HOMELAND SECURITY and EMERGENCY MANAGEMENT
A Legal Guide for State and Local Governments
THIRD EDITION

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CHAPTER 13

Representing States, Tribes, and Local Governments Before, During, and After a Presidentially Declared Disaster

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Lawyers have a critical role in protecting governments, businesses, nonprofits, and individuals from the financial disaster that could follow a natural or man-made disaster if federal requirements are not understood and followed - and an attorney’s involvement in pre-event planning can increase efficiency after an event, improve the quality of life of survivors, and help a community to rebuild.
When responding to a man-made or natural event, time is a valuable, yet limited, resource. In the aftermath of a disaster, it is critical for local governments to take rapid action to save lives, protect property, and protect the public health and safety. Communities do so through actions such as ordering evacuations, establishing shelters, cordonning off dangerous areas, removing debris, and taking actions necessary to ensure the provision of police, medical, fire, and utility services.

Assistance from the federal government may be critical to a community’s ability to respond and recover. Yet, unless they were subject to previous disaster losses, most communities lack prior experience with federal disaster relief programs at the time they respond to an event. Communities may incur costs before federal officials arrive to explain the reimbursement process and applicable rules, and perhaps even before the state or tribe requests federal assistance.

When federal emergency response teams do arrive, they commit to providing all the assistance they can, consistent with existing law and policy, to meet emergency needs and to help communities and individuals recover. However, this assistance can only be as generous as is authorized by statute and regulation. As the response crisis fades from memory, questions will be asked about actions already taken, such as: Did the state, tribe, or local government comply with applicable laws, regulations, and policies when performing or contracting for emergency work? Further, a community’s eligibility for federal assistance could be jeopardized even before the event takes place if the community failed to follow mitigation or preparedness requirements. For example, if a community does not restrict construction or rebuilding in the floodplain, or fails to adopt and enforce building codes so that homes and businesses will withstand earthquakes in seismic zones or hurricane force winds in hurricane alleys, it may find itself ineligible for assistance, or find that the amount of assistance available is significantly reduced.

All federal disaster assistance is subject to documentation and review requirements, and may be audited by the Department of Homeland Security’s Office of the Inspector General. When the rules are not followed, frequently for lack of documentation or failure to follow procurement regulations, the Federal Emergency Management Agency (FEMA) may disallow or “de-obligate” costs already incurred by the community. This means that all or a portion the federal award provided, whether spent or not, must be returned or be offset against other requests for reimbursement.

Lawyers have a critical role in protecting governments, businesses, nonprofits, and individuals from the financial disaster that could follow a natural or man-made disaster if federal requirements are not understood and followed. A successful attorney will

3. Id. § 5172(c)(1).
assist her or his client in identifying and maximizing all available resources; help her or his clients follow the rules; articulate the type and extent of assistance needed, and clearly document the actions taken, rationale applied, and costs incurred.

In addition, an attorney’s involvement in pre-event planning can increase efficiency after an event, improve the quality of life of survivors, and help a community to rebuild. Attorneys can help their clients develop strong, clear, and comprehensive response, recovery, and mitigation plans; laws that implement or accommodate the activities envisioned in those plans; mutual aid agreements; contract provisions that address responsibilities in the event of a disaster; building codes and standards; and attorneys can ensure that their clients’ property is properly insured.

This chapter gives attorneys a head start in understanding FEMA’s disaster assistance programs.6 In doing so, the chapter highlights some of the most significant issues that attorneys representing states, tribes, and local governments are likely to grapple with during a federally declared disaster. This chapter also identifies several pre- and post-event actions that attorneys can take to ensure that their clients are properly prepared for disaster response and recovery, and well positioned to maximize federal disaster assistance. The first three sections discuss federal disaster assistance in general, including how assistance is requested. The next sections outline specific programs—Public Assistance Program, Community Disaster Loan Program, and Fire Management Assistance Grant Program—followed by sections covering Individual and Households Program, other Individual Assistance Programs, and Hazard Mitigation Assistance. The final sections outline closeout, audits, appeals, arbitration, and judicial review.

LEGAL AUTHORITY

FEMA provides the disaster assistance programs discussed in this chapter under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (Stafford Act)7 as authorized in the Homeland Security Act of 2002, as amended (the Homeland Security Act)8 and delegated by the Secretary of Homeland

6. This chapter does not address all aspects of FEMA’s disaster grant programs. Some projects and situations raise technical and complex issues requiring detailed research and/or specialized training.
7. 42 U.S.C. § 5121 et seq. (2012). Although FEMA’s flood insurance and floodplain management programs are beyond the scope of this chapter, emergency management attorneys should also be aware that FEMA administers the National Flood Insurance Program, which provides most of the flood insurance available in the United States today. See National Flood Insurance Act of 1968, as amended, 42 U.S.C. § 4001 et seq. (governing this program).
8. 6 U.S.C. § 101 et seq. (2012). The functions vested in the President by the Stafford Act, except those functions vested in the President by sections 401, 405, 412, and 501 were delegated to FEMA in Exec. Order No. 12,673, 54 Fed. Reg. 12,571, section 4-203 (Mar. 28, 1989). The Homeland Security Act
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Security in DHS Delegation No. 9001.1. FEMA’s implementing regulations can be found in title 44 C.F.R., chapter 1, with relevant regulations also found in title 6 C.F.R. and title 2 C.F.R., part 200. In addition, FEMA’s implementing policies may be found online, at www.FEMA.gov.

New policies, regulations, and statutory changes affecting any FEMA program or federal assistance could be issued at any time. However, with rare exception, the law and policy applicable to an event is the law and policy in effect on the date that the President of the United States issued the declaration authorizing Stafford Act assistance for that event.

**DISASTER RESPONSE AND RECOVERY FRAMEWORKS**

Although this chapter focuses on the assistance available from FEMA under the Stafford Act, the response to and recovery from an event requires a comprehensive approach that involves resources from a wide range of stakeholders. A community needs the efficient collaboration of all levels of government, private for-profit entities, nonprofit organizations, and voluntary organizations to respond and recover. The National Response Framework (NRF) and National Disaster Recovery Framework (NDRF) provide scalable solutions and resources that can be used to assist states, tribes, and local governments in disaster response and recovery. States, tribes, and local governments can use the NRF/NDRF framework to integrate resources from one another, the federal government, voluntary, nonprofit, and private sector agencies regardless of an event’s size, scale, or whether it receives a presidential declaration.

There are many federal resources that may be available to assist a community after an event. The Environmental Protection Agency, Department of Agriculture, of 2002 vested all functions of the organizational units of the Department (including FEMA) in the Secretary.


Department of Housing and Urban Development, Department of Health and Human Services, Department of Defense, and Department of Commerce, and many other federal departments and agencies have resources that may be available to a community independent of, or in coordination with, FEMA’s programs and assistance. In addition to learning about FEMA’s disaster assistance programs, attorneys should familiarize themselves with the NRF/NDRF and the resources available from other federal agencies to ensure their clients maximize the availability of federal assistance and do not miss funding opportunities.

### REQUESTING AN EMERGENCY OR MAJOR DISASTER DECLARATION UNDER THE STAFFORD ACT

When the damage from an event exceeds the abilities and resources of the local government, the state, or tribe, the governor of the state or the Indian tribal chief executive may request federal assistance under the Stafford Act. If the damage is of such severity that the President declares a “major disaster” or “emergency,” then the communities located within the declared counties may be eligible to receive federal grant awards and/or direct federal assistance from FEMA to assist with their response and recovery efforts.

The disaster relief and emergency assistance programs discussed in this chapter are available only after the President declares either a “major disaster” or an “emergency.” While FEMA has the delegated authority to make recommendations to the President, the President has not delegated to anyone the authority to declare a major disaster or emergency. The issuance of a presidential declaration remains solely a presidential prerogative.

The Stafford Act defines the two types of declarations and specifies the assistance programs that are triggered by each. A “major disaster” is defined as:

12. See 42 U.S.C. §§ 5122(4), 5122(6), 5123, 5170(b), 5191(c) (2012). The Sandy Recovery Improvement Act of 2013, amended the Stafford Act to provide federally recognized Indian tribal governments the option to either make their own request for a presidential emergency or major disaster declaration independently of a state, or to seek assistance under a state’s declaration. Pub. L. No. 113-2, 127 Stat. 4.


[A]ny 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 this 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.\(^\text{15}\)

A disaster is an event that has already caused damage to people or property—even if additional damage is continuing. By contrast, the statutory definition of an “emergency” does not require existing damage. The declaration of an emergency allows federal assistance to save lives, protect property, public health and safety, and to help lessen or avert a catastrophe from occurring. As defined in the Stafford Act, an “emergency” may exist in:

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 to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.\(^\text{16}\)

Governors and tribal leaders may, but are not required to, request and receive an emergency declaration before a major disaster declaration.\(^\text{17}\) For example, the governor of a coastal state may request an emergency declaration to assist with emergency measures required for evacuation and sheltering in advance of a hurricane. After landfall, the governor may then submit a request for a major disaster to assist with the repair and replacement of facilities damaged by the hurricane. For example, many states sought and received pre-landfall emergency declarations and post-landfall major disaster declarations in response to Superstorm Sandy in 2012\(^\text{18}\) and Hurricane Irma in 2017.\(^\text{19}\)

\(^{16}\) Id. § 5122(1).
\(^{17}\) Office of Response and Recovery Policy, FEMA, FP 010-4, Pre-Disaster Emergency Declaration Requests (May 18, 2012).
In addition to the timing of the declaration itself, there are other critical distinctions between a major disaster and an emergency. The President is not authorized to declare a major disaster unless the governor of an affected state or the chief executive of an affected federally recognized Indian or Alaska native tribe (hereinafter “tribe”) requests the declaration.20 By contrast, the President is authorized to declare an emergency without such a request, but only if the President:

determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.21

Although unilateral declarations are rare, President William Clinton issued a unilateral emergency declaration after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City because the event involved a federal building.22 Also, President George W. Bush declared an emergency to allow federal funding for search and retrieval of debris from the breakup of the space shuttle Columbia,23 and for the response to the September 11, 2001, attack on the Pentagon.24

Another distinction between a major disaster and an emergency declaration is that the type of event that may receive an emergency declaration is broader. With some exceptions, the President generally may not declare a major disaster in response to non-natural events. By statute, a non-natural event can be a major disaster only if it involves a fire, flood, or explosion. So, a computer virus cannot be a major disaster, although an explosion caused by the virus or active infiltration by a hacker could. Similarly, an engineered biological agent released by terrorists would fall outside the definition of a major disaster unless the resulting disease was considered a “natural catastrophe.”

By contrast, a naturally occurring outbreak of swine flu (H1N1), Ebola, or Zika could technically lead to the declaration of a major disaster. However, a major disaster or emergency will only be declared when there is a need that is unaddressed after application of other, more specific, federal authorities.25 For example, although

21. Id. § 5191(b). Consultation is particularly important due to the potential financial impact on the state/local government. All unilateral declarations (as of March 2016) issued under this authority have not required a state cost share.
24. The emergency declaration for the Commonwealth of Virginia was subsequently elevated to a major disaster. Virginia; Major Disaster and Related Determinations, 66 Fed. Reg. 51435 (Sept. 21, 2001).
25. 44 C.F.R. § 206.37(d) (2016).
there was an explosion, there was no Stafford Act declaration in response to the Deepwater Horizon oil spill in 2010. The federal response and recovery to that event was covered by the authorities of the Coast Guard, Environmental Protection Agency, and Department of the Interior. There was no unmet need that required a Stafford Act declaration. Similarly, neither the 2009 H1N1 pandemic nor the 2014 Ebola outbreak received Stafford Act declarations, as both were handled under the authority of the Centers for Disease Control and Prevention within the Department of Health and Human Services.

Finally, major disaster declarations authorize the President to approve more assistance programs than emergency declarations. Both an emergency and major disaster declaration may be used to authorize assistance to address immediate threats to life, property, and the public health and safety, and to remove debris under the Public Assistance Program. Both types of declarations may also authorize housing and other needs assistance to individuals and households through the Individual Assistance Program. However, assistance to repair or replace damaged facilities under the Public Assistance Program is only available after the declaration of a major disaster. Further, a major disaster declaration authorizes a number of additional programs, such as hazard mitigation, crisis counseling, disaster unemployment assistance, food stamps,

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29. FEMA may provide public assistance to state, territorial, tribal, and local governments and certain types of private nonprofit (PNP) organizations. 42 U.S.C. §§ 5170a–b, 5192 (2012).
30. Id. (authorizing assistance under 42 U.S.C. § 5174).
31. Id. § 5172. Also, although debris removal assistance is available under both an emergency and major disaster, debris removal that is in the public interest but will not address an immediate threat (i.e., debris removal specifically intended to ensure the economic recovery of the affected community at large) is only available for major disasters. Compare 42 U.S.C. § 5170b(a)(3)(A) and 44 C.F.R. § 206.225 (2016) with 42 U.S.C. § 5173 and 44 C.F.R. § 206.224 (2016).
33. Id. § 5183.
34. Id. § 5177.
35. Id. § 5179.
emergency public transportation, and community disaster loans that are not available if only an emergency is declared.

