical security, and asset recovery plans to protect against the threat of cyber-attack. Today, utilities are working to ensure that forthcoming cyber security regulations will promote reliable and cost-effective service.

FERC has also encouraged the formation of regional transmission organizations (RTOs) and Independent System Operators (ISOs) to oversee electricity markets. These organizations help to run the transmission grid on a regional basis. There are currently seven RTO/ISO regions across the United States.

FERC does not regulate the activities of state or municipal power systems, federal power marketing agencies like the TVA, and most rural electric cooperatives. (State governments, through their public utility commissions or equivalent, regulate retail electric service as well as facility planning and siting.) FERC does not address reliability problems related to failures of local distribution facilities.

2. North American Electric Reliability Corporation (NERC)

In 2006, FERC certified the North American Electric Reliability Corporation (NERC) as the Electric Reliability Organization—an independent, self-regulating entity created by Congress. This private entity enforces and develops reliability standards for the bulk power industry for the U.S., and engages in some coordination with Canada. The reliability standards are planning and operating rules that apply to electric utilities. NERC also has infrastructure security responsibilities, for both cyber and physical threats. NERC operates the Electricity Sector Information Sharing and Analysis Center (ESISAC) under DHS and Public Safety Canada to enhance communications among federal agencies and Canada. DOE has also designated NERC as the electricity coordinator for critical infrastructure protection. Under NERC, the critical infrastructure protection committee (CIPC) provides technical and subject matter expertise. The CIPC executive committee, along with the president and CEO of NERC, serve as the Electricity Sector Coordinating Council to collaborate with DHS and DOE on critical infrastructure and security matters.

3. Additional Federal Regulators

The electric power industry must comply with hundreds of environmental regulations, including rules created under the federal Clean Air Act and Clean Water Act. The U.S. Environmental Protection Agency (EPA) has

primary responsibility for developing and enforcing most federal environmental regulations. Other federal agencies have broad authority over electric company facilities crossing federal lands or affecting unique interests, such as historical sites or endangered species.

Electric companies also are regulated by the Federal Communications Commission (FCC). Electric companies are required to allow telecommunications companies to use electric poles for wires and other facilities supporting wireless, fiber, broadband, and other communications systems. The structural integrity, safety, security, and reliability of utility poles are fundamental components of the Nation's critical energy infrastructure.

4. State Regulators

Shareholder owned electric companies are also regulated by state agencies, typically known as Public Utility Commissions or Public Service Commissions. All states regulate rates for the delivery of electricity to end users (customers) through distribution wires and related systems. How the price for electricity is set, however, varies by state. Electric companies must also comply with environmental regulations issued by individual states. Additionally, states have the primary role in approving the siting of company facilities, including transmission facilities that may serve many different states.

How does the Federal Government Protect the Grid?

1. National Infrastructure Protection Plan (NIPP)

On June 30, 2006, the U.S. Department of Homeland Security (DHS) announced completion of the National Infrastructure Protection Plan (NIPP), a comprehensive risk management framework that defines critical infrastructure protection (CIP) roles and responsibilities for all levels of government, private industry, and other sector partners. NIPP builds on the principles of the President's National Strategy for Homeland Security and strategies for the protection of critical infrastructure and key resources (CIKR). NIPP was reissued in January 2009.

NIPP fulfills the requirements of the Homeland Security Act of 2002, which assigns DHS the responsibility to develop a comprehensive national plan for securing CIKR, as well as Homeland Security Presidential Directive 7 (HSPD-7), which provides overall guidance for developing and implementing the national CIP program. In accordance with HSPD-7, the national infrastructure is divided into 18 distinct CIKR sectors, and CIKR protection responsibilities are assigned to select federal agencies called Sector-Specific Agencies (SSAs).

2. 2010 Energy Sector-Specific Plan (SSP)

The Department of Energy (DOE) is the Sector-Specific Agency (SAA) responsible for energy security. In its role as SSA for the energy sector, DOE has worked closely with dozens of government and industry partners to prepare the 2010 Energy Sector-Specific Plan (SSP) which is an annex to NIPP. Much of that work was conducted through the two Energy Sector Coordinating Councils (SCCs) and the Energy Government Coordinating Council (GCC). The Electricity SCC and the Oil and Natural Gas SCC comprise the Energy SCC and represent the interests of their respective industries. The Energy GCC represents all levels of government – federal, state, local, territorial, and tribal – that are concerned with the energy sector. The SSP, in relevant part, addresses the following areas:

Critical Infrastructure and Key Resource (CIKR) Assessment and Prioritization

As the sector is characterized by very diverse assets and systems, prioritization of sector assets and systems is highly dependent upon changing threats and consequences. The significance of many individual components in the network is highly variable, depending on location, time of day, day of the week, and season of the year. Owners and operators of sector assets, whether oil and natural gas or electricity, have well-developed protocols in place to identify priorities and ensure business continuity and operational reliability. Therefore, prioritization of assets and systems in the sector needs to be flexible according to circumstances. Further dialogue among DOE, DHS, and other public and private stakeholders is necessary to examine cross-sector needs and approaches to support national infrastructure protection programs.

Information Collection and Sharing

The energy sector has considerable data available to support a wide range of consequence, risk, and vulnerability assessments. The data is collected and used by owners, operators, trade associations, and a variety of industry organizations such as NERC, the American Gas Association (AGA), and American Petroleum Institute (API). In addition, the U.S. government collects a wide variety of energy sector information, principally through the authorities of various federal agencies and—at the state and local levels—through authorities of public utility commissions, state energy offices, and state and local homeland security initiatives. Established communication links also exist between federal, state, and local government representatives and industry. However, the amount of energy sector cyber data is limited.

During times of increased security posture or emergency situations, the best information sources are the trusted relationships between government and industry. Such relationships ensure that necessary information is provided when and where it is needed and can be directly applied to protect and recover key energy infrastructure and resources. Established relationships between industry, all levels of government, and other key stakeholders will continue to facilitate information flow, when necessary, through Homeland Security Information network (HSIN) and other information-sharing mechanisms. Working with the Department of Energy, sector partners will continue to communicate with DHS regarding additional needs, information resources, and database approaches required to support DHS programs. State energy emergency preparedness and response plans highlight the identification of assets and the role of state government officials, in conjunction with their private sector counterparts, in addressing various levels of an energy emergency.

The energy sector owners and operators have a long history of mutual aid and support that can be relied on in emergency situations. This aid is largely focused on emergency response and recovery to support restoration of service to customers. Regional planning groups in the natural gas and electricity industries plan for regional reliability and often conduct exercises to prepare for energy emergencies. States also conduct regional energy emergency exercises involving the private sector to assure coordinated responses across state borders and with the private sector.

Screening Infrastructure

Electric grid operators utilize their energy management systems to run sophisticated contingency analysis programs every 5 to 10 seconds to identify the most critical components of the electric grid. The operators are always aware of the critical components, as well as the consequences if a key component is removed from service, and operate the system to mitigate the loss of any key components.

Assessing Consequences

The potential physical and cyber consequences of any incident, including terrorist attacks and natural or manmade disasters, are the primary consideration in risk assessment. In the context of NIPP, consequence is measured as the range of loss or damage that can be expected.

The consequences that are considered for the national level comparative risk assessment are based on the criteria set forth in HSPD-7. These criteria can be divided into four main categories:

- **Human Impact:** Effect on human life and physical well-being (e.g., fatalities, injuries).
- **Economic Impact:** Direct and indirect effects on the economy (e.g., costs resulting from disruption of products or services, costs to respond to and recover from the disruption, costs to rebuild the asset, and long-term costs due to environmental damage).
- **Impact on Public Confidence:** Effect on public morale and confidence in national economic and political institutions.
- **Impact on Government Capability:** Effect on the government's ability to maintain order, deliver minimum essential public services, ensure public health and safety, and carry out national security-related missions.

An assessment of all categories of consequence may be beyond the capabilities available for a given risk analysis. Most energy sector assets are not associated with the possibility of mass casualties, but may have

economic and long-term health and safety implications if disrupted. The redundancy of system-critical facilities and overall system resilience minimize the potential for such consequences.

Assessing Threats

The energy sector takes a broad view of threat analysis, one that encompasses natural events, criminal acts, insider threats, and foreign and domestic terrorism. Natural events are typically addressed as part of emergency response and business continuity planning. In the context of risk assessment, the threat component is calculated based on the likelihood that an asset will be disrupted or attacked. Such information is essential for conducting meaningful vulnerability and risk assessments. Relevant and timely threat information must be disseminated whenever possible. A number of sector representatives hold national security clearances that facilitate the sharing of classified threat information. In addition, the ES-ISAC facilitates communications between electricity subsector participants, the federal government, and other critical infrastructures, and is a conduit for disseminating sensitive threat and incident information. A number of state and local authorities, with DHS support, have created fusion centers that combine relevant law enforcement and intelligence information analysis and coordinate security measures to reduce threats in their respective communities.

Asset owners and operators must rely on threat information from DHS, federal, state, and local law enforcement organizations in order to assess the relative risk associated with a given asset. The DHS Homeland Infrastructure Threat and Risk Analysis Center (HITRAC), which conducts integrated threat analysis for all CIKR sectors, works in partnership with owners and operators and other federal, state, and local government agencies to ensure that suitable threat information is made available. The same level of partnership must exist within all levels of federal, state, and local law enforcement.

Assessing Vulnerabilities

Vulnerabilities are the characteristics of an asset, system, or network's design, location, security posture, process, or operation that render it susceptible to destruction, incapacitation, or exploitation by mechanical failures, natural hazards, terrorist attacks, or other malicious acts.

Vulnerability assessments identify areas of weakness that could result in consequences of concern, taking into account intrinsic structural weaknesses, protective measures, resilience, and redundancies.

Energy sector owners and operators have well-developed protocols, organizations, and systems for ensuring the reliability of energy networks. The importance of sector assets, both physical and cyber, is affected by changing threats and continually changing consequences. Prioritization of assets and systems in the energy sector is dynamic—it changes constantly and goes on continuously. Static prioritization of assets could lead to critical decision-making based on outdated or erroneous asset information in efforts to direct scarce resources to those assets, systems, and networks that may be the most critical at any point in time. The public and private partners in the energy sector will continue their dialogue with DHS/DOE and other stakeholders to examine cross-sector needs and approaches to support DHS programs. DOE works with DHS to identify gaps in existing energy information and to identify publicly available databases or sources that could provide data to support DHS efforts to prioritize assets.

How Are Electric Power Assets Restored When They are Damaged?

1. Emergency Support Function (ESF) #12 - Energy

The National Response Framework (NRF) established ESF #12 to facilitate the restoration of damaged energy systems and components when activated by the Secretary of Homeland Security for incidents requiring a coordinated federal response. Under DOE leadership, ESF #12 is an integral part of the larger DOE responsibility of maintaining continuous and reliable energy supplies for the United States through preventive measures and restoration and recovery actions.

The other primary and support agencies that comprise ESF #12 are:

Department of Agriculture

Department of Commerce

Department of Defense

Department of Homeland Security

Department of the Interior

Department of Labor

Department of State

Department of Transportation

Environmental Protection Agency

Nuclear Regulatory Commission

Tennessee Valley Authority

As the Coordinator of ESF #12, DOE:

- Serves as the focal point within the federal government for receipt of information on actual or projected damage to energy supply and distribution systems and requirements for system design and operations, and on procedures for preparedness, restoration, recovery, and mitigation.
- Is the primary federal point of contact with the energy industry for information sharing and requests for assistance from private- and public-sector owners and operators.
- Maintains lists of energy-centric critical assets and infrastructures, and continuously monitors those resources to identify and mitigate vulnerabilities to energy facilities.
- Establishes policies and procedures regarding preparedness for attacks to U.S. energy sources and response and recovery due to shortages and disruptions in the supply and delivery of electricity, oil, natural gas, coal, and other forms of energy and fuels that impact or threaten to impact large populations in the United States.
- Undertakes all preparedness, response, recovery, and mitigation activities for those parts of the Nation's energy infrastructure owned and/or controlled by DOE. Restoration of

normal operations at energy facilities for non-federal entities is the responsibility of the facility owners.

- Assists federal departments and agencies by locating fuel for transportation, communications, emergency operations, and national defense.
- Provides assistance to federal, state, tribal, and local authorities utilizing Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA)-established communications systems.

When Activated by DHS/FEMA, ESF #12:

- Provides representatives to the DHS National Operations Center, Domestic Readiness Group, and National Response Coordination Center (NRCC).
- Assigns Regional Coordinators to each of the 10 DHS/FEMA regions. These coordinators attend meetings, participate in exercises, and develop expertise on regional issues and infrastructure.
- Deploys personnel to the Regional Response Coordination Center (RRCC) and Joint Field Offices (JFO). Within the JFO, ESF #12 serves as the primary source for reporting of CIKR damage and operating status for the energy systems within the impacted area. The Infrastructure Liaison, if assigned, proactively coordinates with ESF #12 on matters relating to security, protection, and/or restoration that involve sector-specific, cross-sector, or cascading effects impacting ESF #12.
- Deploys personnel as members of Incident Management Teams and as members of the Rapid Needs Assessment Teams for state emergency operations centers.
- Provides incident-related reports and information to ESF #5 – Emergency Management.

- Assesses the energy impacts of the incident, provides analysis of the extent and duration of energy shortfalls, and identifies requirements to repair energy systems. ESF #12 coordinates preliminary damage assessments in the energy sector to determine the extent of the damage to the infrastructure and the effects of the damage on the regional and national energy system.
- In coordination with DHS and state, tribal, and local governments, prioritizes plans and actions for the restoration of energy during response and recovery operations. State, tribal, and local governments have primary responsibility for prioritizing the restoration of energy facilities. State, tribal, and local governments are fully and consistently integrated into ESF #12 operations.
- Coordinates with the private sector. DOE provides subject-matter experts to the private sector to assist in the restoration efforts. This support includes assessments of energy systems, latest technological developments in advanced energy systems, and best practices from past disruptions. The private sector normally takes the lead in the rapid restoration of infrastructure-related services after an incident occurs. Appropriate entities of the private sector are integrated into ESF #12 planning and decision-making processes. ESF #12 coordinates information and requests for assistance with the following private-sector entities: the electricity and the oil and natural gas sector coordinating councils, the Electric Reliability Organization, and various associations that represent portions of the energy sector.
- Facilitates the restoration of energy systems through legal authorities and waivers.

2. Practical Aspects of Incident Response

Before a power restoration effort can begin, conditions must be safe for restoration operations. High winds, darkness and flooded conditions, for example, may prohibit restoration work when lines are down. The first crews in are generally debris removal crews, followed by line repair

crews. The crews belong to the utilities as employees, contractors, or are provided under mutual aid pacts. The crews will not move into place until they are requested by the state, due to cost considerations. DOE does not play a large role in this process, as plans and priorities are worked out in advance in coordination with DOE, and little oversight of the process is usually necessary. However, DOE has the authority to inject itself into the process and require a company complete a repair as a priority. For example, if a water treatment plant is down, and the nearby utility would not repair it because it was not their customer, DOE can require them to make the repair if the functioning of the plant is critical and the servicing utility is unable to make the repair in a timely fashion. This extraordinary authority is rarely exercised.

DOE can also override regulations, and request waivers of regulations. For example, if there were a critical need to buy gas from Canada, but the Canadian gas was not within U.S. specifications, DOE could waive those specifications.

DOE tracks power outages, reporting numbers and percentages of customers without power. “Customers” are accounts, rather than individuals, so a customer could be one household, or business, therefore many more people may be without power than reported. It is also important to note that the percentage of customers without power in a given area may be more important than the raw number of customers without power because it is more likely that a large segment of support services will be without power as well as residential customers when the percentages are high.

Although restoration requirements are prioritized to reach the greatest needs first, that is often not possible because fixing local lines to places like hospitals can only take place after damaged plants, substations, or major transmission lines have been repaired.

What is USACE’s Role in Providing Emergency Power?

The U.S. Army Corps of Engineers (USACE) is an integral part of ESF #7-Logistics. USACE has the capability to provide local and state officials broad support for their unmet emergency power needs (emergency power restoration). This support ranges from technical expertise and

assistance to determine what generator(s) are needed at a critical public facility through complete management of an emergency power mission including the procurement, installation, and operation of generators.

USACE assets utilized to fulfill emergency power mission requirements include elements of the U.S. Army 249th Engineering Battalion “Prime Power,” Emergency Power Planning & Response Teams (PRTs) from across USACE, USACE-contracted forces, and USACE Deployable Tactical Operations System (DTOS) for communications. USACE also coordinates with other federal partners such as the Federal Emergency Management Agency (FEMA) and the Department of Energy (DOE). These assets can provide technical assistance which include, but is not limited to, the following:

- Assessing emergency power requirements needed at a facility.
- Assessing conditions & capabilities of existing emergency generation equipment.
- Troubleshooting, repairing, and operating emergency generation/distribution equipment.
- Installing, operating, fueling, and maintaining emergency power generation equipment.
- Safety inspections and assessment of damaged electrical distribution systems and equipment.
- All hazards emergency power planning.
- The execution of a power mission involves the combined efforts of the 249th, the Power PRT, DTOS, pre-established contracts, and state and federal partners. During these missions, the technical assistance items discussed earlier are brought to bear along with the following:

- Provide assistance to state and local officials in determining priorities for assessing and installing generators at critical public facilities.
- Preparation, hauling, and installation of generators.
- Operation, fueling, service, and maintenance of installed generators.
- De-installation and return of generators. This can also include remediation of the generator installation site to its pre-installation site condition.
- Service, maintenance, and repair of generators prior to their return to long-term storage to ensure they are Fully Mission Capable (FMC). This may also include load testing.
- Replenishing any Bill of Materials (BOM) used during execution of the mission Generator procurement and/or lease, if required, can be performed by USACE through a collaborate team comprised of the supporting Districts technical and contract staff.

Operational maintenance of FEMA generators can be performed by a combination of 249th, PRT, and contractual support. The 249th may also be requested to complete power needs assessments of critical public facilities in support of training exercises and/or catastrophic disaster planning efforts, or other pre-disaster response planning activities.

What Is FEMA's role In Providing Emergency Power?

1. Assessment:

FEMA Logistics and the U.S. Army Corps of Engineers (USACE) work with states and territories to conduct power assessments for pre-identified critical facilities. Assessments record the location, power requirements, and point of contact (POC) for each facility, and determine if the facility needs to install a generator connection for emergency use. USACE and FEMA jointly built the Emergency Power Facility Assessment Tool

(EPFAT), where facility data can be uploaded by the owners, reducing the need for on-site assessment teams.

2. Generator Support:

FEMA maintains a fleet of approximately 850 generators in its Distribution Centers (DCs) throughout the country and three outside the Continental United States (OCONUS). The generators are maintained by FEMA as a set of pre-configured generator packages called “54 Packs,” composed of generators of varying power, and are designed to support a variety of power requirements. These generators are deployed by FEMA to disaster locations and either provided directly to states to install, or provided to USACE for installation and other services.