A presidential declaration is not required for Fire Management Assistance Grants, which are discussed later in this chapter.

How to Request a Declaration

Only the governor of a state or the chief executive of a federally recognized Indian tribal government, or an individual with the legal authority to act on behalf of the governor or tribal chief executive, may request a presidential declaration. Declarations are requested using a standard form that includes the minimum necessary information and certifications required by the Stafford Act, including a certification that the requestor has taken appropriate action under state law and directed the execution of the state emergency plan or tribal equivalent. That form is submitted along with supporting documentation to the FEMA regional administrator of the FEMA region within which the affected state or tribe is located.

The governor or Indian tribal chief executive must furnish information on the nature and amount of state/tribe and local resources that have been or will be committed to alleviating the results of the disaster, an estimate of the amount and severity of damage and the impact on the private and public sector, and an estimate of the type and amount of assistance needed under the Stafford Act. The request must be based upon a finding that the event is of such severity and magnitude that effective response is beyond the capabilities of the state/tribe and the affected local governments, and that federal assistance is necessary. Attorneys can assist their clients in ensuring that the information provided in the declaration request is clearly communicated and thorough. Typically, requests are submitted after a joint state/federal preliminary damage assessment team has surveyed the damage. In situations of such unusual severity and magnitude that a damage assessment is not necessary

36. Id. § 5186.
37. Id. § 5184.
40 44 C.F.R. §§ 206.35(a) and 206.36(a).
41. Id.
42. 42 U.S.C. §§ 5170, 5191(a) (Supp. 2013).
43. 44 C.F.R. § 206.33 (2016).
to determine the need for federal assistance, an expedited major disaster declaration
request may be submitted without a preliminary damage assessment.\footnote{44}{Id. § 206.36(d); FEMA, INTERIM DISASTER ASSISTANCE POLICY 1004-02 (2007).}

A request for an emergency declaration “must be submitted within [five] days after
the need […] becomes apparent, but no longer than [thirty] days after the incident.”\footnote{45}{44 C.F.R. § 206.35. Any extension request must be submitted within the 30-day period and must provide the reason for the delay. Id.}

A request for a major disaster declaration must be submitted within 30 days of the
incident unless the governor submits, and FEMA approves, a request for extension.\footnote{46}{Id. § 206.36. Any extension request must be submitted within the 30-day period and must provide the reason for the delay. Id.}

**How a Declaration Request Is Processed and Issued**

Once received, FEMA will consider several factors in reviewing the request and mak-
ing its recommendation to the President. These factors are set out in FEMA’s regula-
tions, and include the estimated cost of assistance; localized impacts at the county, city,
and tribal government levels; whether there were recent disasters declared in the state
or tribe; the prevalence of insurance coverage; whether appropriate hazard mitigation
measures were taken; the concentration of damage; and the level of damage to special
populations (for example the elderly or low-income families).\footnote{47}{Id. §§ 206.35, 206.37. FEMA considers all of these factors as the Stafford Act prohibits FEMA from applying solely an "arithmetic formula or sliding scale based on income or population." 42 U.S.C. § 5163 (2012).}

Cost is a primary factor. FEMA established a minimum $1 million damage
threshold for Public Assistance requests from states, and a $250,000 damage threshold
for Public Assistance requests from tribes.\footnote{48}{44 C.F.R. § 206.48(a)(1) (2016). See also, Tribal Declarations Pilot Guidance, supra note 37.}

FEMA expects that all states or tribes can cover this minimum level of damage using state or tribe resources before needing federal assistance. Additionally, FEMA evaluates the per capita impact of the event against a per capita indicator, which is published in the Federal Register each year.\footnote{49}{For fiscal year 2017, the statewide per capita indicator is $1.43 and the countywide indicator is $3.61. 81 Fed. Reg. 70433 (2016). https://www.fema.gov/public-assistance-indicator-and-project-thresholds (last updated Sept 12, 2017 14:02.).}

Upon evaluating the information in the request against these factors, FEMA
will submit its recommendation, along with a copy of the request, to the President.
Whether to issue a declaration is entirely within the President’s discretion.\footnote{50}{See supra, note 7.} The
Stafford Act gives the President the authority to tailor the declaration to the particular
type of incident that occurred, the incident period, the programs authorized, areas

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44. Id. § 206.36(d); FEMA, INTERIM DISASTER ASSISTANCE POLICY 1004-02 (2007).
45. 44 C.F.R. § 206.35. Any extension request must be submitted within the 30-day period and must provide the reason for the delay. Id.
46. Id. § 206.36. Any extension request must be submitted within the 30-day period and must provide the reason for the delay. Id.
47. Id. §§ 206.35, 206.37. FEMA considers all of these factors as the Stafford Act prohibits FEMA from applying solely an “arithmetic formula or sliding scale based on income or population.” 42 U.S.C. § 5163 (2012).
50. See supra, note 7.
covered, and types of assistance that may be provided. The President’s declaration notice includes an initial designation of the counties within the state (or tribal lands) that are covered by the declaration, the specific programs that are being activated for this declaration, and the amount of the federal cost share.

The county designation is critical to eligibility under the Stafford Act. If a county is included in the declaration, all eligible recipients in that county who incurred damage from the disaster event may be eligible for federal assistance. If a county is not included, no federal assistance is available within that county, without regard to the scope of damage suffered by any particular applicant. This is particularly apparent in individual assistance, where Mr. and Mrs. Smith of 101 Main Street may receive repair assistance for their home, but Mr. and Mrs. Jones who live across the street at 102 Main Street are not eligible because 101 Main Street is in a declared county, and 102 Main Street is not.

Also important are the description of the incident and the incident period. Only work undertaken in anticipation of and immediately preceding the incident or as a result of the incident is eligible for assistance. The earlier in time that work is performed before the event, the less likely that it will be deemed eligible for assistance. Similarly, preexisting damage, or damage caused by something other than the type of incident declared, is not eligible. For example, if a wildfire clears vegetation on a slope, compromising a watershed and causing a mudslide, if the declaration is only for a wildfire, as opposed to wildfire, flooding, mud flows, and debris flows, damage from the mudslide would not be eligible.

After the President issues a declaration, if requested by the state or tribe, FEMA may amend the declaration to include additional areas or types of assistance. Such requests must be submitted within 30 days of the termination date of the incident or 30 days after the declaration, whichever is later. If, on the other hand, the President

52. Id. §§ 5170c (Supp. 2013), 5172 (Supp. 2015); 41 U.S.C. § 5174 (Supp. 2015) (The President may contribute up to 75 percent of the cost of hazard mitigation measures under the Hazard Mitigation Grant Program, no less than 75 percent of the cost under the Public Assistance Program, and 100 percent of the cost of housing assistance and 75 percent of the costs of other needs assistance under the Individual Assistance Program.). FEMA will automatically waive the nonfederal cost share for insular areas, including American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands if the entire grant is under $200,000 (for larger grants, FEMA may waive all or a part of the cost share). 48 U.S.C. § 1469a(d) (2012); FEMA, Hazard Mitigation Assistance Guidance, pt. III, C (2015), http://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0b-d4ea8a161e8bb7b79553/HMA_Guidance_022715_508.pdf [hereinafter HMA].
54. 44 C.F.R. § 206.40(c)–(d) (2016).
55. Id. § 206.40(d).
denies the declaration request, the governor or Indian Tribal Chief Executive may appeal the denial within 30 days after the date of the denial letter.\(^{56}\) The appeal must include additional information supporting the request for declaration.\(^{57}\)

Once a declaration has been issued, FEMA and the state or tribe enter into a FEMA-State Agreement (FSA) or FEMA-Tribal Agreement (FTA).\(^{58}\) The FSA and FTA are standard grant-agreement templates, the terms of which are not open to negotiation. They are legally binding agreements that state the understandings, commitments, and conditions under which FEMA will provide and coordinate federal disaster assistance. Without an executed FSA or FTA, FEMA will not provide funding or direct federal assistance through mission assignment, except as necessary to provide essential emergency services or housing assistance.\(^{59}\) Attorneys should familiarize themselves with the FSA/FTA terms in advance of an event.

### THE PUBLIC ASSISTANCE PROGRAM

The Public Assistance Program is a grant and direct assistance program that helps state and local governments, and some nonprofit entities providing government-type services, in their response to and recovery from presidentially declared events.\(^{60}\) In general, under the Stafford Act the federal government reimburses “not less than 75%” of the cost of “emergency measures”—such as police overtime and debris removal—incurred by states, tribes, local governments, and some nonprofit organizations in response to either a declared major disaster or emergency. Additionally, the federal government reimburses “not less than 75%” of the cost of repairing, restoring, reconstructing, or replacing, eligible facilities damaged or destroyed by a major disaster.\(^{62}\)

There are a number of critical legal issues that are hidden within this simple summary of the Public Assistance Program, and failure to understand them can jeopardize eligibility. Attorneys representing states, tribes, and local governments must become familiar with the basic FEMA publications explaining public assistance eligibility: the Stafford Act, 2 C.F.R. part 200, 45 C.F.R. part 74 (if applicable), 44 C.F.R. parts 206 and 207, the Public Assistance Policy and Program Guide (PAPPG), and other public

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56. Id. § 206.46.
57. Id.
58. Id. § 206.44.
59. Id.
62. Id. § 5172(b)(1).
assistance policies. On January 1, 2016, FEMA published the PAPPG, which consolidated most prior public assistance policies into a single volume. The PAPPG only applies to events declared on or after January 1, 2016, and FEMA intends to update the PAPPG annually. Accordingly, the substance of this chapter and footnotes reflects the program requirements as they stood on March 5, 2016.63

**How to Apply**

Soon after the President issues a declaration in which Public Assistance is authorized, the state or tribe will conduct Applicant Briefings, during which general information about the program is provided to prospective applicants, and the “Request for Public Assistance (RPA)”64 form is distributed. A local government or private nonprofit entity initiates the process of obtaining a public assistance award by filing the RPA with the state or tribe. The RPA is due within 30 days of the date the area in which the damaged facility is located, is included in the declaration. Although FEMA individually reviews and approves all awards and subawards, the state or tribal government awardee administers all subawards, and communications are routed through the state or tribal awardee.65 The RPA form is short, simple, and straightforward; it does not require a detailed estimate of the work or funding requested. In fact, it does not even require the prospective applicant to identify its projects.

After the RPA is submitted, FEMA will meet66 with the applicant to explain the Public Assistance Program and answer questions. Although not required, as the

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64 The Request for Public Assistance (FF 90-49) is available on FEMA’s website, https://www.fema.gov/media-library/assets/documents/10145 (last updated June 3, 2014).

65 FEMA, and the state or tribe, may establish a Joint Field Office after a disaster to facilitate coordination and processing of applications. U.S. Dep’T of Homeland Sec., Joint Field Office Activation and Operations: Interagency Integrated Standard Operating Procedure, at 6 (Ver. 8.3, interim, 2006), http://www.fema.gov/pdf/emergency/nrf/NRP_JFO_SOP.pdf (“Staff focus on providing support to on-scene efforts, incident management, and/or disaster response and recovery program implementation, and coordination of broader support operations that may extend beyond the immediate incident site. The JFO does not manage on-scene operations.”).

66 FEMA began using a new Public Assistance process delivery model on September 12, 2017 (including Hurricanes Harvey, Irma and Maria). That new process delivery model creates a Program Delivery Manager (PDMG) who acts as the applicant’s FEMA customer service representative throughout the application process. The PDMG will first have an Exploratory Call, and then a Recovery Scoping Meeting with the applicant to discuss the program requirements, gather information about the applicant and its damaged facilities, and answer questions. See, New Public Assistance
applicant’s attorney, you may wish to attend this meeting to ensure a good understanding of the documentation and other requirements that come with the award or subaward, so that you can help your client as they work with FEMA to prepare the project worksheet (the document that is used to develop the scope of work and amount of the award or subaward). Applicants must identify and report all damage to FEMA within 60 days of that meeting. Throughout the grant process, FEMA and the applicant will periodically meet, as well as do site visits to identify projects and develop the project worksheet.

Once the project worksheet is completed, the state or tribe, as recipient of the award and pass-through entity to the subrecipient, the applicant, as subrecipient, and FEMA sign the project worksheet. After the project worksheet is signed, FEMA obligates all or a portion of its share of the costs to the state or tribe which then makes the funds available to the subrecipient. Emergency work must be completed within six months of the declaration and permanent work within 18 months of the declaration. Extensions to these deadlines may be provided.

Steps for Determining Eligibility

FEMA uses a four-part analysis to determine what projects are eligible for Public Assistance and the amount of assistance to award:

First, FEMA looks at the entity. FEMA determines whether the particular legal entity applying for assistance is eligible for assistance under the Stafford Act.

Second, FEMA looks at the facility. FEMA determines whether the facility is eligible for assistance under the Stafford Act.