FEMA also routinely provides mission assignments to USACE to provide generators, and associated services. A tertiary source of generators is GSA, and FEMA can also lease additional generators if required to meet emergency needs. FEMA procures fuel to support generator missions primarily through an Interagency Agreement with the Defense Logistics Agency, or mission assignment to USACE.

FEMA often mission assigns USACE to provide:

- Technical Assistance.
- Generator assets.
- Preparation, transportation, installation, fuel, and maintenance of generators at deployed locations, including FEMA generators.
- De-installation, service, maintenance, and repair of FEMA generators prior to their return to long-term storage to ensure they are Fully Mission Capable (FMC). This may also include load testing and remediation of the generator installation site to its pre-installation site condition.
- Replenishing any Bill of Materials (BOM) used during execution of the mission.

Conclusion

Numerous characteristics of the Nation's energy infrastructure, including the wide diversity of owners and operators and the variety of energy supply alternatives and delivery mechanisms, make protecting it a challenge. Energy infrastructure assets and systems are geographically dispersed. Millions of miles of electricity lines and oil and natural gas pipelines and many other types of assets exist in all 50 states, the District of Columbia, and the six territories of the U.S. In many cases, these assets and systems are interdependent and subject to regulation in various forms. Although the private sector has the lead in power restoration activities, the federal government has played a large role in shaping those activities, and close coordination between industry and government at all levels is necessary to maintain the grid, and restore it when it is compromised by natural disaster or other hazards.

APPENDIX E

2018 FEMA APPROPRIATIONS TABLE

Fund Code Number, Name & FEMA Designation Number:		<u>Fund OS and Fund DS</u>
Date Passed by Congress:		<u>05/04/2017</u>
Date Signed into Law:		<u>05/05/2017</u>
Time	<u>One-year</u>	Fund Type <u>General</u>
Authority		Amounts and dates of expiration ¹
<u>Division F of the Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. No. 115-31 (2017)</u> (see below for exact language). For additional information, see also: • <u>Operations and Support, Congressional Justification, FY 2017;</u> • <u>Explanatory Statement;</u> • <u>H.R. Rep. No. 114-668, at 66 (2016);</u> • <u>S. Rep. No. 114-264, at 105 (2016);</u>		For necessary expenses of FEMA for <u>operations and support</u> \$1,048,551,000 available until Sept. 30, 2017 , of which: Not to exceed \$2,250 is available until Sept. 30, 2017 , for <u>official reception and representation</u> expenses; Sec. 533. Funding for operations and support may be used for minor <u>procurement, construction, and improvements</u> (minor refers to end items with a unit cost of \$250,000 or less for personal property, and \$2,000,000 or less for real property)

¹ Note that this document is primarily dedicated to describing FEMA’s annual appropriation for Fiscal Year 2016 and thus does not discuss all of FEMA’s permanent appropriations, reimbursable authority, borrowing authority, and other sources of budget authority available to FEMA to carry out certain activities.

Fund Code Number, Name & FEMA Designation Number:		<u>Fund PI 70-17/18-0414</u> <u>Procurements, Construction & Improvements (PC&I)</u>	
Date Passed by Congress:		<u>05/04/2017</u>	
Date Signed into Law:		<u>05/05/2017</u>	
Time	<u>Multi-year (Two-year)</u>	Fund Type	<u>General</u>
Authority		Amounts and dates of expiration²	
Division F of the Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. No. 115-31 (2017) (see below for exact language). For additional information, see also: • <u>Procurement, Construction and Improvements, Congressional Justification, FY 2017</u> • <u>Explanatory Statement</u>; • <u>H.R. Rep. No. 114-668, at 66 (2016)</u>; • <u>S. Rep. No. 114-264, at 105 (2016)</u>;		For necessary expenses of FEMA for <u>procurement, construction, and improvements</u> , \$35,273,000 available until Sept. 30, 2018	

² Note that this document is primarily dedicated to describing FEMA's annual appropriation for Fiscal Year 2016 and thus does not discuss all of FEMA's permanent appropriations, reimbursable authority, borrowing authority, and other sources of budget authority available to FEMA to carry out certain activities.

Fund Code Number, Name & FEMA Designation Number:	
Date Passed by Congress:	
Date Signed into Law:	
Time	Fund Type
Authority	Amounts and dates of expiration³

³ Note that this document is primarily dedicated to describing FEMA’s annual appropriation for Fiscal Year 2016 and thus does not discuss all of FEMA’s permanent appropriations, reimbursable authority, borrowing authority, and other sources of budget authority available to FEMA to carry out certain activities.

Fund Code Number, Name & FEMA Designation Number	Authority	Date Passed by Congress	Date Signed into Law	Amounts and dates of expiration ⁴ ₅	Time	Fund Type
<u>Fund FA 70-17-0413</u> <u>Federal Assistance</u> <u>(Annual/One-year)</u>	<u>Division F of the Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. No. 115-31 (2017)</u> (see below for exact language). For additional information, see also: <u>Federal Assistance, Congressional Justification, FY 2017;</u> <u>Explanatory Statement;</u> <u>H.R. Rep. No. 114-668, at 66 (2016);</u>	<u>05/04/2017</u>	<u>05/05/2017</u>	For activities of FEMA for <u>Federal assistance</u> through grants, contracts, cooperative agreements, and other activities, \$2,983,458,000 which shall be allocated as follows: \$467,000,000 shall be for the State Homeland Security Grant Program under <u>section 2004 of the Homeland Security Grant Program of 2002 (6 U.S.C. §</u>	<u>One-year</u>	<u>General</u>

⁴ Please note that this document is primarily dedicated to describing FEMA's annual appropriation for Fiscal Year 2017 and thus does not discuss all of FEMA's permanent appropriations, reimbursable authority, borrowing authority, and other sources of budget authority available to FEMA to carry out certain activities.

⁵ Where language applicable to a specific FEMA appropriation was given a section number in *Division F of the Consolidated Appropriations Act, 2017*, the section number was included in the body of the table.

	<u>S. Rep. No. 114-264, at 105 (2016);</u> State Homeland Security Grant Program under <u>6 U.S.C. § 605 (2015);</u> Tribal Homeland Security Grant Program under <u>6 U.S.C. § 606 (2015)</u> Urban Area Security Initiative under <u>6 U.S.C. § 604 (2015);</u> Federal Emergency Management Agency <u>6 U.S.C. § 313-314;</u> Public Transportation Security			<u>605)</u> ⁶ , of which: \$55,000,000 shall be for Operation Stonegarde n; Puerto Rico is required to make these funds available to local and tribal governments for fiscal year 2017 in accordance with <u>section 2004(c)(1) of the Homeland Security Act of 2002 (6 U.S.C. § 605(c)(1))</u> , notwithstanding <u>section (c)(4) of the Homeland Security Act of 2002 (6 U.S.C. § 605 (c)(4))</u> ; \$605,000,000 for the		

⁶ NOTE: Sections 303-306, and 308 of *Division F of the Consolidated Appropriations Act, 2017* contain several provisions governing grants under the State Homeland Security Grant Program, the Urban Area Security Initiative, Public Transportation Security Assistance, Railroad Security Assistance, Over-the-Road Bus Security Assistance, and Port Security Grants. Such provisions include, for example, a limitation on the percentage of a grant which may be used for expenses directly related to administration of the grant.

----- <u>Fund F7</u> <u>70-17/18-</u> <u>0413</u> <u>Federal</u> <u>Assistance</u> <u>(Multi-year)</u>	Assistance under <u>6 U.S.C. § 1135 (2015)</u>; Railroad Security Assistance under <u>6 U.S.C. § 1163 (2015)</u>; Over-the-Road Bus Security Assistance under <u>6 U.S.C. § 1182 (2015)</u>; Port Security Grants under <u>46 U.S.C. § 70107 (2015)</u>; <u>Section 1204 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, 386 (codified at 6 U.S.C. § 1102 (2014))</u>;			Urban Area Security Initiative under <u>section 2003 of the Homeland Security Act of 2002 (6 U.S.C. § 604)</u> , of which: \$25,000,000 shall be for 501 (c)(3) organizations determined by the Secretary to be at high risk of a terrorist attack; \$100,000,000 for Public Transportation Security Assistance, Railroad Security Assistance, and Over-the-Road Bus Security Assistance under sections 1406, 1513, and 1532 of the Implementing Recommendations of the 9/11 Commission	----- <u>Multi-year</u> <u>(Two-year)</u>	

----- <u>Fund FX</u> <u>70-X-0413</u> <u>Federal</u> <u>Assistance</u> <u>(No-Year)</u>	<u>Federal Fire</u> <u>Prevention</u> <u>and Control</u> <u>Act of 1974</u> <u>(codified as</u> <u>amended at</u> <u>15 U.S.C.</u> <u>§§ 2201 et</u> <u>seq.</u> <u>(2015));</u> <u>Federal Fire</u> <u>Prevention</u> <u>and Control</u> <u>Act of 1974</u> <u>(codified as</u> <u>amended at</u> <u>15 U.S.C.</u> <u>§§ 2229-</u> <u>2229a</u> <u>(2015));</u> <u>National</u> <u>Flood</u> <u>Insurance</u> <u>Act of 1968</u> <u>(codified as</u> <u>amended at</u> <u>42 U.S.C.</u> <u>§§ 4001 et</u> <u>seq.</u> <u>(2015));</u> <u>Robert T.</u> <u>Stafford</u> <u>Disaster</u> <u>Relief and</u> <u>Emergency</u> <u>Assistance</u> <u>Act</u> <u>(codified as</u> <u>amended at</u> <u>42 U.S.C.</u> <u>§§ 5121 et</u> <u>seq.</u> <u>(2015));</u> <u>Earthquake</u> <u>Hazards</u>			n Act of 2007 (<u>6</u> <u>U.S.C. §§</u> <u>1135,</u> <u>1163, and</u> <u>1182</u>), of which: \$10,000,00 0 shall be for Amtrak security; and \$2,000,000 shall for Over-the- Road Bus Security Assistance; Public transportati on security assistance shall be provided directly to public transportati on agencies; \$100,000,0 00 for Port Security Grants in accordance with <u>46</u> <u>U.S.C. §</u> <u>70107</u>; \$350,000,0 00 for emergency manageme nt performanc e grants under the <u>National</u> <u>Flood</u> <u>Insurance</u>	----- <u>No-</u> <u>year</u>	

	<u>Reduction Act of 1977 (codified as amended at 42 U.S.C. §§ 7701 et seq. (2015))</u>; <u>Reorganization Plan No. 3 of 1978, 92 Stat. 3788 (codified at 5 U.S.C. App. (2015))</u>; <u>Section 203 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (codified as amended at 42 U.S.C. § 5133 (2015))</u>; and <u>Subchapter III of the McKinney-Vento Homeless Assistance Act (codified as amended at 42 U.S.C. §§ 11331-11352 (2015))</u>.			<u>Act of 1968 (42 U.S.C. § 4001)</u>, the <u>Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121)</u>, the <u>Earthquake Hazards Reduction Act of 1977 (42 U.S.C. § 7701)</u>, <u>6 U.S.C. § 762</u>, and <u>Reorganization Plan No. 3 of 1978 (5 U.S.C. App.)</u>; \$273,927,000 to sustain current operations for training, exercises, technical assistance, and other programs. Sec. 307. FEMA may acquire real property for the purpose of establishing or		

				appropriatel y extending the security buffer zones around FEMA training facilities <u>\$690,000.00</u> available until <u>September</u> <u>30, 2018.</u> of which: <u>\$345,000,00</u> shall be for Assistance to Firefighter Grants under section 33 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. § 2229) <u>\$345,000,00</u> shall be fore Staffing for Adequate Fire and Emergency Response Grants under section 34 of the Federal Fire Prevention and Control Act of 1974		

				(15 U.S.C. § 2229a); Sec. 544. \$41,000,000 to remain available until September 30, 2018, exclusively for providing reimbursement of extraordinary law enforcement personnel costs for protection activities directly and demonstrably associated with any residence of the President that is designated or identified to be secured by the United States Secret Service (USSS). Funds are available only for eligible costs that a State or local agency incurs after 01/20/17		

				and before 10/01/17 Where a property is designated or identified by the USSS after a State or local agency incurs eligible costs, designation shall apply retroactively to 01/20/17 No funds may be used to hire new or additional personnel The appropriation contains several additional provisions related to eligible costs. \$100,000,000 for the National Predisaster Mitigation Fund under <u>section 203 of the Stafford Act (42 U.S.C. § 5133)</u> to remain available until expended;		

				\$177,531,000 for necessary expenses for Flood Hazard Mapping and Risk Analysis to remain available until expended; Funds are to supplement any other sums appropriated under the National Flood Insurance Fund Includes authority to augment with sums provided from cost-shared mapping activities by State and local governments or other political subdivisions under <u>42 U.S.C. § 4101(f)(2)</u> (also available until expended). \$120,000,000 for the		

				emergency food and shelter program under <u>title III of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11331)</u> to remain available until expended; Total administrative costs shall not exceed 3.5% of amount available.		
<u>Fund 06 and Fund 6R 70-X-0702 Disaster Relief Fund (DRF)</u>	<u>Division F of the Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. No. 115-31 (2017)</u> (see below for exact language). For additional information, see also: <u>DRF Congressional Justification, FY 2017;</u>	<u>05/04/2017</u>	<u>05/05/2017</u>	\$7,328,515,000 , for necessary expenses, in carrying out the <u>Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121 et seq.)</u> to remain available until expended, of which	<u>No-year</u>	<u>General</u>

	<u>Explanatory Statement;</u> <u>H.R. Rep. No. 114-668, at 66 (2016);</u> <u>S. Rep. No. 114-264, at 105 (2016)</u> and <u>Robert T. Stafford Disaster Relief and Emergency Assistance Act (codified as amended at 42 U.S.C. §§ 5121 et seq. (2015)).</u>			\$6,713,000 ,000 shall be for major disasters declared pursuant to the <u>Robert T. Stafford Disaster Relief and Emergency Assistance Act (codified as amended at 42 U.S.C. §§ 5121 et seq.)</u> and is designated by Congress as being for disaster relief pursuant to <u>section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985 (codified as amended at 2 U.S.C. § 901(b)(2)(D))</u>; TRANSFER Sec. 310 Transfers \$56,872,752 in unobligated balances from "Federal		

				Emergency Management Agency – Disaster Assistance Direct Loan Program Account” to the DRF, provided that Congress designates certain specified funds as an emergency requirement pursuant to <u>section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985</u> and only if the President subsequently so designates the entire transfer as such and transmits such designation to the Congress. RESCISSION Sec. 538 Of the unobligated balances made		

				available to the DRF, \$789,248,000 shall be rescinded, except for funds designated as an emergency requirement or as being for disaster relief <u>under section 251(b)(2)(A)(i) or section 251(b)(2)(D)</u> , respectively, of the <u>Balanced Budget and Emergency Deficit Control Act of 1985 (codified as amended at 2 U.S.C. § 901(b)(2)(A)(i), (D))</u> .		
<u>Fund 5</u> <u>National</u> <u>Flood</u> <u>Insurance</u> <u>Fund</u> <u>(NFIF)</u>	<u>Division F of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 (2017)</u> (see	<u>05/04/2017</u>	<u>05/05/2017</u>	\$181,799,000 (from offsetting collections under <u>section 1308(d) of the</u>	<u>Multi-year (Two-year)</u> ⁷	<u>Public Enterprise</u> <u>Revolving</u> <u>Fund</u>

⁷ To simplify understanding, this table reflects certain NFIF line items as being a multi-year or one-year appropriation, as the funds are available for those purposes for the periods designated. Those funds, however, until obligated for those purposes, remain no-year funds within the NFIF. Thus, those funds do not expire and do not revert to the Department of the Treasury five years after their period of availability, and instead remain a part of the *corpus* of the NFIF.

<u>70-X-4236</u>	below for exact language). For additional information, see also: <u>NFIF Congressional Justification, FY 2017;</u> <u>Explanatory Statement;</u> <u>H.R. Rep. No. 114-668, at 66 (2016);</u> <u>S. Rep. No. 114-264, at 105 (2016);</u> <u>National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973 (codified as amended at 42 U.S.C. §§ 4001 et seq. (2015));</u> <u>Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 405, 916; and</u> <u>Homeowner Flood</u>			<u>National Flood Insurance Act of 1968 (42 U.S.C. § 4015(d))</u>), for activities under the <u>National Flood Insurance Act of 1968 (42 U.S.C. §§ 4001 et seq.)</u>, the <u>Flood Disaster Protection Act of 1973 (42 U.S.C. §§ 4001 et seq.)</u>, the <u>Biggert-Waters Flood Insurance Reform Act of 2012 (Public Law 112-141, 126 Stat. 916)</u>, and the <u>Homeowner Flood Insurance Affordability Act of 2014 (Public Law 113-89; 128 Stat. 1020)</u> available until Sep. 30, 2018, of which:	----- <u>One-year</u> ----- <u>No-year</u> ----- <u>One-year</u>	

	<u>Insurance</u> <u>Affordability</u> <u>Act of 2014,</u> <u>Pub. L. No.</u> <u>113-89, 128</u> <u>Stat. 1020.</u>			\$13,436,000 shall be available for mission support associated with flood management; \$168,363,000 shall be available for flood plain management and flood mapping; Additional fees collected under <u>42 U.S.C. § 4015(d)</u> shall be credited as an offsetting collection & available for flood plain management & flood mapping; In FY 2017, no funds from the NFIF under <u>42 U.S.C. § 4017</u> shall be available in excess of: \$147,042,000 for	<u>No-year</u>	

				operating expenses and salaries and expenses associated with flood insurance operations; \$1,123,000,000 for commissions and taxes of agents; Such sums as are necessary for interest on Treasury borrowings ; and \$175,061,000, which shall remain available until expended, for flood mitigation actions and for flood mitigation assistance under <u>42 U.S.C. § 4104c</u> (notwithstanding 42 U.S.C. §§ , <u>4104c(e)</u>, <u>4017</u>); May be augmented through		

				collection of premiums under <u>42 U.S.C. §§ 4012a and section 1366(e) of the National Flood Insurance Act of 1968 (42 U.S.C. § 4104c(e))</u> (notwithstanding 42 U.S.C. §§ 4012a(f)(8) L, 4104c(e), 4104d(b)(1)-(3)); Total administrative costs may not exceed 4% of the total appropriation; Up to \$5,000,000 is available to carry out <u>section 24 of the Homeowner Flood Insurance Affordability Act of 2014, 42 U.S.C. § 4033;</u>		

				Note that the NFIF remains available on a permanent, indefinite basis for the payment of claims and claims adjustment expenses under <u>42 U.S.C. § 4017(d)(1)</u> .		
<u>Fund 68 70-X-0715 Radiological Emergency Preparedness Program (REPP)</u>	Division F of <u>the Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. No. 115-31 (2017)</u> (see below for exact language). For additional information, see also: <u>Radiological Emergency Preparedness Program Congressional Justification, FY 2017;</u> <u>Explanatory Statement;</u> <u>H.R. Rep. No. 114-668, at 66 (2016);</u>	<u>05/04/2017</u>	<u>05/05/2017</u>	Sec. 312. Aggregate charges assessed during FY 2017, as authorized in <u>title III of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (42 U.S.C. § 5196e)</u> must not be less than 100% of the amounts anticipated to be	<u>No-year</u>	<u>General</u>

	<u>S. Rep. No. 114-264, at 105 (2016);</u> Radiological Emergency Preparedness Fund under <u>42 U.S.C. § 5196e (2015).</u>			necessary for DHS' Radiological Emergency Preparedness Program for the next FY and shall become available on October 1, 2017, and remain available until expended.		