Third, FEMA looks at the work. FEMA reviews whether particular work is eligible. To be eligible for public assistance, the work must be required as a result of a declared event; be located within the designated disaster area, except for host state


67. Chapter 3 of the PAPPG, supra note 58, contains a detailed overview of the Public Assistance Program process, including useful documentation checklists that attorneys should review. Id.

68. PAPPG, supra note 58, at ix.

69. For small projects, FEMA obligates its entire share of the project up front based on estimates, but for large projects, FEMA obligates funds as costs are documented by the subgrantee. 42 U.S.C. § 5189 (Supp. 2013). In 2013, 42 U.S.C. section 5189f was added to allow applicants to participate in a pilot program that allows both large and small projects to be funded on the basis of estimates. Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 § 1102. The small project threshold was set at $120,000 in fiscal year 2014, and is updated annually based on the Consumer Price Index. 79 Fed. Reg. 10685 (Feb. 26, 2014) (codified at 44 C.F.R. § 206.203). More information, see Alternative Procedures, FEMA, https://www.fema.gov/alternative-procedures (last updated Sept. 7, 2017, 3:40 PM).

70. 44 C.F.R. § 206.204(c) (2016).
evacuation and sheltering; and be the legal responsibility of an eligible applicant at the
time of the disaster.71

Finally, FEMA looks at the costs. FEMA reviews whether the costs incurred in per-
forming the eligible work are reasonable and documented, and that all procurement
procedures were appropriately followed.

Since grant awards and subawards are provided only to those who apply for
them, the importance of timely submitting an RPA and starting the process cannot be
overstated.72

Who Can Apply: The Entity73

Eligibility of States, Tribes, and Local Governments

States, tribes, and local governments (including public authorities) are eligible to
receive direct assistance and financial awards under the Public Assistance Program.74 A
“state” includes any state of the United States, the District of Columbia, Puerto Rico,
the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern
Mariana Islands.75 On the other hand, a “local government” includes counties, munici-
palities, cities, towns, townships, local public authorities, school districts, special dis-
tricts, intrastate districts, councils of government, regional or interstate government
entities, nonfederally recognized tribes, and agencies or instrumentalities of a local
government.76 Rural communities, unincorporated towns or villages, and other public
entities for which an application for assistance is made by a state or political subdivi-
sion of a state are also considered “local governments.”77

In 2013, Congress added section 103 of the Stafford Act, which explains that ref-
ences to the terms “state” and “local” with respect to governments or officials are
deemed to refer to federally recognized Indian tribal governments and officials, as
appropriate.78 As a result, tribes may apply for a presidential declaration directly, or
may opt to do so through a state. If a tribe independently seeks and receives a declara-
tion, it is treated as a grant recipient for purposes of the Public Assistance Program, and

71. Id. § 206.223(a).
72. In addition, a federal agency may be prohibited from funding projects that begin without compli-
ance with federal environmental and historic preservation rules. See infra Environmental and Historic
Preservation Requirements.
73. See generally 44 C.F.R. § 206.222 (2016).
74. See 42 U.S.C. §§ 5170a, 5170b, 5172(a), 5173 (2012).
75. Id. § 5122(4).
76. Id. § 5122(8).
77. Id.
Representing States, Tribes, and Local Governments Before, During, and After a Presidentially Declared Disaster

if tribal lands are declared as a part of a state’s request, the tribe may opt to participate as either a recipient or a subrecipient.\footnote{79. See 44 C.F.R. § 206.201(c) (2016).}

Before an entity can receive a public assistance grant, the requesting state or tribe must have a FEMA-approved (standard or enhanced) mitigation plan. Mitigation plans must be updated every five years. A state or tribe applying as a recipient who lacks a FEMA-approved mitigation plan may only receive emergency assistance.\footnote{80. See §§ 201.4(a)–(d), 201.7(a)–(d)(3).} Pre-Disaster mitigation grants may be available to develop or update a mitigation plan.\footnote{81. See infra Flood Mitigation Assistance.}

Eligibility of Nonprofit Organizations

The Stafford Act also authorizes FEMA to provide assistance to nonprofit institutions that provide: (1) critical services (educational, utility, emergency, and medical services); or (2) non-critical, essential governmental-type services.\footnote{82. 42 U.S.C. § 5122(11) (2012); 44 C.F.R. § 206.221(e) (2016); PAPPG, supra note 58 at 11–13.} Both of these terms are defined more thoroughly in the discussion on facility eligibility that follows. The organizations providing the services in paragraph 2 of section 5122 must provide the services “to the general public.”\footnote{83. 42 U.S.C. § 5122(11)(B) (2012).}

All private nonprofit applicants must provide a letter from the Internal Revenue Service ruling that it is a 501(c), (d), or (e) exempt organization or has satisfactory evidence from the state that it is a nonprofit organization doing business under state law.\footnote{84. See generally 26 U.S.C. §§ 501(c)–(e) (2012); 44 C.F.R. § 206.221(f) (2016).} In addition, unless the private nonprofit is providing a “critical service” the private nonprofit must first apply for a loan from the Small Business Administration before it may apply for a public assistance grant from FEMA for permanent work.\footnote{85. 42 U.S.C. § 5172(a)(3)(B) (2012); see generally 44 C.F.R. § 206.226(c)(1); see PAPPG, supra note 58 at 16–17.}

Ineligibility of For-Profit Organizations

A for-profit business may provide resources, equipment, and personnel in response to a federally declared disaster, but it is ineligible for reimbursement of its costs under the Public Assistance Program.\footnote{86. 42 U.S.C. §§ 5172(a), 5189e (2012).} On the other hand, if the for-profit business provides services or equipment to an eligible government or nonprofit applicant, under a properly procured contract to provide these services, they may receive payment for services rendered in accordance with the contract.\footnote{87. 2 C.F.R. § 200.323(a) (2016).} If the services or equipment are otherwise eligible, the eligible applicant could then seek reimbursement of the federal share of

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79. See 44 C.F.R. § 206.201(c) (2016).
80. See §§ 201.4(a)–(d), 201.7(a)–(d)(3).
81. See infra Flood Mitigation Assistance.
these eligible *contract* costs under the Public Assistance Program. For example, Bottled Water, Inc. could sell bottled water to State A for use in a congregate shelter.\footnote{Bottled water is eligible for reimbursement under 42 U.S.C. § 5170b(a)(3)(B) (2012).} State A would pay Bottled Water, Inc. for the bottled water, and then State A would seek reimbursement of the nonfederal share of the cost (typically 75 percent) from FEMA.

The ineligibility of for-profit businesses can be significant to communities where there has been substantial privatization of traditionally public functions. Communities that outsource public functions, or that develop public–private partnerships, may find that those emergency services are no longer eligible for federal assistance.\footnote{This issue may be important not just with respect to public assistance grants after a disaster, but also to eligibility of costs incurred to ensure that (for example) for-profit hospitals in a community have adequate equipment, training, and exercises to ensure preparedness for terrorist attacks.} Attorneys should at least be aware of the implications that structuring these arrangements may have on the availability of federal assistance and consider whether the costs of private sector partners who provide services to a municipality should be structured as contract costs that can be reimbursed under federal disaster programs.

### What Property Is Eligible: The Facility

When an applicant seeks assistance for the permanent repair, restoration, reconstruction, or replacement of a damaged facility; for temporary repairs; or for mold remediation, FEMA next determines the eligibility of the facility itself. In the case of other forms of emergency work (i.e., actions taken to meet immediate threats to life and property) or debris removal, this step is not analyzed and FEMA skips to determining work eligibility.\footnote{See PAPPG, *supra* note 58, at 14.}

Generally, facilities must have been in active use for an eligible purpose at the start of the incident period.\footnote{PAPPG, *supra* note 58, at 18.} If the facility is owned or operated by a state, tribe, or local government, facility eligibility is broad. The following facilities owned or operated by a state, tribe, or local government are eligible public facilities: flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, airport, nonfederal aid street road or highway, and parks.\footnote{42 U.S.C. § 5122(10) (2012); 44 C.F.R. § 206.221(h) (2016); PAPPG, *supra* note 58, at 15.} Further, “any other public building, structure, or system, including those used for educational, recreational, or cultural purposes”\footnote{42 U.S.C. § 5122(10) (2012).} is an eligible public facility if owned or operated by a state, tribe, or local government. Engineered beaches may be eligible under certain conditions.\footnote{44 C.F.R. § 206.226(j) (2016); PAPPG, *supra* note 58, at 79, 119–21.}
If the facility is owned or operated by a private nonprofit, however, facility eligibility is more limited. Facilities providing “critical services,” which are defined as educational, utility (including irrigation to provide water for drinking water supply, fire suppression, or electricity generation), emergency (ambulance, fire protection, and rescue), and medical care (diagnosis or treatment of mental or physical injury or disease) may be eligible for assistance even if they are not open to the general public.95

Private nonprofit facilities that provide “non-critical, essential governmental-type services,” however, must be open to the general public. These are:

- Community centers established and primarily used for the purpose of offering the following, or similar, services to the community at large:
  - Art services authorized by a state, tribe, or local government;
  - Educational enrichment activities that are not vocational, academic, or professional training;
  - Multipurpose arts programming;
  - Senior citizen projects, rehabilitation programs, community cleanup projects, blood drives, local government meetings, and similar activities;
  - Services and activities intended to serve a specific group of individuals, provided the facility is otherwise available to the public on a non-discriminatory basis;
  - Social activities to pursue items of mutual interest or concern; and
  - Community centers operated by a religious institution that provides secular activities that help the community at large.

- Facilities that do not provide medical care, but do provide:
  - Alcohol and drug treatment;
  - Assisted living
  - Custodial care;
  - Rehabilitation;
  - Child care;
  - Day care for individuals with disabilities or access and functional needs;
  - Food assistance programs;
  - Health and safety services;
  - Homeless shelters;
  - Libraries;
  - Low-income housing;
  - Certain museums;
  - Residential and other services for victims of abuse;

Residential services for individuals with disabilities;
Senior citizen centers;
Shelter workshops that create products using the skills of individuals with disabilities;
Zoos;
Performing arts centers with a primary purpose of producing, facilitating, or presenting live performances; and
Public broadcasting that monitors, receives, and distributes communication from the Emergency Alert System.96

Unless the private nonprofit facility provides a “critical service,” the applicant must first apply for a loan from the Small Business Administration before it is eligible to receive a public assistance permanent work award from FEMA.97

Frequently, facilities are used for multiple purposes. Where there are multiple uses for a facility, more than 50 percent of the facility must be used for an eligible purpose for the facility to be eligible.98 FEMA considers the entire structure when determining primary use and common space (i.e., elevators, hallways, and bathrooms) is not included in mixed-use space.99

Consider a fellowship hall owned by a church. Space dedicated to or primarily used for religious, political, athletic, recreational, vocational activities, or for academic training, conferences, or similar activities is not eligible for public assistance.100 Accordingly, a church sanctuary could not be eligible for assistance. Yet if the fellowship hall of the church is available for use by the general public as a community center more than 50 percent of the time, even if it is occasionally used for overflow church services, it could be eligible. But the fellowship hall could only be eligible if it constitutes more than 50 percent of the entire church facility.

Whether owned or operated by a governmental entity or private nonprofit, a “facility” may also include its contents. Equipment and furnishings (e.g., motor vehicles, medical equipment, and medical supplies) that are in an eligible space and damaged beyond repair may be eligible for replacement.101 This includes library books and publications.102

98. PAPPG, supra note 58, at 16.
99. Id.
100. Id., at 11, 14.
101. 44 C.F.R. § 206.226(h) (2016); PAPPG, supra note 58, at 112.
Any facility, however, could be deemed ineligible for public assistance if it is subject to insurance requirements that have not been met.\footnote{103} If a facility owner/operator receives a public assistance award to repair or replace a facility, but does not purchase and maintain insurance on that facility for the type of incident that caused the damage, and for the amount of the prior public assistance grant, the facility will not be eligible for future public assistance awards.\footnote{104}

**What FEMA Will Reimburse: The Work\footnote{105}**

To be eligible for reimbursement under the Public Assistance Program, the work must be:

- Required as a result of a declared event,
- Located within the designated disaster area, and
- The legal responsibility of an eligible applicant at the time of the disaster.

These requirements are explained in the following sections.

**The Result of a Declared Event**

Generally, only disaster-related damage or expenses incurred during the incident period provided in the President’s declaration are eligible for assistance. However, reasonable costs incurred for emergency protective measures in anticipation of the event may also be eligible. Preexisting damage (i.e., damage from poor maintenance before the event) is not eligible.\footnote{106} So, for example, if a police station seeks repairs to its roof from a two-foot flooding event, the work is likely to be ineligible because the roof is unlikely to be within two feet of the ground. However, the cost to remove and replace drywall, flooring, and electrical lines on the first floor of the building would be eligible if the damage to the first floor was caused by the flood. Similarly, work to place sand bags around the police station in anticipation of the flood would also be eligible.