Language from the Appropriations Act

Division F of the Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. No. 115-31 (May 5, 2017)

Operations and Support

For necessary expenses of the Federal Emergency Management Agency for operations and support, \$1,048,551,000: *Provided*, That not to exceed \$2,250 shall be for official reception and representation expenses.

Procurement, Construction and Improvements

For necessary expenses of the Federal Emergency Management Agency for procurement, construction, and improvements, \$35,273,000, to remain available until September 30, 2018.

Federal Assistance State and Local Programs

For activities of the Federal Emergency Management Agency for Federal assistance through grants, contracts, cooperative agreements, and other activities, \$2,983,458,000, which shall be allocated as follows:

- (1) \$467,000,000 for the State Homeland Security Grant Program under section 2004 of the Homeland Security Act of 2002 (6 U.S.C. 605), of which \$55,000,000 shall be for Operation Stonegarden: *Provided*, That notwithstanding subsection (c)(4) of such section 2004, for fiscal year 2017, the Commonwealth of Puerto Rico shall make available to local and tribal governments amounts provided to the Commonwealth of Puerto Rico under this paragraph in accordance with subsection (c)(1) of such section 2004.
- (2) \$605,000,000 for the Urban Area Security Initiative under section 2003 of the Homeland Security Act of 2002 (6 U.S.C. 604), of which \$25,000,000 shall be for organizations (as described under section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such code) determined by the Secretary of Homeland Security to be at high risk of a terrorist attack.
- (3) \$100,000,000 for Public Transportation Security Assistance, Railroad Security Assistance, and Over-the-Road Bus Security Assistance under sections 1406, 1513, and 1532 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (6 U.S.C. 1135, 1163, and 1182), of which \$10,000,000 shall be for Amtrak security and \$2,000,000 shall be for Over-the-Road Bus Security: *Provided*, That such public transportation security assistance shall be provided directly to public transportation agencies.
- (4) \$100,000,000 for Port Security Grants in accordance with 46 U.S.C. 70107.
- (5) \$690,000,000, to remain available until September 30, 2018, of which \$345,000,000 shall be for Assistance to Firefighter

Grants and \$345,000,000 shall be for Staffing for Adequate Fire and Emergency Response Grants under sections 33 and 34 respectively of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2229 and 2229a)

- (6) \$350,000,000 for emergency management performance grants under the National Flood Insurance Act of 1968 (42 U.S.C. 4001), the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121), the Earthquake Hazards Reduction Act of 1977 (42 U.S.C. 7701), 6 U.S.C. 762, and Reorganization Plan No. 3 of 1978 (5 U.S.C. App).
- (7) \$100,000,000 for the National Predisaster Mitigation Fund under section 203 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5133), to remain available until expended.
- (8) \$177,531,000 for necessary expenses for Flood Hazard Mapping and Risk Analysis, in addition to and to supplement any other sums appropriated under the National Flood Insurance Fund, and such additional sums as may be provided by States or other political subdivisions for cost-shared mapping activities under 42 U.S.C. 4101(f)(2), to remain available until expended.
- (9) \$120,000,000 for the emergency food and shelter program under title II of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11331), to remain available until expended: *Provided*, That not to exceed 3.5 percent shall be for total administrative costs.
- (10) \$273,927,000 to sustain current operations for training, exercises, technical assistance, and other programs.

Disaster Relief Fund

For necessary expenses in carrying out the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), \$7,328,515,000 to remain available until expended, of which

\$6,713,000,000 shall be for major disasters declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) and is designated by the Congress as being for disaster relief pursuant to section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESCISSION

Sec. 538. Of the unobligated balances made available to “Federal Emergency Management Agency—Disaster Relief Fund”, \$789,248,000 shall be rescinded: *Provided*, That no amounts may be rescinded from amounts that were designated by the Congress as an emergency requirement pursuant to a concurrent resolution on the budget or the Balanced Budget and Emergency Deficit Control Act of 1985, as amended: *Provided further*, That no amounts may be rescinded from the amounts that were designated by the Congress as being for disaster relief pursuant to section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985.

National Flood Insurance Fund

For activities under the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.), the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 et seq.), the Biggert-Waters Flood Insurance Reform Act of 2012 (Public Law 112–141, 126 Stat. 916), and the Homeowner Flood Insurance Affordability Act of 2014 (Public Law 113–89; 128 Stat. 1020), \$181,799,000, to remain available until September 30, 2018, which shall be derived from offsetting amounts collected under section 1308(d) of the National Flood Insurance Act of 1968 (42 U.S.C. 4015(d)); of which \$13,436,000 shall be available for mission support associated with flood management; and of which \$168,363,000 shall be available for flood plain management and flood mapping: *Provided*, That any additional fees collected pursuant to section 1308(d) of the National Flood Insurance Act of 1968 (42 U.S.C. 4015(d)) shall be credited as offsetting collections to this account, to be available for flood plain management and flood mapping: *Provided further*, That in fiscal year 2017, no funds shall be available from the National Flood Insurance Fund under section 1310 of the National Flood Insurance Act of 1968 (42 U.S.C. 4017) in excess of—

- (1) \$147,042,000 for operating expenses and salaries and expenses associated with flood insurance operations;
- (2) \$1,123,000,000 for commissions and taxes of agents;
- (3) such sums as are necessary for interest on Treasury borrowings; and
- (4) \$175,061,000, which shall remain available until expended, for flood mitigation actions and for flood mitigation assistance under section 1366 of the National Flood Insurance Act of 1968 (42 U.S.C. 4104c), notwithstanding sections 1366(e) and 1310(a)(7) of such Act (42 U.S.C. 4104c(e), 4017):
- (5) *Provided further*, That the amounts collected under section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a) and section 1366(e) of the National Flood Insurance Act of 1968 shall be deposited in the National Flood Insurance Fund to supplement other amounts specified as available for section 1366 of the National Flood Insurance Act of 1968, notwithstanding section 102(f)(8), section 1366(e), and paragraphs (1) through (3) of section 1367(b) of such Act (42 U.S.C. 4012a(f)(8), 4104c(e), 4104d(b)(1)–(3)): *Provided further*, That total administrative costs shall not exceed 4 percent of the total appropriation: *Provided further*, That up to \$5,000,000 is available to carry out section 24 of the Homeowner Flood Insurance Affordability Act of 2014 (42 U.S.C. 4033).

ADMINISTRATIVE PROVISIONS (Including Transfer of Funds)⁸

Sec. 303. Notwithstanding section 2008(a)(11) of the Homeland Security Act of 2002 (6 U.S.C. 609(a)(11)) or any other provision of law, not more than 5 percent of the amount of a grant made available in paragraphs (1) through (4) under “Federal Emergency Management

⁸ Only Administrative Provisions described in the table or footnotes above are included here. Accordingly, the Administrative Provisions described in sections 301, 302, 309, and 311 of the *Division F of the Consolidated Appropriations Act, 2017* were not included here.

Agency—Federal Assistance”, may be used by the grantee for expenses directly related to administration of the grant.

Sec. 304. Applications for grants under the heading “Federal Emergency Management Agency—Federal Assistance”, for paragraphs (1) through (4), shall be made available to eligible applicants not later than 60 days after the date of enactment of this Act, eligible applicants shall submit applications not later than 80 days after the grant announcement, and the Administrator of the Federal Emergency Management Agency shall act within 65 days after the receipt of an application.

Sec. 305. Under the heading “Federal Emergency Management Agency—Federal Assistance”, for grants under paragraphs (1) through (4), the Administrator of the Federal Emergency Management Agency shall brief the Committees on Appropriations of the Senate and the House of Representatives 5 full business days in advance of announcing publicly the intention of making an award.

Sec. 306. Under the heading “Federal Emergency Management Agency—Federal Assistance”, for grants under paragraphs (1) and (2), the installation of communications towers is not considered construction of a building or other physical facility.

Sec. 307. Notwithstanding section 509 of this Act, the Administrator of the Federal Emergency Management Agency may use the funds provided under the heading “Federal Emergency Management Agency—Federal Assistance” in paragraph (10) to acquire real property for the purpose of establishing or appropriately extending the security buffer zones around Federal Emergency Management Agency training facilities.

Sec. 308. Notwithstanding any other provision of law—

- (1) grants awarded to States along the Southwest Border of the United States under sections 2003 or 2004 of the Homeland Security Act of 2002 (6 U.S.C. 604 and 605) using funds provided under the heading “Federal Emergency Management Agency—Federal Assistance” for grants under paragraph (1) in this Act, or under the heading “Federal Emergency Management Agency—State and Local Programs” in Public Law 114–4, division F of Public Law

113–76, or division D of Public Law 113–6 may be used by recipients or sub-recipients for costs, or reimbursement of costs, related to providing humanitarian relief to unaccompanied alien children and alien adults accompanied by an alien minor where they are encountered after entering the United States, provided that such costs were incurred between January 1, 2014, and December 31, 2014, or during the award period of performance; and

- (2) grants awarded to States under section 2004 of the Homeland Security Act of 2002 (6 U.S.C. 605) using funds provided under the heading “Federal Emergency Management Agency—Federal Assistance” for grants under paragraph (1) in this Act may be used by recipients or sub-recipients for costs, or reimbursement of costs, related to public safety in support of a State declaration of emergency.

Sec. 310. The Administrator of the Federal Emergency Management Agency shall transfer \$56,872,752 in unobligated balances made available for the appropriations account for “Federal Emergency Management Agency—Disaster Assistance Direct Loan Program Account” by section 4502 of Public Law 110–28 to the appropriations account for “Federal Emergency Management Agency— Disaster Relief Fund”: *Provided*, That amounts transferred to such account under this section shall be available for any authorized purpose of such account: *Provided further*, That amounts transferred pursuant to this section that were previously designated by the Congress as an emergency requirement pursuant to a concurrent resolution on the budget are designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 and shall be transferred only if the President subsequently so designates the entire transfer and transmits such designation to the Congress.

Sec. 312. The aggregate charges assessed during fiscal year 2017, as authorized in title III of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (42 U.S.C. 5196e), shall not be less than 100 percent of the amounts anticipated by the Department of Homeland Security to be necessary for its Radiological Emergency Preparedness Program for the

next fiscal year: *Provided*, That the methodology for assessment and collection of fees shall be fair and equitable and shall reflect costs of providing such services, including administrative costs of collecting such fees: *Provided further*, That such fees shall be deposited in a Radiological Emergency Preparedness Program account as offsetting collections and will become available for authorized purposes on October 1, 2017, and remain available until expended.

General Provisions

Sec. 533. (a) Funding provided in this Act for “Operations and Support” may be used for minor procurement, construction, and improvements.

- (a) For purposes of subsection (a), “minor” refers to end items with a unit cost of \$250,000 or less for personal property, and \$2,000,000 or less for real property.

Sec. 544. (a) For an additional amount for “Federal Emergency Management Agency—Federal Assistance”, \$41,000,000, to remain available until September 30, 2018, exclusively for providing reimbursement of extraordinary law enforcement personnel costs for protection activities directly and demonstrably associated with any residence of the President that is designated or identified to be secured by the United States Secret Service.

- (b) Funds under subsection (a) shall be available only for costs that a State or local agency—
 - (1) incurs after January 20, 2017, and before October 1, 2017;
 - (2) can demonstrate to the Administrator as being—
 - (A) in excess of the costs of normal and typical law enforcement operations;
 - (B) directly attributable to the provision of protection described herein; and

- (C) associated with a non-governmental property designated or identified to be secured by the United States Secret Service pursuant to
- (D) Section 3 or section 4 of the Presidential Protection Assistance Act of 1976 (Public Law 94–524); and
- (3) certifies to the Administrator as being for protection activities requested by the Director of the United States Secret Service.
- (c) For purposes of subsection (a), a designation or identification of a property to be secured under subsection (b)(2)(C) made after incurring otherwise eligible costs shall apply retroactively to January 20, 2017.
- (d) The Administrator may establish written criteria consistent with subsections (a) and (b).
- (e) None of the funds provided shall be for hiring new or additional personnel.
- (f) The Inspector General of the Department of Homeland Security shall audit reimbursements made under this section.

Additional Rescissions

Sec. 534. Of the funds appropriated to the Department of Homeland Security, the following funds are hereby rescinded from the following accounts and programs in the specified amounts: *Provided*, That no amounts may be rescinded from amounts that were designated by the Congress as an emergency requirement pursuant to a concurrent resolution on the budget or the Balanced Budget and Emergency Deficit Control Act of 1985 (Public Law 99-177):

- (1) 95,000,000 from Public Law 109-88,

(18) \$11,071,000 from unobligated prior year balances from “Federal Emergency Management Agency, State and Local Programs” account 70 x 0560;

rescinded from the following accounts and programs in the specified amounts:

(7) \$15,562 from “Federal Emergency Management Association – Office of Domestic Preparedness”.

Sec. 536. The following unobligated balances made available to the Department of Homeland Security pursuant to section 505 of the Department of Homeland Security Appropriations Act, 2016 (Public Law 114-113) are rescinded:

(13) \$332,309 from “Federal Emergency Management Agency—State and Local Programs”;

(14) \$48,524 from “Federal Emergency Management Agency—United States Fire Administration” ;

(15) \$1,275,569 from “Federal Emergency Management Agency—Management and Administration”;

Sec. 535. Of the funds transferred to the Department of Homeland Security when it was created in 2003, the following funds are hereby

APPENDIX F
Fiscal and Appropriations Law in an Operational Environment
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Fiscal and Appropriations Law in an Operational Environment

I. Introduction

Sound fiscal and contract law principles apply to every facet of the FEMA Mission, especially the response to, and recovery from, a natural disaster, act of terrorism, or other man-made disaster.¹ Money and property must be accounted for at various levels. Goods and services must be procured using appropriate federal acquisition regulations or through the Mission Assignment (MA) process.

FEMA personnel tasked with handling expenditures in support of response and recovery operations should be familiar with the laws and regulations regarding funding, property accountability, contracting, and the annual appropriations acts. This section provides a general overview of fiscal law and a framework to address common fiscal law issues.

A. Fiscal Law and the Deployed Office of Chief Counsel (OCC) Attorney

Fiscal law touches everything FEMA does, whether at headquarters, in the regions, or in a field setting, such as a Joint Field Office (JFO). Behind every disaster operation, or even in a steady state, funds are required to pay for goods and services and the salaries of support staff. Your ability to scrutinize the fiscal aspects of the mission will assist FEMA in meeting the Federal Coordinating Officer's (FCO's) intent and will keep FEMA within the boundaries of the law. Without understanding the fiscal law aspects of a decision, your clients may be committing a potential Antideficiency Act violation which may result in a ratification action or not being able to support the mission.

¹ 6 U.S.C. § 313(b)(1).

To identify fiscal legal issues, a deployed Office of Chief Counsel (OCC) attorney needs to understand:

- General fiscal law principles and
- Specific appropriations language for the funds being used.

To analyze a fiscal matter, the field attorney should answer the following questions:

- What is being funded?
- Which program is funding it?
- What funds are being used for the expense?
- What is the purpose for the funding?
- What is the availability of the funds being used for the expense?

Some situations are fairly straightforward. QUESTION: *Can we use the Disaster Relief Fund (DRF) to pay for the purchase of water for disaster survivors?* ANSWER: *Yes.*

But some issues are more nuanced and rife with legal and policy implications. QUESTION: *Can we buy water for federal employees?* ANSWER: *Maybe.*

Although the U.S. Constitution grants the President certain authorities, the power to authorize and appropriate funds is vested exclusively with Congress. The U.S. Constitution states that no money shall be spent without a specific appropriation. *See* U.S. Const. art. I, § 9, cl. 7. That is the law! Although we recognize the importance of having funds to accomplish our mission, we often times do not appreciate the underlying law that requires affirmative authority to spend the money in the manner the FCO intends. It is your responsibility to

make sure FCOs use the appropriate funds for the purpose(s) for which they are given.

FEMA attorneys, especially deployed counsel, often find themselves immersed in fiscal law issues. When this occurs, we must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets. To aid FEMA attorneys in this endeavor, this section affords a basic, quick reference guide to common fiscal law authorities. Fiscal matters are highly legislated, regulated, audited, and disputed; thus, this reference guide is not a substitute for thorough research and sound application of the law to specific facts or consultation with the FEMA OCC Procurement and Fiscal Law Division (PFLD).

B. Constitutional Framework

Under the Constitution, Congress raises revenue and appropriates funds for federal agency operations and programs. *See* U.S. Const., art. I, § 8. Courts interpret this constitutional authority to mean that executive branch officials (e.g., FCOs and staff members) must find affirmative authority for the obligation and expenditure of appropriated funds.² *See, e.g., U.S. v. MacCollom*, 426 U.S. 317, at 321 (1976), which states: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” Likewise, in many cases, Congress has limited the ability of executive branch officials to obligate and expend funds through annual authorization laws, appropriations acts, or permanent legislation.

²An obligation arises when the government incurs a legal liability to pay for its requirements, e.g., supplies, services, or construction. For example, a contract award normally triggers a fiscal obligation. FCOs also incur obligations when they obtain goods and services from other U.S. agencies. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events. *See* 42 Comp. Gen. 733, 734 (1963).

C. Legislative Framework

The principles of federal appropriations law permeate throughout all federal activity, as well as in disasters and emergencies. Thus, there are no “contingency” exceptions to the fiscal principles discussed throughout this appendix. However, Congress has provided FEMA with special appropriations and/or authorizations for use in support of disaster operations. Fiscal issues arise frequently during disaster operations. Failure to understand the fiscal nuances and the special appropriations and/or authorizations during disaster operations may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous OCC involvement in mission planning and execution is essential. Attorneys who participate actively and have situational awareness will gain a clear view of the FCO’s activities and a better understanding of what type of appropriated funds, if any, are available for a particular need.