To determine whether something is required as a result of the event, you first need to consider whether the work is emergency work or permanent work.

**Emergency Work**

The primary rule used in evaluating eligibility of emergency work is whether the emergency measure and the cost of that emergency measure were incurred to address an immediate threat to life, property, or the public health and safety caused by the

\footnote{103. See infra Insurance Considerations.}
\footnote{105. 44 C.F.R. § 206.223 (2016).}
\footnote{106. PAPPG, supra note 58, at 19.
declared event. Eligible emergency measures are identified within the Stafford Act and include actions such as search and rescue, emergency medical care, debris removal, the provision of temporary facilities for schools and other essential community services, demolition of unsafe structures which endanger the public, and the provision of rescue, care, shelter, and essential needs of individuals with household pets and service animals, and to such pets and service animals. Emergency work includes “any work or services essential to saving lives and protecting and preserving property or public health and safety including . . . reduction of immediate threats to life, property, and public health and safety.” Accordingly, much of a state, tribe, or local government’s costs associated with the emergency response to the event will be eligible for reimbursement. For example, a city may use its Emergency Operation Center (EOC) to direct and coordinate resources and response activities associated with eligible work. Facility lease costs, increased utility costs, supply costs, and in some instances meal costs are eligible. Similarly, costs to purchase, pack, and distribute life-sustaining commodities, such as food, water, ice, personal hygiene items, cots, blankets, tarps, plastic sheeting for roof damage, and generators, to the impacted community are also eligible. Costs incurred by a community’s police force are another example of costs incurred to reduce immediate threats to life, property, and public health. After a catastrophic event, state and local law enforcement may be overwhelmed, and may themselves be victims of the disaster. States and local governments may seek federal law enforcement officers (FLEOs) to supplement their police force. This could prove difficult, though. Although FLEOs have arrest authority, as a general rule they may only enforce federal law, and state peace officer statutes generally only confer on FLEOs the authority to enforce state felony or violent misdemeanor laws—leaving FLEOs unable to make arrests for non-violent misdemeanors like looting. That said, “there is no

107. 42 U.S.C. § 5170b (2012). “Immediate threat” is the threat of additional damage or destruction from an incident that can reasonably be expected to occur within five years of the declared incident. 44 C.F.R. § 206.221(c) (2016); PAPPG, supra note 58, at 42.
108. In addition to addressing immediate threats to life, health, and safety, and improved property, debris removal may be eligible to ensure economic recovery of the affected community. 44 C.F.R. § 206.224(a)(3) (2016); PAPPG, supra note 58, at 42.
111. PAPPG, supra note 58, at 61.
112. Id., at 62.
requirement that FLEOs’ arrest authority come from a federal source, only that it be expressly conferred by a legislative act.” 115 States and locals may, therefore, deputize FLEOs mobilized in response to a presidentially declared disaster if there is an express statutory grant of authority to FLEOs to make arrests for state law violations. 116 Attorneys should be cognizant of their jurisdiction’s deputization statutes, and the scope of such statutes (such as prerequisites to deputization, and whether the authority includes the enforcement of criminal laws).

Costs associated with mobilization and use of the National Urban Search and Rescue (US&R) teams are also eligible. US&R teams are nationally credentialed and available to rapidly deploy for the location, rescue (extraction), and initial medical stabilization of individuals trapped in confined spaces.

Frequently, after large events, other countries may offer the assistance of their trained US&R teams. The teams may come with doctors to render aid, medical supplies, structural engineers, search dogs and handlers, and so on. Although states have the right to accept foreign aid through bilateral relations with foreign governments that have the consent of Congress, 117 and some border states have such agreements, 118 it is not always prudent to do so.

When faced with offers of foreign donations, those states that lack a preexisting congressionally ratified international agreement with the offering country may wish to direct the offering country to the Department of State. In response to the aftermath of Hurricane Katrina, FEMA, the Department of State, and the United States Agency for International Development (USAID) established procedures to efficiently manage the flow of international resources into the United States. 119 Using FEMA’s gift acceptance authority, the federal government follows these established procedures to coordinate resources and timely accept/reject donations, and to provide assistance with administrative requirements such as expediting customs clearance for accepted resources and

115. Id. at 7.
116. Id. at 6.

120. 42 U.S.C. § 5201(b).
personnel, expediting Department of Agriculture clearance for search dogs, expediting Health and Human Services clearance for medical supplies, and so on.

The cost of emergency medical care is also eligible. Large events typically result in mass casualties, which can stress the impacted area’s medical system. Out-of-state medical professionals may be willing to volunteer (including but not limited to those on international US&R teams), but the authority to practice medicine and tort liability laws vary from state to state, and often limit one’s ability to accept out-of-state medical volunteers.

The Department of Health and Human Services has Disaster Medical Assistance Teams (DMATs) that provide rapid-response medical care—deploying 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. DMAT personnel maintain appropriate certifications and licensure within their discipline. When activated as federal employees, their licensure and certification is recognized by all states, they are paid by the federal government, and they have the protection of the Federal Tort Claims Act. Although the DMAT may sound like the perfect answer to states in need of supplemental medical assistance, they are a limited resource.

When doing pre-disaster planning or evaluating whether to accept assistance post-event, attorneys should evaluate the laws applicable to their jurisdiction regarding the practice of medicine and tort liability laws. In addition, attorneys should consider laws or procedures that could create exceptions to those licensing, certification, and tort liability laws in the event of a catastrophe.

Finally, although an emergency measure itself may have been caused by the event, it is not always the case that the cost of the emergency measure was incurred because of the event. Costs that were not incurred because of the event are not eligible for reimbursement. For example, even without a disaster, a city will pay its workforce regular time pay and benefits (FEMA calls this “force account labor”). So, even if a city employee is performing otherwise eligible emergency measures, the employee’s straight time salary and benefits are not new costs incurred because of the disaster. As a result, with some exceptions, straight time costs are not eligible for FEMA assistance. On the other hand, overtime paid to employees performing emergency measures in response to a declared emergency or major disaster, is eligible. Similarly, both regular

123. Under the Federal Tort Claims Act, the federal government becomes the defendant in the event of a malpractice claim. 28 U.S.C. § 2671 et. seq.
pay and overtime pay for temporary employees hired as a result of the disaster are eligible costs. This is because the city would not have had to incur the overtime or temporary employee costs had the disaster not occurred.125

The Sandy Recovery Improvement Act of 2013 created a potential exception to the ineligibility of straight time force account labor costs for emergency work.126 This change authorized FEMA to establish alternate procedures for the Public Assistance Program, which authorize reimbursement of straight time and overtime wages for employees performing or administering debris and wreckage removal. FEMA implemented the alternative procedures through a pilot program available for events declared through June 27, 2018. After the pilot, FEMA may elect to discontinue the program, extend the pilot, or issue regulations to institute the program changes authorized by the law.127

**Permanent Work**

When it comes to repairing, replacing, or reconstructing a facility, assistance is generally provided only to restore or reconstruct a structure to pre-disaster condition; but there is one major exception to this general rule. Construction should be in accordance with the building codes, specifications, and standards that were in effect as of the date of the disaster.128 For example, if a school is damaged by a declared event, the eligible repairs to the school are limited to the size, capacity, and function of the school as it existed the day before the declared event. However, upgrades required to conform to the building codes in effect on the date of the disaster are also eligible (e.g., when replacing plumbing, the new pipes must meet state code requirements regarding minimum air gaps for water distribution).

FEMA regulations129 and policy130 specify which codes and standards trigger federal funding of improvements over the preexisting condition of a structure. FEMA will only fund code upgrades that apply to the type of restoration required, are appropriate to the pre-disaster use of the facility, and are reasonable, in writing, formally adopted, and enforced uniformly. FEMA will not fund upgrades where it appears that the code applies only, or principally, where federal funding is available.131

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125. For more information regarding the eligibility of labor costs, see PAPPG, *supra* note 58, at 22–25.
128. 42 U.S.C. § 5172(c)(1) (Supp. 2015). This section was amended by the Disaster Mitigation Act of 2000, with the amendment becoming effective upon promulgation of implementing regulations. As of September 2017, such regulations have not been promulgated. Pub. L. No. 106-390, 114 Stat. 1552 (2000).
129. 44 C.F.R. § 206.226(d) (2016).
130. PAPPG, *supra* note 58, at 86–89.
131. *Id.*, at 89.
It does not make sense to spend federal funds to reconstruct a facility that will be just as susceptible to damage as it was before the disaster. As a result, FEMA may require and fund the applicant to rebuild a facility in conformity with nationally applicable codes, specifications, and standards, as well as safe land use and construction practices not otherwise required by local codes. FEMA may also fund cost-effective upgrades to a disaster-damaged structure, which will have the effect of reducing future disaster damage.

FEMA’s authorities also allow for situations where a community does not want to rebuild the damaged structure, even with code upgrades added. Perhaps it makes more sense to replace a washed out one-lane bridge with a two-lane bridge. Where the function of the original facility is maintained, FEMA may approve an “improved project.” An improved project can be eligible for assistance but only in the amount that would have been received had only the original facility been replaced or repaired (i.e., funding is “capped” at the estimated cost of rebuilding the pre-event facility without improvements). As a result, the community could get permission to build the two-lane bridge, but the subaward would only include the costs for a one-lane bridge, the additional lane would need to be funded entirely by the community. As another example, given the pattern of growth in the community, perhaps the community’s hospital should be rebuilt in a different location more accessible to a larger population. In that situation, the subaward would be a fixed estimate of the costs to repair the damaged hospital. Any costs associated with the new facility (e.g., land acquisition, additional materials, etc.) would be funded entirely by the subrecipient.

The law also allows FEMA to accommodate situations where an applicant determines that the public welfare would not be best served by restoring either a damaged facility or its function. Perhaps the community does not want to rebuild its public library and would rather use the money to build a new community center or concert hall. If pre-approved by FEMA, an “alternate project” is eligible but the amount of funding for the project is reduced. To determine the amount of an alternate project grant, FEMA first estimates the eligible cost to repair, restore, reconstruct, or replace the original damaged facility and then applies the cost share rate for the event from the presidential declaration. The amount of the alternate project grant is then fixed at 90 percent of the federal share. All alternate and improved projects must be approved by FEMA before construction begins.

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132. See 42 U.S.C. § 5165(a) (2012); 44 C.F.R. § 206.400 (2016); PAPPG, supra note 58, at 89.
133. See 42 U.S.C. § 5172(c)(2012); 44 C.F.R. § 206.226(c) (2016); PAPPG, supra note 58, at 94–96.
134. See 44 C.F.R. § 206.203(d)(1) (2016); PAPPG, supra note 58, at 100–08.
135. 42 U.S.C. § 5172(c) (2012); 44 C.F.R. § 206.223(d)(2) (2016); PAPPG, supra note 58, at 100–08.
For major disasters declared on or after May 20, 2013, applicants may opt to participate in a Public Assistance Permanent Work Pilot Program. As authorized by the Sandy Recovery Improvement Act of 2013, FEMA may determine the amount of large repair or replacement project grants based on a fixed estimate. FEMA will fund the full federal share of these fixed estimate grants without the 10 percent alternate project reduction.\textsuperscript{137}

The Public Assistance Permanent Work Pilot Program also allows subrecipients to combine two or more capped projects into a single project, creating what is called a consolidated project or consolidated subaward. Funding can be shared across any of the facilities or sites within a consolidated subaward to meet a subrecipient's post-disaster recovery needs.\textsuperscript{138} Recipients must notify FEMA of consolidated projects and complete the Statement of Work within 12 months of the date of the declaration.\textsuperscript{139}

\textbf{Located within the Designated Disaster Area}

As discussed earlier, the presidential declaration generally designates the counties, cities, or tribal areas that are eligible for assistance. Eligible work must be located within these geographic boundaries.\textsuperscript{140} There are two exceptions to this rule:

First, tribal declarations do not usually contain designated geographic areas, as tribal governments do not always have geographical boundaries and some have boundaries that cross state lines.\textsuperscript{141}

Second, emergency evacuation and sheltering costs incurred by a host state/host tribe or host locality outside the declared area, to shelter disaster survivors from within the declared area, may be eligible.\textsuperscript{142} Accordingly, state, tribe, and local government attorneys should consider whether they will accept evacuees from other jurisdictions and consider agreements with other jurisdictions when drafting their own evacuation and sheltering plans. When doing so, however, attorneys should review the standard Emergency Management Assistance Compact (EMAC) language,\textsuperscript{143} compare it with his or her own state’s implementing regulations, and compare it with the regulatory language promulgated by the potential state partner. EMAC, which is administered by the National Emergency Management Association (NEMA) in collaboration with

\begin{footnotes}
\footnote{138. \textit{Id.} at 10–11; PAPPG, \textit{supra} note 58, at 106–07.}
\footnote{139. \textit{Public Assistance}, \textit{supra}, note 139 at 10.}
\footnote{140. 44 C.F.R. § 206.223(a)(2) (2016).}
\footnote{141. PAPPG, \textit{supra} note 58, at 20.}
\footnote{142. 44 C.F.R. § 206.223(a)(2) (2016); PAPPG, \textit{supra} note 58, at 68–69.}
\end{footnotes}
FEMA, establishes procedures so that a disaster-impacted state can request and receive assistance from other member states quickly and efficiently.\textsuperscript{144} All members of EMAC, by adopting the language of the compact into law, agree to abide by and fulfill the articles of the compact. However, some states’ implementing laws contain additional language.