OCC attorneys should consider several sources that provide the Agency’s authority to fund and carry out programs and activities, to include:

- Title 31, U.S. Code; specifically, 31 U.S.C. § 1301(a);
- Title 44, U.S. Code;
- Title 44 of the Code of Federal Regulations;
- Robert T. Stafford Act Disaster Relief and Emergency Assistance Act (Stafford Act) (as amended), Pub. L. 93-288, as amended, (1988), 42 U.S.C. §§ 5121, et seq.;
- The Homeland Security Act as amended; Pub. L. 107-296, (2002), 6 U.S.C. §§ 101, et seq.;
- Fire Prevention and Control Act; Pub. L. 93-498, (1974), 15 U.S.C. §§ 2201, et seq.;

- National Flood Insurance Act of 1968; Pub. L. 90-488 (1968), 42 U.S.C. §§ 4001, et seq.;
- Earthquake Hazards Reduction Act of 1977; Pub. L. 108-360 (1977), 42 U.S.C. §§ 7701, et seq.;
- Defense Production Act of 1950; Pub. L. 81-774, 50 U.S.C. Appx. §§ 4501, et seq.;
- National Security Act of 1947, Pub. L. 80-253 (1947), §§ 102 and 303, 50 U.S.C. §§ 403, 405;
- Post-Katrina Emergency Management Reform Act of 2006, Pub. L. 109-295 (2006);
- Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. 112-141, (2012), 42 U.S.C. §§ 4001, et seq.;
- National Dam Safety Act, Pub. L. 106-980 (2000), 42 U.S.C. § 467(a-n);
- McKinney-Vento Homeless Assistance Act, Pub. L. 100-77 (1987), 42 U.S.C. §§ 11201, et seq.;
- Decisions of the U.S. Attorney General,
See <http://www.justice.gov/olc/opinions>;
- Comptroller General (GAO) Decisions,
See <http://www.gao.gov/legal/index.html>;
- FEMA's annual and supplemental appropriations.

Without an explicit statement of positive legal authority, the OCC attorney should be prepared to articulate a rationale for an expenditure which is a “necessary expense” of carrying out an existing authority.

II. Basic Fiscal Controls

Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The three basic fiscal controls are as follows:

- 1) Purpose: Obligations and expenditures must be for a proper purpose;
- 2) Time: Obligations must occur within the time limits applicable to the appropriation (e.g., salaries and expense funds [S&E] are available for obligation for one fiscal year); and
- 3) Amount: Obligations must be within the amounts authorized by Congress.

The U.S. Comptroller General, head of the Government Accountability Office (GAO), audits executive agency accounts regularly and scrutinizes compliance with the fund control statutes and regulations.

III. The Purpose Statute

A. In General

Although each fiscal control is essential, the “purpose” control is most likely to become an issue during disaster operations. The Purpose Statute, 31 U.S.C. § 1301(a), provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”³ In other words, where an appropriation specifies the purpose for which the funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds to the specified purpose.⁴

³ See 31 U.S.C. § 1301(a).

⁴ See U.S. Government Accountability Office (hereafter GAO), GAO-04-261SP, Principles of Federal Appropriations Law, 4-11 (3d. ed. 2004) *available at* <http://www.gao.gov/assets/210/202437.pdf>. For example, an appropriation for topographical surveys in the United States was not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899).

However, absent specific language in the appropriation, FEMA has reasonable discretion in determining how to carry out the objects of the appropriation through a concept known as the “necessary expense doctrine.”⁵

When applying the necessary expense doctrine, an expenditure may be justified after meeting a three-part test:

- 1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
- 2) The expenditure must not be prohibited by law.
- 3) The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.⁶

In examining the statutory language under the first step of the analysis, the necessary expense rule directs that an appropriation is available for those expenses that are necessary to the proper execution or achievement of the object of the appropriation. In other words, Congress has charged FEMA with the responsibility for administering the Stafford Act, and FEMA’s interpretation of how a proposed expenditure will contribute to accomplishing Stafford Act functions will be given considerable weight. This discretion, however, is not without limits. FEMA’s interpretation must be reasonable and must be based on a permissible construction of the statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–238 (2001); *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See also B-286661, Jan. 19, 2001.

⁵ See GAO-04-261SP, Principles of Federal Appropriations Law, 4-20 (3d. ed. 2004) available at: <http://www.gao.gov/products/GAO-04-261SP>. 4-20.

⁶ See *id.*, 4-22.

The second test under the necessary expense doctrine is that the expenditure must not be prohibited by law. As a general proposition, neither a "necessary expense" rationale nor the "necessary expense" language in an appropriation act can be used to overcome a statutory prohibition.⁷

Regarding the third question (whether there is another appropriation to which the expenditure should be charged), if counsel is confronted with two appropriations that are arguably available for the same purpose, she must determine which appropriation is the most specific and thus appropriate. If two appropriations are available for the same expenditure, the agency must determine which appropriation it will charge.⁸ Once this election is made, the agency must continue to use that appropriation for that purpose.⁹ The agency cannot change the appropriation for that purpose even if the funds are exhausted.¹⁰ If the agency wishes to charge a different appropriation, it must notify Congress at the beginning of the fiscal year.¹¹

B. Purpose Statute Violations

1. Violations of the Purpose Statute

As noted at the beginning of this chapter, the Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."¹² Thus, if the FCO uses funds for an improper purpose, it must adjust the accounts by deobligating the funds used erroneously and seek the proper appropriation. Counsel should also consult the relevant appropriations act

⁷ See *id.*, 4-28; See e.g., *Matter of: Prohibition on Use of Appropriated Funds for Defense Golf Courses*, B-277905, Mar. 17, 1998 (expenditure for installation and maintenance of water pipelines to support a military base golf course not permissible because such expenditure is specifically prohibited by 10 U.S.C. § 2246, which prohibits the use of appropriated funds to "equip, operate, or maintain" a golf course).

⁸ B-231445, 69 Comp. Gen. 337 (1989).

⁹ See, *Funding for Army Repair Projects*, B-272191, Nov. 4, 1997.

¹⁰ *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

¹¹ See GAO-04-261SP, Principles of Federal Appropriations Law, 4-12 (3d. ed. 2004) available at <http://www.gao.gov/products/GAO-04-261SP>

¹² See 31 U.S.C. § 1301(a).

to determine whether there are any temporary restrictions or riders that would limit the expenditure of the appropriated funds.

2. Correcting Violations of the Purpose Statute

For example, if the FCO leases a facility for \$300,000 (funded costs) in support of a presidentially declared major disaster with the S&E funds, she has violated the Purpose Statute. Remember, S&E funds are normally proper only for FEMA's salaries and operating expenses. To correct this violation, FEMA must deobligate the S&E funds and substitute (obligate) DRF funds, which are available for carrying out activities authorized under the Stafford Act.

This is an example of an internal account adjustment of the agency's accounting records and does not demonstrate the recovery of the actual payment disbursed to the contractor or other payee. However, if there were disallowed costs or improper payments made to a contractor or recipient, appropriate debt collection actions should be taken.

While this is a matter of adjusting agency accounts, FEMA must report a potential Antideficiency Act violation if proper funds (in this example, the DRF) were not available: (1) at the time of the original obligation (e.g., lease); (2) at the time the adjustment is made; and (3) continuously at all times in-between.

Absent statutory authority to expend funds for a particular purpose, counsel may also employ the necessary Expense Doctrine to justify the expenditure of DRF funds if the expenditure meets the GAO three prong test: 1) the expenditure was logically and reasonably related to carrying out activities authorized under the Stafford Act for disaster relief, 2) was not prohibited by law, and 3) was not otherwise provided for in some other appropriation or statutory funding.

Finally, government officials and agents cannot expend appropriated funds for known unconstitutional, or otherwise illegal, purposes.

IV. The Time Limitation

A. Overview

The “time” control includes two major elements:

- 1) Appropriations have a definite life span; and
- 2) Appropriations must be used for the needs that arise during their period of availability (i.e., the *Bona Fide Needs* rule).

Thus, a time-limited appropriation is available to incur an obligation only during the period for which it is made.¹³ However, it remains available beyond that period, within limits, to make adjustments to the amount of such obligations and to make payments to liquidate such obligations.¹⁴

B. Period of Availability

Most appropriations are available for a finite period.¹⁵ For example, S&E funds (the appropriation most prevalent in an operational setting) are normally available for one fiscal year; conversely Disaster Relief Fund appropriations are no-year funds, meaning the funds are available without fiscal year limitation.

The GAO provides, “[T]he standard language used to make a no-year appropriation is ‘to remain available until expended.’”¹⁶ If funds are not obligated during their period of availability, they “expire” and are unavailable for new obligations (e.g., new contracts and grants or changes outside the scope of an existing contract or grant).¹⁷ Funds that are expired may be used, however, to adjust existing obligations (e.g., to pay for a price increase following an in-scope change to an

¹³ See GAO-04-261SP, Principles of Federal Appropriations Law, 5-4 (3d. ed. 2004) available at <http://www.gao.gov/products/GAO-04-261SP>

¹⁴ *Id.*, 2-6.

¹⁵ 31 U.S.C. § 1301(c).

¹⁶ See GAO-04-261SP, Principles of Federal Appropriations Law, 5-7 (3d. ed. 2004) available at <http://www.gao.gov/products/GAO-04-261SP>

¹⁷ 31 U.S.C. § 1554(a).

existing contract or grant).¹⁸ After five years, the expired account is closed and the balances remaining are canceled.¹⁹

The *Bona Fide Needs* rule. This rule provides that funds are available only to satisfy requirements that arise during their period of availability and will affect which fiscal year appropriation one uses to acquire supplies and services.²⁰

1. Supplies

A *bona fide need* for supplies typically exists when the government actually uses the items in the same fiscal year in which the funds to purchase the items were obligated. Thus, one would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, one may not use current year funds for office supplies that are not needed until the next fiscal year.

Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a current need is documented. Note that there are lead time and stock-level exceptions to the general rule governing purchases of supplies.

The lead-time exception allows the purchase of supplies with current year funds at the end of a fiscal year, even though the time period required for manufacturing or delivery of the supplies may extend into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. In any event, “stockpiling” items is prohibited.²¹

¹⁸ 31 U.S.C. § 1553(a).

¹⁹ 31 U.S.C. § 1552(a). Any remaining balances that would have been properly charged to the cancelled account may be paid from the current appropriation account available for the same purpose. *Id.*

²⁰ See 31 U.S.C. § 1502(a).

²¹ See, *Mr. H.V. Higley*, B-134277, Dec. 18, 1957 (unpub.).

Example: Purchase at the End of a Fiscal Year

For example, a FEMA official determines that there is a need for 50 new computers at the end fiscal year 2014, but the computer provider notifies the official that the computers cannot arrive until the beginning of fiscal year 2015. The official may obligate 2014 funds to purchase the computers. If, upon receipt of the computers in 2015, the official determines that there is a need for 25 additional computers, she cannot obligate fiscal year 2014 funds for the additional computers—she must obligate fiscal year 2015 funds.

2. Services

Services provided to an agency are either severable or non-severable. The severability of the services is dispositive in determining which fiscal year funds should be obligated to purchase the services. Severable services include services that are complete whenever the service is rendered. Normally, severable services are *bona fide needs* of the period in which they are performed. Custodial services, equipment maintenance, and window washing are examples of severable services because of the recurring day-to-day need. Continuing and recurring severable services are charged to the appropriation account for the fiscal year in which they are rendered.

As an exception to the *Bona Fide Needs* rule, however, federal law permits FEMA and any civilian agency to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services.²²

In contrast, non-severable services are incomplete when they are rendered. In other words, the agency does not receive a benefit until all of the services are performed. Non-severable services are those that contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. For example, if an agency hires a contractor to monitor an

²² 41 U.S.C. § 3902; *See generally*, GAO-04-261SP, Principles of Federal Appropriations Law, 5-11 (3d. ed. 2004) available at <http://www.gao.gov/products/GAO-04-261SP>

agency’s activities and provide a year-end report, the service would not be complete until the report was delivered. Non-severable services are charged against the appropriation current when the obligation (i.e., contract) was made.

Table F-1: Severable v. Non-Severable Chart

Type of Service	Description	Which FY Funds?	Example
Severable	Services that are complete when the service is rendered.	Appropriation account in the fiscal year when services are rendered.	Janitorial services, equipment maintenance, window washing.
Non-Severable	A single undertaking that cannot be feasibly sub-divided.	Appropriation account in the fiscal year when the obligation (i.e., contract) was made.	Studies, reports, overhaul of an engine, painting a building.

V. The Amount Control

A. Augmentation of Appropriations and Miscellaneous Receipts

1. Augmentation of Appropriations:

A corollary to the Purpose Statute is the prohibition against augmentation.²³ Augmentation occurs when an agency attempts to supplement its appropriated funds with money collected through varying means.

2. Miscellaneous Receipts Statute:

This statute is a tool to enforce the rule against augmentation of appropriations. It requires that a government official or agent who receives money for the government, from any source, must deposit those

²³ See, *Nonreimbursable Transfer of Admin. Law Judges*, B-221585, 65 Comp. Gen. 635 (1986); cf. 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law).

funds into the U.S. Treasury as soon as practicable without deduction for any charge or claim.²⁴

3. Exceptions.

There are, however, statutory exceptions to the Miscellaneous Receipts Doctrine:

- a. There are interagency acquisition authorities that allow augmentation or retention of funds from other sources.²⁵ The Economy Act authorizes a federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services.²⁶ An agency cannot, however, transfer funds to another agency to retain the funds for *bona fide need* arising in a subsequent fiscal year.²⁷ Consult FEMA and DHS regulations for order approval requirements.²⁸
- b. Similarly, Sec. 402 of the Stafford Act authorizes the President, through FEMA, to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of state and local assistance response and recovery efforts;...”²⁹

²⁴ 31 U.S.C. § 3302(b).

²⁵ See, e.g., Economy Act, Pub. L. 73-2 (1933), codified as amended at 31 U.S.C. § 1535; Homeland Security Act, Pub. L. 107-56 (2002), 6 U.S.C. § 189, Stafford Act, codified as amended, Pub. L. 100-707 (1988), 42 U.S.C. §§ 5170a, 5192.

²⁶ See, *Washington Nat’l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest).

²⁷ See *In the Matter of Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, Comp. Gen. B-308944 (2007).

²⁸ See, e.g., Federal Acquisition Regulation Subpart 17.5; Homeland Security Acquisition Regulation 3017.5.

²⁹ 42 U.S.C. 5170a.

- c. The Stafford Act provides gift acceptance authority to FEMA so that it may receive and use donations, cash, property, or services to carry out its duties.³⁰
- d. Refunds are receipts related to previously recorded expenditures. A refund may occur as a result of an erroneous payment, overpayments, and adjustments for previous amounts disbursed. Refunds are credited back to the appropriation account against which the previous expenditure was obligated.
- e. An agency can credit excess procurement costs that an agency recovers due to a defaulting contractor to the original appropriation and use the sums to complete or correct the contracted work. Any amount exceeding the costs to complete or correct the work shall be deposited into the Treasury.³¹

B. The Antideficiency Act (31 U.S.C. §§ 1341(a), 1342, and 1517(a))

The Antideficiency Act prohibits any government officer or employee from:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or funds in excess of the amount available in the appropriation or fund unless otherwise authorized by law, or obligation in advance of or in excess of an appropriation. 31 U.S.C. § 1341(a)(1)(A);
- Involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise authorized by law. 31 U.S.C. § 1341(a)(1)(B);
- Accepting voluntary services for the United States, or employing personal services not authorized by law, except in

³⁰ Stafford Act § 621(d); 42 U.S.C. § 5197(d).

³¹ See 40 U.S.C. § 503 and 40 U.S.C. § 571 for additional exceptions to the Miscellaneous Receipts Statute.

cases of emergency involving the human life or protection of property. 31 U.S.C. § 1342; and

- Making obligations or expenditures in excess of an apportionment or reappropriation, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

C. Requirements When an Antideficiency Act Violation Is Suspected

Any suspected violation of the Antideficiency Act must be reported immediately to the Office of the Chief Financial Officer and OCC. FEMA must investigate suspected violations to establish responsibility and discipline violators.³² Specifically, Department of Homeland Security (DHS) policy requires a component with some evidence that a violation may have occurred to conduct a preliminary review of the applicable business transactions resulting in a Preliminary Review Report. The Preliminary Review Report is coordinated with the OCC and then forwarded to the DHS Chief Financial Officer (CFO) along with a legal opinion. Attorneys, contracting officers, and resource managers all have been found responsible for violations. The Antideficiency Act states that an officer or employee of the federal government cannot:

- Make or authorize expenditures or obligate funds in excess of the available amounts appropriated for such expenditures or obligations.
- Involve the government in contracts or obligations for payment of funds prior to an appropriation unless specifically authorized by law.
- Accept voluntary services or employ personal services for amounts exceeding those authorized by law except in the case of

³² See DHS Financial Policy Manual, Chapter 2: *Planning, Programming, Budgeting and Execution*, Section 2.5 – *Administrative Control of Funds, Antideficiency Act*, available online at: <http://cfo-policy.dhs.gov/default.aspx>

emergencies involving the safety of human life or protection of property, not including ongoing regular functions of government.

- Incur any obligation or make any expenditure in excess of an apportionment or reapportionment or in excess of other subdivisions established pursuant to 31 U.S.C. §§ 1513–1514.
- Make or authorize an expenditure or obligation, or involve the government in a contract for payment of funds required to be sequestered.³³

VI. Conclusion

A. Active Participation

Congress limits the authority of FEMA and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are purpose, time, and amount. These controls apply to FEMA's day-to-day operations and in response to and recovery from emergency and major disaster operations. The Comptroller General, Office of Management and Budget, and the DHS Inspector General monitor compliance with rules governing the obligation and expenditure of appropriated funds. Regional Administrators, FCOs, and staff rely heavily on OCC for fiscal advice.

Active participation by attorneys in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that FEMA uses appropriated funds properly. Those found responsible for funding violations may face adverse personnel actions and possibly criminal sanctions.

1. Necessity for OCC to Get It Right

Not surprisingly, these operations are conducted under the bright light of the U.S. press and members of Congress; thus, precise and probing questions concerning the legal authority for the activity are certain to surface. Additionally, congressional members will often have an interest in

³³ *Id.*

the location, participants, scope, and duration of the operation. Few response and recovery operations FEMA conducts escape congressional interest. Thus, it is imperative that the FCOs and their staff be fully aware of the legal basis for the conduct of the operation.

OCC attorneys bear the primary responsibility for ensuring that all players involved, and especially the FCO and staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for FEMA in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the Antideficiency Act and possible reprimands or criminal sanctions for the responsible individuals.

Should you have any question, please contact PFLD.

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Sincerely,

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Mary Ellen Martinet, Associate Chief Counsel for Response and Recovery

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