The Legal Responsibility of an Eligible Applicant at the Time of the Disaster

When an eligible applicant owns and operates a facility, legal responsibility is clear. However, the determination regarding legal responsibility for a leased facility can be far more complex and will require a review of the lease. If an eligible public applicant transferred control of the facility to an ineligible applicant, for example, by lease or in a construction contract, assistance is available to the eligible applicant only to the extent that it is “legally responsible” for performing the work.\textsuperscript{145} Typically, FEMA will not construe a general maintenance and repair clause, standing alone, to obligate a tenant to make extraordinary repairs resulting from an act of God. However, such a clause paired with an insurance policy held by the tenant is likely to provide sufficient support for a determination that the lessee is legally responsible for repairs.

This issue frequently occurs in connection with construction or remodeling projects. During project construction, contract documents frequently transfer control of a structure to the contractor, who is required to purchase insurance covering the structure during the period of construction. As a result, if such a facility is destroyed by a natural disaster during project construction, the facility is not eligible for federal disaster assistance. Similarly, a city’s efforts to stimulate economic development can also lead to mixed ownership or responsibility for structures, which can result in legal disputes over whether a structure is eligible for federal disaster assistance. Attorneys should draft leases and contracts with legal liability in mind, clearly drafting such provisions to address legal responsibility for repair or replacement after an act of God. However, such provisions should ensure that legal responsibility remains constant, and does not rely upon a presidential declaration or the availability of assistance from FEMA.\textsuperscript{146}

\textsuperscript{144}. Otherwise eligible emergency work, emergency utility restoration, and grant management costs incurred by a requesting state through a mutual aid agreement (including EMAC) are reimbursable. To receive reimbursement, the requesting entity must provide a description of the services requested and received, along with documentation of associated costs (e.g., labor, equipment, supplies, materials) to FEMA. See PAPPG, supra note 58, at 33.


\textsuperscript{146}. 2 C.F.R. § 200.43(c) (2016).
How Much Is Eligible: The Costs

Help from FEMA will by no means cover all losses and economic impacts incurred after a disaster. The Stafford Act’s disaster assistance programs are supplemental in nature and are not intended to replace insurance or other resources. States, tribes, local governments, nonprofit organizations, and individuals should protect their property with insurance rather than rely on federal disaster assistance.

Under the Stafford Act, FEMA reimburses “costs” incurred as result of a federally declared emergency or major disaster. The meaning of the word “costs” may appear obvious but a cost is only incurred when someone pays for something. With respect to public assistance, a cost is not incurred when a disaster event keeps money from coming in. Loss of revenue is not an eligible cost.

To be eligible under the Public Assistance Program, a cost must:

❯ Be properly documented,
❯ Be reasonable and necessary to accomplish the work,
❯ Comply with requirements for competitive procurement, and
❯ Be reduced by applicable credits, such as anticipated insurance proceeds and salvage values

These requirements are further explained in the following sections.

Proper Documentation

The Public Assistance Program provides federal awards and is therefore subject to the uniform federal administrative requirements, cost principles, and audit requirements for federal awards to nonfederal entities. All public assistance awards are made to the state or tribal government, which then may issue subawards to eligible local government

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147. Extensive guidance to assist states, tribes, local governments, and private nonprofit entities with these cost principles, including a 40-minute narrated presentation, is available online. Procurement Under Grants Public Assistance Policy, FEMA, https://www.fema.gov/media-library/assets/documents/96773 (last updated Apr. 12, 2016).
149. 44 C.F.R. § 206.228 (2016); PAPPG, supra note 59, at 41–42 (Loss of revenue, loss of useful service life, tax assessments, and increased operating costs are ineligible costs under the Public Assistance Program.).
and nonprofit entities. All awards and subawards issued under the Public Assistance Program must comply with the uniform requirements for federal awards, including, but not limited to, requirements regarding documentation, record retention, monitoring, and audit. Similarly, the uniform requirements contain enforcement provisions for noncompliance. Failure to follow the uniform requirements can result in de-obligation of all or a portion of the award, even if the federal funds received have been spent to accomplish the purpose of the grant. It is therefore critical that legal counsel for award and subaward recipients help their clients follow these requirements and ensure proper documentation is created and maintained.

**Reasonable and Necessary to Accomplish the Work**

If a cost is unreasonable or unnecessary, it will not be eligible for reimbursement. Although there are several factors that are considered when determining whether a cost is or is not reasonable, generally, the nature and amount of a cost will be deemed reasonable if it does not exceed the amount that would be paid by a prudent person acting under the circumstances at the time the decision was made. Typically, FEMA looks to the use of historic 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.

The best way to ensure that a cost is considered reasonable and necessary is to engage in a competitive procurement and to document the need for the cost and the steps taken to ensure the best price was achieved. The urgency of a situation alone may not justify an exorbitant price. Similarly, the existence of a presidential declaration and availability of public assistance funds to reduce the impact of the cost on the applicant do not justify an exorbitant price or action.

**Compliance with Requirements for Competitive Procurement**

Failure to follow the requirements regarding procurement of goods, services, and real property using federal award funds has resulted in a significant number of de-obligations under the Public Assistance Program. One of the most frequent and costly errors made by recipients and subrecipients is a failure to comply with competition requirements.

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153. *Id.* § 200.403.
154. *Id.* § 200.404.
All contracts expending federal awards must be competitively bid, with very limited exceptions.\(^{156}\)

A state procuring property and services using federal award funds must follow the same policies and procedures it uses for procurements using its nonfederal funds.\(^{157}\) In addition, in every purchase order or other contract expending federal award funds, the state must include clauses addressing pre-identified topics, including equal employment opportunities, the Davis Bacon Act,\(^{158}\) energy efficiency, and suspension and debarment; and the state must comply with requirements regarding the procurement of recovered materials.\(^{159}\)

Even though they receive their subaward from the state, local governments, state agency subrecipients, and private nonprofit entities must follow federal procurement requirements.\(^{160}\) Also, whether receiving their award directly from FEMA or as a subaward from the state, tribes must follow federal procurement requirements.\(^{161}\) To ensure proper contracting practices, the recipient will be required to provide records showing the rationale for the method of procurement used, selection of contract type, contractor selection or rejection, and the basis for the contract price.\(^{162}\) The recipient must also perform a cost or price analysis for every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications.\(^{163}\) To increase the likelihood that these procurement procedures are followed, written procedures for procurement transactions are required.\(^{164}\) In addition, subrecipients need to be cognizant of requirements established in 2014 which require all nonfederal entities to have written standards of conduct covering conflicts of interest and governing the performance of their employees engaged in the selection, award, and administration of contracts.\(^{165}\) Legal counsel should assist their clients in complying with this requirement.

There are limited exceptions to the requirement for full and open competition. One exception that is frequently misapplied is the emergency exception. The federal procurement requirements allow sole source procurement when “the public exigency or emergency for the requirement will not permit a delay resulting from competitive

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\(^{157}\) Id. § 200.317.

\(^{158}\) The Stafford Act does not require compliance with Davis-Bacon for disaster grants. Therefore, applicant contracts to execute eligible work under the Public Assistance Program are not required to contain a Davis-Bacon provision. PAPPG, supra note 58, at 32.

\(^{159}\) The clauses are in appendix II to title 2 of the Code of Federal Regulation, part 200, as required by regulation. 2 C.F.R. § 200.326 (2016).


\(^{162}\) Id. § 200.318(i).

\(^{163}\) Id. § 200.323(a).

\(^{164}\) Id. § 200.319(c).

\(^{165}\) Id. § 200.318(c)(1).
solicitation.\footnote{166} Applicants cannot safely ignore competitive procurements just because the President has found the situation to be of such severity that it is beyond the capability of state and local resources to respond or just because the entity is seeking assistance for what FEMA regulations call "emergency work." FEMA will not necessarily agree that sole-source procurement is appropriate.

An unsuccessful appeal by a mayor from a denial of assistance, based on the city’s failure to competitively bid a debris removal contract, illustrates this point:

The citizens of the County had no electricity, no heat, no water, and no telephone service. The County’s 800 miles of paved roads were impassable. Emergency vehicles could not serve the County’s citizens. The thaw compounded the problem by creating road washouts over 14 inches deep in some places and leading to severe rutting of the County’s paved roads. The body of one deceased resident remained uncollected for over two days because no emergency vehicle could reach him. The weather forecast included more subfreezing temperatures. The County faced the possibility of more deaths due to lack of heat, food, running water and other necessities of life unless it could quickly reopen its roads.\footnote{167}

This county appeal was denied by FEMA on the ground that the county’s sole-source contract covered not just the emergency clearing of one lane of road for emergency vehicles but the entire debris removal operation. FEMA’s position in this case, sustained in litigation,\footnote{168} was that the county could have separated the tasks into separate contracts. It should have conducted a competition for the larger portion of the work to clear the entire right of way, transport, and place the debris in a landfill.

In short, to protect eligibility of costs for reimbursement, attorneys should ensure that competition is conducted to obtain bids from multiple sources and documented to demonstrate that the award recipient attempted the best competition possible under the circumstances, and to demonstrate what other bidders were willing to charge for similar work. Where some work must be done before any competition can take place, communities should limit the scope of the work that must be performed in the immediate aftermath of the event to allow for competition in later phases. The same contractor, whose resources will already be mobilized for the community, may well prevail in this competition, but separately procuring the follow-up work may prevent denial of reimbursement.

\footnote{166} Id. \$ 200.320(f)(2).
\footnote{167} First appeal filed by Scott County, Arkansas, FEMA-1354-DR-AR, PA ID#127-99127-00, PW 124 (Mar. 9, 2001).
Communities may consider advance contracting for the services that are likely to be required in a disaster event. Communities can also pre-qualify debris removal contractors, or contractors for other emergency work that is commonly required, prior to an event and solicit bid prices from this list of contractors once an event has occurred. This method allows competitive bidding, while preserving the ability to achieve reasonable market prices at the time the work is performed. In addition, until the end of FEMA’s debris removal pilot program, applicants with a pre-qualified debris management plan and one or more pre-approved debris and wreckage removal contractors can receive a 2 percent increase in the federal cost share.

Another option to consider is that state and local governments may use contracts available on the Federal Supply Schedule in disaster response. Also, states, tribes, and local governments may enter into mutual aid agreements, including, but not limited to EMAC, as discussed earlier. With mutual aid agreements, communities overwhelmed by an event can count on receiving help from surrounding communities, building on a “neighbor helping neighbor” tradition that dates from the earliest days of our nation’s history. Attorneys can help their clients enter into mutual aid agreements before disaster strikes, and to address the subject of reimbursement in their written mutual aid agreements. Nonetheless, FEMA will reimburse mutual aid expenses incurred under mutual aid agreements entered into after the disaster event. Indeed, FEMA will even reimburse mutual aid expenses incurred under oral, post-disaster mutual aid agreements, as long as the oral agreement is ratified in a written agreement and submitted to FEMA, preferably within 30 days of the applicant’s briefing.

Finally, the form of the contract itself can result in ineligibility. Cost plus percentage of cost contracts are expressly prohibited. Time and materials (T&M) contracts are also discouraged. T&M contracts do not provide incentives for efficient performance and are only permissible where the applicant shows that no other type of contract is suitable, the contract includes a ceiling price that the contractor exceeds at its own risk, and the applicant provides a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and

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169. In addition, nonfederal entities are encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. 2 C.F.R. § 200.318(c) (2016).
170. A pre-qualified contractor is one that has been identified and evaluated by a local government and has been determined to be capable to perform debris removal work. A pre-qualified contractor does not constitute a “stand-by” contract.
173. PAPPG, supra note 58, at 33.
174. Id.
175. 2 C.F.R. § 200.323(d) (2016); PAPPG, supra note 58, at 32.
176. PAPPG, supra note 58, at 32.
effective cost controls. FEMA only allows use of T&M contracts for a “reasonable time based on the circumstances during which the Applicant could not define a clear scope of work (SOW).” Caution: FEMA’s definition of reasonable time and your definition of reasonable time may differ. Former agency guidance limited the use of time and materials contracts to the first 70 hours after an event.

Reduced by Applicable Credits, Such as Anticipated Insurance Proceeds and Salvage Values

All assistance under the Stafford Act, including the Public Assistance Program, is subject to a general statutory prohibition against making federal disaster payments that duplicate benefits:

The President . . . in consultation with the head of each Federal agency administering any program providing financial assistance to persons, business concerns, or other entities suffering financial losses as a result of a major disaster or emergency, shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.

The prohibition is not limited to duplicated assistance that a community in fact receives; it also extends to assistance “available” to the community. These provisions can lead to disputes over how much assistance, usually in the form of insurance, is in fact available to the insured, and therefore how much should be deducted from the FEMA-eligible cost. These disputes usually arise where there are substantial coverage and aggregate deductibles available for both FEMA-eligible and FEMA-ineligible losses.

As part of the process of applying for public assistance, applicants must advise FEMA of all potential insurance proceeds. Applicants should document their efforts to recover under their insurance policies, track insurance proceeds for “FEMA-eligible” losses, and where insurance checks or settlements commingle FEMA-eligible

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177. 2 C.F.R. § 200.318(j) (2016); PAPPG, supra note 58, at 32.
178. PAPPG, supra note 58, at 32.
181. See id. § 5155(c) (“A person receiving Federal assistance . . . shall be liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source.”).
and ineligible losses, document, from statements of values, proof of loss documents, policy sublimits and the like, the allocation between FEMA-eligible and ineligible losses. If there is a dispute over coverage, and an applicant settles for less than the policy amounts, it should advise FEMA as to why the applicant believes it acted in a commercially reasonable manner in determining the amount of insurance proceeds to accept.\footnote{\textit{See Hawaii v. FEMA, 294 F.3d 1152, 1161 (9th Cir. 2002).}}

This “any other source” of financial assistance provision is not limited to insurance. For nonprofit entities, an important other source is the Small Business Administration’s (SBA) Disaster Loan Program.\footnote{\textit{Small Business Act, 15 U.S.C. §§ 636(b), (c), (f) (effective Nov. 25, 2015).}} The dollar value of an SBA disaster loan is considered financial assistance, and as a result, a nonprofit entity must apply for and borrow the maximum loan available from the SBA before it can receive a public assistance grant from FEMA. The only exception to this rule is for private nonprofit entities providing “critical services,” which was discussed previously in more detail.\footnote{\textit{42 U.S.C. § 5172(a)(3)(B) (2012); see generally 44 C.F.R. § 206.226(c)(1); see PAPPG, supra note 58, at 16–17.}}

Applicants should also be aware that FEMA generally does not reimburse costs if there is another federal program specifically available for that type of cost.\footnote{\textit{44 C.F.R. § 206.226(a) (2016) (stating “Generally, disaster assistance will not be made available under the Stafford Act” for projects under the specific authority of another federal agency). See 31 U.S.C. § 1301(a); Honorable Clarence Cannon, Chairman, Committee on Appropriations, House of Representatives, B-139510, 1959 U.S. Comp. Gen. LEXIS 2385 (May 13, 1959) (supporting the principle that if an appropriation for a specific object is available for that object it acts to the exclusion of more general appropriations that may also be available for that object.).}} For example, the Department of Agriculture, Natural Resources Conservation Service (NRCS) has a program called the Emergency Watershed Protection (EWP) program, which provides financial and technical assistance to help people and conserve natural resources by relieving imminent hazards to life and property caused by natural disasters.\footnote{\textit{See 7 C.F.R. § 624.5 (2016) (noting a presidential declaration under the Stafford Act is not required).}}\footnote{\textit{http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/landscape/ewpp/} (last visited June 16, 2016).} Under this authority, the NRCS can provide assistance to remove debris from streams, culverts, and bridges; reshape and protect eroded banks; correct damaged drainage facilities; establish cover on critically eroding lands; repair levees and structures; and repair conservation practices.\footnote{\textit{See, e.g., Mo. Dep’t of Nat’l Res., Debris Removal from Locust Creek, FEMA-1934-DR-MO, PA ID#000-UB2M9-00, PW 605 (Aug. 3, 2012), http://www.fema.gov/appeal/220381 (denying applicant’s...}}

Funding for NRCS’ EWP is limited, and may not be available to all applicants. However, if an applicant fails to apply to the NRCS for an EWP-eligible project before it begins construction, it likely will not be eligible for either the EWP or FEMA assistance.\footnote{\textit{See the any other source” of financial assistance provision is not limited to insurance. For nonprofit entities, an important other source is the Small Business Administration’s (SBA) Disaster Loan Program. The dollar value of an SBA disaster loan is considered financial assistance, and as a result, a nonprofit entity must apply for and borrow the maximum loan available from the SBA before it can receive a public assistance grant from FEMA. The only exception to this rule is for private nonprofit entities providing “critical services,” which was discussed previously in more detail.}}
FEMA maintained a similar policy for debris removal assistance on Federal Aid Roads until 2012 legislation shifted funding for debris removal on Federal Aid Roads from the Federal Highway Administration to FEMA.\textsuperscript{189} Permanent work and snow removal on Federal Aid Roads, however, remain ineligible for FEMA public assistance. Similarly, FEMA began funding damage to the Department of Housing and Urban Development (HUD) Public Housing Authorities after Congress repealed HUD’s authority to do so.\textsuperscript{190}

While an applicant will incur reductions in FEMA assistance for financial assistance available from other sources, in contrast, an applicant may receive a credit for donated resources. Donations of otherwise eligible goods and services may be credited toward the applicant’s cost share. FEMA Public Assistance awards in almost all disasters are “cost shared,” requiring a “nonfederal” contribution (normally from the coffers of state or local government) of up to 25 percent of eligible costs. The value of donated resources can count toward the nonfederal match requirement, reducing the applicant’s obligation to match the federal award with cash.\textsuperscript{191} For example, the work incurred by volunteers to pick up debris from roadways, or to place sandbags around city-owned facilities could be credited toward the applicant’s cost share. It is essential that applicants maintain detailed records of all donated resources (e.g., time cards, work completed, etc.), as the value of donated resources can be quite significant.

Other Considerations under the Public Assistance Program

Project eligibility and funding eligibility are not the only considerations that an applicant needs to be aware of when applying for public assistance from FEMA. Applicants should also be aware of the availability of management cost funds, of complications that could arise with debris removal work, and of the need to comply with a multitude of environmental and historic preservation requirements.

request for FEMA assistance for creek logjam removal because NRCS had authority for the work); Fla. Sunshine Water Control Dist., Removal of Vegetative Debris from Canal, FEMA-1545-DR-FL, PA ID#011-UIZNS-00, PW 3806 (May 31, 2012), https://www.fema.gov/appeal/219570 (denying the cost of debris removal from canal system because, \textit{inter alia}, NRCS had authority for the work but denied funding because the applicant performed the work before submitting a request for assistance and signing an agreement with NRCS, contrary to EWP program regulations).


\textsuperscript{190} PAPPG, supra note 58, at 17 (discussing implementing the changes from the Public Housing Disaster Relief Act of 2008, Pub. L. No. 110-289, 122 Stat. 2661).

\textsuperscript{191} PAPPG, supra note 58, at 35.
Management Costs
Local governments recovering from major disasters will incur financial, accounting, and administrative costs as they perform the work necessary to save lives and protect property, identify damage, define repair or reconstruction projects, estimate project costs, apply for assistance, segregate grant funds, account for and document expenditures, oversee contractors and contract monitors, negotiate with FEMA, and so on. These costs incurred to manage the grant for the disaster recovery project, as opposed to costs incurred to manage the performance of the disaster recovery project itself, are referred to as management costs.192

FEMA will reimburse a state or tribe’s actually incurred management costs in an amount up to 3.34 percent of its eligible program costs for a major disaster or 3.90 percent of its eligible program costs for an emergency.193 Management costs are those indirect costs incurred to administer or manage Public Assistance awards and are not directly chargeable to a specific project. The management cost rate is locked-in 12 months after the date of the declaration.194 In addition, FEMA will reimburse a recipient or subrecipient’s direct administrative costs, which are those costs that can be specifically assigned to an individual project, at the same cost-share rate applicable to the project itself, provided other eligibility criteria are met (e.g., costs are reasonable and necessary, documented, properly procured, etc.).195

Under this rule, states have the authority to determine the portion, if any, of the 3.34 percent or 3.90 percent management cost rate that will be passed on to subrecipients; although traditionally most states pass on little to none. All management costs must be spent within two years of the date of an emergency declaration or within eight years of the date of a major disaster declaration.196 To the extent that a subrecipient can account for and assign administrative costs directly to projects, for example through use of time management software or by contractors with that capability, the subrecipient may increase the amount of its administrative/management costs that are reimbursed by FEMA.

Debris Removal Complications
Debris, which is generated by most presidentially declared events, frequently leads to difficult and complex emergency management issues. For example, debris removal may complicate lines of authority because many different public and private organizations have physical or financial responsibilities for debris removal. Contracting may be done

193. See id. § 2075(b)(4); PAPPG, supra note 58, at 36–37.
195. PAPPG, supra note 58, at 37–38.
196. 44 C.F.R. § 2078 (2016).
in haste using emergency procurements that bypass or at least expedite normal competitive processes. Further, the debris itself often consists of a dangerous pile of the collapsed and intermingled property of multiple owners.

Debris can take many forms: vegetative debris from downed trees, including those that remain standing but pose a safety threat; construction and demolition debris from collapsed structures; sand, boats, and cars washed onto roads and private property by storm surge or flooding; barrels and containers of environmentally hazardous substances; and more. It consists of both public and private property and often needs to be removed immediately because it blocks access to streets and utilities that are critical to the recovery effort. In a disaster caused by a terrorist attack, as in the case of the Oklahoma City bombings and the attacks on the World Trade Center, the site of the debris may be a crime scene with restricted access.

To deal with the potential liability from handling debris, the Stafford Act requires that a state or local government arrange an unconditional authorization for the removal of debris or wreckage from public and private property and, in the case of removal of debris or wreckage from private property, indemnify the federal government against any claim arising from such removal before FEMA can provide any debris removal assistance. This required indemnity is in the declaration request and in the FEMA-State or FEMA-Tribes Agreement. As a statutory requirement, it is a non-negotiable term of the grant, but state attorneys should be aware that such open indemnification agreements may conflict with state law.

The Stafford Act authorizes FEMA to assist in the removal of debris from both public and private lands, if the removal of debris is found “in the public interest.” By regulation, FEMA has determined that it is in the public interest to remove debris from public and private property when doing so would either:

- eliminate immediate threats to public health and safety;
- eliminate immediate threats of significant damage to improved public or private property;
- ensure the economic recovery of the community at large; or

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197. Debris in federally maintained navigable channels and waterways; flood control works under the authority of the NRCS; agricultural land; and natural, unimproved land, such as heavily wooded areas and unused areas is not eligible. PAPPG, supra note 58, at 44. In some cases, removal and disposal of animal carcasses may be eligible, but FEMA generally does not provide funding when another federal agency has authority for the carcass removal and disposal. NRCS has authority to remove animal carcasses under the EWP, the USDA’s Farm Service Agency may provide assistance for farmland debris cleanup, and the EPA and USCG may remove animal carcasses contaminated with oil, hazardous substances, pollutants, or contaminants. PAPPG, supra note 58, at 71.
198. 42 U.S.C. § 5173(b) (2012).
199. Id. § 5173(a).
mitigate risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired using Hazard Mitigation Grant Program funds to uses compatible with open space, recreation, or wetlands management practices.

But debris removal is eligible for federal assistance only if it is performed or contracted for by an eligible entity. Just like other public assistance costs, FEMA will not provide assistance directly to an individual or private organization, or to an eligible entity that chooses to reimburse the debris removal costs incurred by private individuals or organizations.

Debris removal from public property is quite common. One of the most frequent instances is the removal of disaster-related debris from the right-of-way. The costs to clear roads in the declared area that are owned or operated by an eligible applicant are likely to be eligible, as the clearance is necessary to allow for access of emergency vehicles, thereby posing an immediate threat to public health and safety.

Debris removal from private property, however, is generally not eligible because it is the responsibility of the individual property owner. But large-scale disasters may place debris over a large area, creating widespread immediate threats to the public-at-large. When the state or local government needs to enter private property to remove debris and abate a threat, debris removal from private property may be in the public interest and therefore eligible for reimbursement.

To receive direct federal assistance with, or reimbursement for, private property debris removal costs, the applicant must submit a written request and receive approval from FEMA before beginning work. The request must include a determination, and provide the basis for the determination, that the disaster-generated debris on private property in the designated area constitutes either an immediate threat to life, public health, or safety or to the economic recovery of the community at large. The request must include the applicant’s established, specific legal requirements for declaring the

200. “Substantial Damage is damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.” PAPPG, supra note 58, at 44.
201. 44 C.F.R. § 206.224(a) (2016); PAPPG, supra note 58, at 43–44.
202. 44 C.F.R. § 206.224(c) (2016). However, financial assistance may be available to individuals and households for home repair costs, which could include debris removal, under the Individual Assistance Program. See id. § 206.117.
203. PAPPG, supra note 58, at 44.
204. 44 C.F.R. § 206.224 (2016); PAPPG, supra note 58, at 53–55.
205. PAPPG, supra note 58, at 54.
existence of a threat to the public health and safety, and a detailed explanation document-
ing the applicant’s authority and legal responsibility to enter the private property to remove disaster-related debris. The request must also contain confirmation that all legal processes and permission requirements are satisfied.

When planning for future disasters, legal counsel may wish to identify, or work with their clients to formally adopt, a local code or ordinance that gives local government officials the responsibility to enter private property to remove disaster-related debris or perform work in the presence of an immediate threat.

FEMA policy contains detailed information regarding the eligibility of debris removal costs. For example, “if the Applicant has legal responsibility for maintenance of a navigable waterway, removal and disposal of debris that obstructs the passage of vessels is eligible to a maximum depth of two feet below the low-tide draft of the largest vessel that utilized the waterway prior to the incident.”207 Also, “removal of broken limbs or branches that are two inches or larger in diameter (measured at the point of break) that pose an immediate threat are eligible.”208 Applicants should consult the Public Assistance Program and Policy Guide209 for the eligibility rules related to the specific type of debris they must remove.

Where will the debris go? Attorneys should ensure that their clients comply with requirements and permits for debris operations. For example, staging and disposal sites should be a safe distance from property boundaries, wetlands, surface water, structures, wells, septic fields, and endangered species, and appropriate sites should be identified for the disposal of hazardous materials.

Communities should also quickly determine, if it will participate in FEMA’s Alternative Procedures Pilot Program for Debris Removal.210 This elective program allows applicants to avail themselves of one or more of the following:

› Increased federal cost share, on a sliding scale, for rapid debris removal completion;
› Reimbursement of straight-time force account labor for debris removal;
› Retention of income generated from debris recycling; and
› A one-time, 2 percent increased cost share incentive for a pre-incident, FEMA-accepted, debris management plan including pre-qualified debris removal contractors.

207. PAPPG, supra note 58, at 50.
208. Id., at 49.
210. Id., at 45. The pilot program is available through June 27, 2018, but may be extended at agency discretion. Debris Pilot Guide, supra note 124.
Attorneys should carefully review debris removal procedures and contract documents. Many of the disputes between FEMA and communities arise from disallowance of debris removal costs. Even though debris removal contracts arise in emergency conditions, they are procurements using a federal grant award and are subject to federal grant procurement rules. Also, communities should take care to hire and train debris monitors and document their debris and debris removal operations. FEMA staff is perpetually on the lookout for ineligible debris removal costs. The financial risk is on the state, tribe, and local government if FEMA disallows costs. Also, the Department of Justice prosecutes fraud by unscrupulous debris removal contractors.

Environmental and Historic Preservation Requirements

Actions taken using federal funds may be subject to federal environmental and historic preservation laws and may require specific review and approval. If an applicant takes an action that is subject to one or more environmental and historic preservation reviews before the reviews are complete, FEMA may de-obligate or deny the award.

The following paragraphs describe the most common environmental and historic preservation laws encountered with the Public Assistance Program.

The National Environmental Policy Act (NEPA) requires that federal agencies consider the environmental impact of proposed actions, including adverse consequences and reasonable alternatives, before making decisions or taking actions that may significantly affect the quality of the human environment. As a result, FEMA must complete appropriate reviews and consultations before work commences. There are very few exceptions to the NEPA review requirement. Emergency work and debris removal completed as an approved public assistance emergency work project to alleviate a health or safety hazard, are exempt from NEPA.

Even though the NEPA requirements are placed on FEMA, indirect actions that are subject to FEMA control or responsibility (such as projects that are funded, even partially, by FEMA) or actions that require a federal permit or other regulatory

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decision to proceed (for example a permit from the Army Corps of Engineers) trigger NEPA.\textsuperscript{216} Although FEMA will conduct the necessary assessments, the underlying documentation and information necessary for the decision-making process typically comes from the applicant. Legal counsel may be instrumental in assisting their clients in timely identifying and providing the documentation necessary to complete these assessments.

The \textit{Coastal Barrier Resources Act (CBRA)}\textsuperscript{217} protects ecologically sensitive and geologically vulnerable barrier islands along the Atlantic, Gulf, and Great Lakes coasts. The Department of the Interior’s Fish and Wildlife Service (USFWS) administers the CBRA, and establishes CBRA zones. The CBRA prohibits federal flood insurance coverage, as well as new federal expenditures and federal financial assistance for development in CBRA zones. Generally, FEMA will not provide recovery assistance in CBRA zones but there are limited circumstances in which FEMA may consider doing so, after consultation with the USFWS.\textsuperscript{218} Counsel should be aware of any CBRA zones in their client communities.\textsuperscript{219}

Similarly, public assistance projects located in or near established coastal zone management areas must be consistent with the enforceable policies of the state’s federally approved coastal zone management plan, pursuant to the \textit{Coastal Zone Management Act (CZMA)}.\textsuperscript{220}

Projects involving rivers and streams could trigger requirements under the \textit{Fish and Wildlife Coordination Act},\textsuperscript{221} which protects fish and wildlife conditions in natural streams and bodies of water; the \textit{Wild and Scenic Rivers Act},\textsuperscript{222} which preserves the free-flowing state of rivers that are listed in the National Wild and Scenic Rivers System or are under study for inclusion in the system because of their scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values; or the \textit{Magnuson-

\begin{itemize}
\item \textsuperscript{216} Emergency work, debris removal, and permanent work that has the effect of restoring the facility substantially as it existed before the event occurred have been statutorily excluded from NEPA. See \textit{42 U.S.C. § 5159} (2012); see also \textit{44 C.F.R. § 10.8} (2016). For more information regarding the Stafford Act and NEPA, see FEMA, CEQ \textit{Fact Sheet: The Stafford Act and its relation to the National Environmental Policy Act}, (2013), http://www.fema.gov/media-library-data/20130726-1748-25045-1063/stafford_act_nepa_fact_sheet_072409.pdf.
\item \textsuperscript{217} \textit{16 U.S.C. §§ 3501–3510} (2012).
\item \textsuperscript{218} \textit{44 C.F.R. §§ 206.344–346} (2016).
\item \textsuperscript{219} USFWS publishes CBRS maps online. See \textit{Official Coastal Barrier Resources System Maps}, U.S. Fish & Wildlife Serv., http://www.fws.gov/ecological-services/habitat-conservation/cbra/Maps/index.html (last updated May 12, 2016).
\item \textsuperscript{220} See \textit{16 U.S.C. § 1451 et seq.} (2012).
\item \textsuperscript{221} See id. §§ 661–667e.
\item \textsuperscript{222} See id. § 1271 et seq.
\end{itemize}
Stevens Fishery Conservation and Management Act,223 which protects essential fish habitats.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),224 more commonly known as the Superfund, may also affect Public Assistance. CERCLA 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. It was passed in the wake of Love Canal and Times Beach and allows the EPA to clean up sites and to compel responsible parties to perform cleanups or to reimburse the government for cleanups. Although one might think that CERCLA would have been triggered by the 2010 Deepwater Horizon oil spill, it was not. CERCLA does not cover oil spills in navigable waters, which fall under the jurisdiction of the Oil Pollution Act of 1990225 (OPA90). If a declared event occurs at or near a CERCLA site or an OPA90 site, FEMA will closely examine the potential for duplication of benefits.

The Endangered Species Act of 1973 (ESA)226 protects endangered and threatened species and their critical habitats. FEMA is required to consult with the National Marine Fisheries Service regarding any disaster assistance action that has the potential to affect endangered and threatened species in the ocean, and the Fish and Wildlife Service regarding all other endangered and threatened species. The other federal agency may prescribe certain conditions or conservation measures to mitigate the effects of the proposed action. For emergency work, FEMA must notify these other federal agencies, but consultation may take place after FEMA takes the action or after the emergency is over. Applicants should notify FEMA immediately if they are aware of endangered or threatened species in a declared area.

The National Historic Preservation Act (NHPA)227 requires federal agencies to consider the effects of proposed federally funded actions or undertakings on historic properties before approving or expending federal funds, as well as allow the Advisory Council on Historic Preservation the opportunity to comment on the proposed action. Applicants need to notify FEMA quickly if a project could affect any district, site, building, structure, landscape, archaeological site, traditional cultural property, or object included in, or eligible for inclusion in, the National Register of Historic Places. Once notified, FEMA will work with the applicant to gather information on the item

223. See id. §§ 1801–1884.
or place through background research, oral history interviews, and field investigations and surveys to assess whether the project has the potential to create adverse effects.228

The Farmland Protection Policy Act229 requires federal agencies to consult with the NRCS to evaluate projects for adverse effects to prime or unique farmland, or land of statewide or local importance, and to consider alternative actions that could avoid adverse effects.

Executive Order 11,988,230 Floodplain Management, requires federal agencies to minimize or avoid activity that adversely affects floodplains. Executive Order 11,990,231 Protection of Wetlands, requires federal agencies to minimize or avoid activity that adversely affects wetlands, and to encourage the preservation and enhancement of the beneficial functions of wetlands.

Finally, Executive Order 12,898,232 Environmental Justice, requires federal agencies to identify and address whether any of their actions would result in a disproportionately high and adverse human health or environmental effects on minority and low-income populations.

**THE COMMUNITY DISASTER LOAN PROGRAM**

After a major disaster, local governments occasionally need financial assistance to continue essential governmental functions, such as police, fire, and medical services. As has been the case after some large major disasters, the tax base of a community may temporarily leave the area, significantly disrupting the community’s flow of income. While the emergency work performed immediately after the event may be eligible under the Public Assistance Program, as would the costs to repair or reconstruct the facilities housing these functions, the longer-term operating costs, such as salaries and benefits, associated with these functions are not eligible for public assistance funding.

The Stafford Act authorizes FEMA to issue Community Disaster Loans (CDLs) to local governments that incur a substantial loss of tax or other revenues as a result of a presidentially declared major disaster and are in need of funds to perform their essential governmental functions.233 CDLs are intended to assist with operational costs, and

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228. See 36 C.F.R. § 800.5 (2016). Certain emergency activities are exempt in the event of a major disaster or imminent threat to national security. 36 C.F.R. § 800.12 (2016).
may not be used for work eligible under the Public Assistance Program. The amount of the loan is based on need and shall not exceed:

- Twenty-five percent of the annual operating budget of the local government for the fiscal year in which the disaster occurs, and shall not exceed $5 million; or
- If the disaster-related loss of tax and other revenues is at least seventy-five percent of the local government’s annual operating budget for the fiscal year in which the major disaster occurs, and shall not exceed $5 million.234

The interest rate on the loan is equal to the rate for five-year maturities as determined by the monthly Treasury Schedule of certified interest rates on the date the promissory note is signed. The standard term is five years; however, this may be extended based on the local government’s financial condition. If the local government’s revenues during the three fiscal years after the disaster are insufficient to meet its operating budget, all or a part of a CDL may be canceled. The specific requirements for demonstrating the insufficiency of revenues to meet the local operating budget are set out in FEMA’s implementing regulations.235

THE FIRE MANAGEMENT ASSISTANCE GRANT PROGRAM

The Fire Management Assistance Grant (FMAG) Program provides direct and financial assistance for equipment, supplies, and personnel costs to any state, tribe, or local government for the mitigation, management, and control of any fire on public or private forestland or grassland that threatens such destruction as would constitute a major disaster.236 Only states may apply to FEMA for an FMAG declaration. Tribes and local governments must apply through the state. FEMA regional administrators may issue the declaration, as the President delegated FMAG declaration authority to FEMA.237

The declaration request must be submitted while the fire is burning uncontrolled and threatens such destruction as would constitute a major disaster. The governor or Governor’s Authorized Representative typically requests an FMAG declaration verbally via phone call to the FEMA Regional Administrator or designated FEMA Regional Fire Duty Liaison. The verbal request is later followed by the Request for Fire Management Assistance Declaration, FEMA form 078-0-1, and the Principal Advisor’s Report, FEMA form 078-0-2, which must be received by FEMA headquarters within 14 days of the phone request. Typically, FMAG declarations are processed on an expedited basis and a decision is rendered within a matter of hours.

Upon receipt of a request, FEMA will evaluate the following:

1. Threat to lives and improved property, including threats to critical facilities/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; and
4. Potential major economic impact.

FEMA will approve an initial award to the state only if the state has an up-to-date State Administrative Plan and Hazard Mitigation Plan approved by FEMA and FEMA determines that the application demonstrates that the total eligible costs for the declared fire meet or exceed an individual fire cost threshold or that the total costs of all declared and non-declared fires for which the state has assumed responsibility in a given calendar year meet the cumulative fire cost threshold.

Like with public assistance, FMAG costs are recorded on a project worksheet and are subject to the cost and documentation requirements of 2 C.F.R. part 200. The types of costs that are eligible include equipment and supplies; labor costs; travel and per diem, the cost to pre-position resources; emergency work costs authorized under section 403 of the Stafford Act, such as search and rescue, police barricading, and arson investigation teams; the temporary repair of damage caused by firefighting activities,

238. 44 C.F.R. § 204.22.
240. 44 C.F.R. § 204.21 (2016).
241. Id. §§ 204.51(b), (d). The individual fire cost threshold is $100,000 or 5 percent × $1.07 × the state population, adjusted annually. Id. § 204.51(b)(2). The cumulative fire cost threshold is the greater of either $500,000 or 3 times the 5 percent × $1.07 × state population figure. Id. § 204.51(b)(3). Pre-positioning costs are not included in the calculation of the fire cost threshold. Id. § 204.51(b)(5).
such as bulldozer lines and staging areas; mobilization and demobilization; and reasonable costs associated with fires on co-mingled federal/state lands.242

The state must submit a grant application to the regional administrator within nine months of the declaration, although this period may be extended by FEMA for up to an additional six months.243 All FMAGs are provided at a 75 percent federal cost share.244

THE INDIVIDUALS AND HOUSEHOLDS PROGRAM (IHP)245

The Stafford Act authorizes limited assistance to individuals and households in their efforts to recover from a presidentially declared emergency or major disaster for which Individual Assistance is authorized.246 Although technically available for either an emergency or major disaster, IHP is rarely authorized in response to an emergency.247

IHP is a compliment to the Public Assistance Program. While public assistance authorizes financial or direct assistance to the state, tribe, or local government to provide emergency sheltering actions necessary to save lives, IHP focuses on survivors’ mid-to-long term, up to 18 months, temporary housing, permanent home repair and replacement, and other disaster-related needs.

In contrast to the Public Assistance Program, most aspects of IHP are administered directly by the federal government. Indeed, most applications for assistance are initiated directly from individuals to FEMA through either FEMA’s 1-800-621-FEMA (3362) telephone number or online application portal at DisasterAssistance.gov. Although assistance tends to flow directly from FEMA to the individual or household affected, the state or tribe may play a part in the administration of the program, and the state/tribe and local government play an increasingly large role in pre-disaster planning and the development of options for residents post-disaster.

IHP is focused on helping individuals and households248 regain self-sufficiency, but it is only supplemental and is unlikely to make a survivor whole. Financial IHP

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242. Id. § 204.42.
243. Id. § 204.52(a). The subawardee must submit its application to the state no longer than 30 days after the close of the incident period. Id. § 204.52(a)(1).
244. Id. § 204.61.
248. 44 C.F.R. §§ 206.110–111. Businesses are ineligible. Id. The Small Business Administration’s (SBA) Business Loan Program provides disaster loans to businesses to repair or replace destroyed or
assistance, regardless of the purpose of the funds, is capped at $33,000 per disaster.\textsuperscript{249} FEMA-provided temporary housing, referred to as “direct assistance,” does not count toward the recipient’s financial cap, but it is time-capped at 18 months from the date of the declaration.\textsuperscript{250} Survivors with losses and needs in excess of those that can be met by FEMA, insurance, or other sources, may apply for low interest loans from the U.S. Small Business Association.\textsuperscript{251}

The types of assistance available from IHP can largely be categorized as Housing Assistance, which includes FEMA-provided temporary housing as well as financial assistance to rent temporary housing and/or financial assistance to repair or replace a homeowner’s pre-disaster residence, and Other Needs Assistance.

**Housing Assistance**

Temporary housing assistance is only available for survivors who are displaced from their pre-disaster primary residence or whose pre-disaster primary residence is rendered uninhabitable, or with respect to individuals with disabilities, rendered inaccessible or uninhabitable as a result of damage caused by a declared event.\textsuperscript{252} It is generally money paid directly to the survivor to help cover the cost of rent while their permanent residence is being repaired, or in the case of a pre-disaster renter, to obtain a replacement rental unit.\textsuperscript{253} If there is a lack of available housing resources for survivors to rent, however, and it is cost-effective to do so, FEMA may provide direct temporary housing in the form of temporary housing units.\textsuperscript{254} Although most commonly thought of as mobile homes, the term “temporary housing unit” is not defined by the Stafford Act. As such, FEMA has explored a wide variety of options, which include, but are not limited to mobile homes.

In addition to temporary housing assistance, FEMA may also assist with the cost to repair or replace an owner-occupied private residence that was damaged by a declared event.\textsuperscript{255} The assistance can include the cost of mitigation measures that reduce the


\textsuperscript{251} Information about SBA’s Disaster Loan Program is available online. See Disaster Loans, U.S. Small Bus. Admin., www.sba.gov (last visited May 21, 2016).

\textsuperscript{252} See 42 U.S.C. § 5174(a) (2012); 44 C.F.R. §§ 206.113(a)(8), (9) (2016).

\textsuperscript{253} 42 U.S.C. § 5174(c) (2012); 44 C.F.R. § 206.117(b)(1) (2016).


likelihood of future damage to the residence, utilities, or infrastructure.\textsuperscript{256} FEMA may also provide financial assistance or direct assistance to construct permanent or semi-permanent housing in insular areas outside the continental United States and in other locations but only when no alternative housing resources are available and other temporary housing options are unavailable, infeasible, or not cost-effective.\textsuperscript{257}

Eligible applicants can receive more than one type of housing assistance, including a mix of financial and direct assistance. FEMA will determine the appropriate types of assistance based on considerations of cost effectiveness, convenience to disaster survivors, as well as suitability and availability of the types of assistance to meet survivor needs in the particular disaster situation.\textsuperscript{258}

**Other Needs Assistance**

FEMA may provide funds for uninsured, disaster-related necessary expenses and serious needs. To be eligible for other needs assistance, the loss must occur within the area designated by the presidential declaration but does not need to be the survivor’s primary residence. For example, Sally, who lives in New York was visiting her grandmother in Georgia when her grandmother’s home was flooded by a declared event. Sally was seriously injured by the event, her vehicle was destroyed, and her grandmother died as a result of the event. Sally could receive reimbursement of her uninsured medical expenses, vehicle repair or replacement, and funeral expenses, up to the $33,000 financial cap.

Other needs assistance includes financial assistance for:

- Medical and dental expenses;
- Funeral and burial costs;
- Repair, cleaning, or replacement of clothing, household items (room furnishings, appliances), specialized tools or protective clothing and equipment required for your job, and necessary educational materials (computers, school books, supplies);
- Clean-up items (wet/dry vacuum, air purifier, dehumidifier);
- Fuel for primary heat source (heating oil, gas);
- Repairing or replacing vehicles damaged by the disaster, or providing for public transportation or other transportation costs (when authorized by the state);
- Moving and storage expenses related to the disaster (including storage or the return of property to a pre-disaster home);

\textsuperscript{256} 44 C.F.R. § 206.117(b)(2)(i)(H) (2016).
\textsuperscript{257} 42 U.S.C. § 5174(c)(4) (2012).
\textsuperscript{258} Id. § 5174(b)(2)(A) (2012); 44 C.F.R. § 206.110(c) (2016).
Other necessary expenses or serious needs (for example, towing, or setup or connecting essential utilities for a housing unit not provided by FEMA); and

- The cost of a National Flood Insurance Program group flood insurance policy to meet flood insurance requirements.259

The Application Process

Survivors must apply for IHP assistance within 60 days following the date of the presidential declaration.260 In addition, applicants must apply to the Small Business Administration for a loan under the Disaster Home Loan Program before they can be eligible for Other Needs Assistance.261

FEMA will conduct a housing inspection to confirm that the applicant’s primary residence was damaged, is uninhabitable, or is inaccessible as a result of the declared event. To be eligible for IHP, an individual or household262 must be a U.S. citizen, non-citizen national, or qualified alien.263 If an applicant does not meet the citizenship criteria, their household may still apply for and be considered for IHP assistance if another adult member of the household meets the eligibility requirements and signs a Declaration and Release form; or the parent or guardian of a minor child who meets the eligibility requirements, who lives in the same household as the child, applies on behalf of the child as a co-applicant.264

FEMA only collects the information necessary to qualify a single member of the pre-disaster household. The agency does not require applicants to declare their specific subcategory of citizenship/immigration status and does not collect citizenship/immigration status for other disaster relief programs under the Public Assistance program.


260. 44 C.F.R. § 206.112(a) (2016).


262. 44 C.F.R. § 206.111 (“Household” is defined as “all persons (adults and children) who lived in the pre-disaster residence, as well as any persons, such as infants, spouses, or part-time residents who were not present at the time of the disaster, but who are expected to return during the assistance period.”)


immigration status information regarding other household members, including a parent/guardian who applies on behalf of a qualifying child.\textsuperscript{265} IHP assistance is not considered income or a resource for federal tax or benefit programs.\textsuperscript{266}

\textbf{Duplication of Benefits and Insurance Requirements}

As with public assistance, any direct or financial assistance provided by FEMA under IHP cannot duplicate assistance available from other sources.\textsuperscript{267} So, if an individual has homeowner’s insurance that covers their cost to rent temporary housing or is in an amount that would fully cover the amount of damage incurred by the disaster, FEMA is legally prohibited from duplicating that assistance. Similarly, if a home was required to be covered by flood insurance but the homeowner failed to obtain and maintain such insurance, FEMA is prohibited from providing any disaster relief assistance to repair, replace, or restore that person's property if it is damaged by flood.\textsuperscript{268}

\textbf{Specific IHP Considerations for States, Tribes, and Local Governments}

\textbf{Cost}

Although housing assistance is provided at 100 percent federal cost (i.e., there is no nonfederal cost share), other needs assistance is cost-shared 75 percent federal/25 percent state.\textsuperscript{269} FEMA provides states and tribes with three administrative options for processing other needs assistance: FEMA, joint, or state/tribe.\textsuperscript{270}

By November 30 of each year, every state/tribe must choose one of these administrative options for the coming year. For the joint or state/tribe option, the state/tribe must have a FEMA-approved ONA Administrative Plan, describing in detail the staffing schedule, assignment of responsibilities, and program procedures that are in place for the program. The cost share remains the same regardless of who administers the program, although if administered by the state/tribe, the state/tribe may receive up to 5 percent of the costs of the program as an administrative fee.\textsuperscript{271}

\textsuperscript{266} 42 U.S.C. § 5155(d) (2012); 44 C.F.R. §§ 206.110(f)–(g) (2016).
\textsuperscript{268} 42 U.S.C. §§ 5154a(a), 5174(c)(3)(B) (2012); 44 C.F.R. § 206.110(k) (2016).
\textsuperscript{269} 42 U.S.C. § 5174(g) (2012).
\textsuperscript{270} 44 C.F.R. § 206.120(a)–(b) (2016); \textit{See also State Individuals and Households Other Needs Assistance Administrative Plan}, FEMA, https://www.fema.gov/media-library/assets/documents/31206 (last updated Mar. 14, 2016) (providing ONA administration forms).
Even if managed by the state/tribe, eligibility for assistance is determined by FEMA. Under FEMA or joint-managed programs, FEMA submits the assistance to the individual or household and bills the state/tribe for its share of the cost. Failure to timely reimburse FEMA for the nonfederal share could result in a federal debt. As a result, some states established emergency assistance funds, which set aside funds to cover their cost share for IHP. Counsel should be aware of such funds in their state/tribe or whether establishing such a fund would be in the best interest of their client.

In addition, states and tribes control whether certain other needs assistance costs are eligible, as well as the maximum amount of such assistance. For example, repair/replacement of automobiles may be authorized with a maximum financial amount for such costs or the maximum amount of reimbursement for those costs could be set at $0. This designation is made in the state or tribe’s yearly submission of FEMA Form 010-0-II, ONA Administrative Option Selection.

**Participation in the National Flood Insurance Program**

Although rental assistance and other needs assistance for uninsurable property remains available, disaster assistance for flood-damaged insurable real and personal property located in a Special Flood Hazard Area (SFHA) is contingent upon the property owner’s purchase and maintenance of flood insurance. Although there are private insurers that offer flood insurance, the most common source is the National Flood Insurance Program (NFIP). The NFIP, and potentially other insurers, will not provide insurance to an individual or household unless the community where the property is located participates in the NFIP at the time of the declaration.

This means that if a community is not participating in the NFIP at the time of a flood event, its residents will not be eligible for repair or replacement assistance or for other needs assistance for any type of loss that could be insurable under the NFIP. Community attorneys should be aware of their community’s NFIP participation status, the requirements for participation, and assist their community leaders in having a plan in place for the community’s residents should the community opt not to participate in the NFIP.

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273. IHPUG supra note 267, at 90.
274. 44 C.F.R. § 106.120(b).
276. See 42 U.S.C. §§ 4001–4129, 5154(a) (2012); 44 C.F.R. §§ 206.113(b)(7), 206.110(k) (2016). If a community is not participating at the time of the event, the state may ask for an extension of time for FEMA to accept IHP applications and process applications if the community begins participating in the NFIP within six months of the date of the declaration. See 44 C.F.R. § 206.110(k)(2).
Shelter and Housing Plans

As mentioned in the preceding discussion of the Public Assistance Program, FEMA may provide assistance for emergency work, which includes the evacuation and shelter of a community’s residents. Some of FEMA’s sheltering options\(^\text{277}\) include:

- Reimbursement of costs associated with pop-up shelters at schools, churches, and other locations identified by the community and typically run by the American Red Cross or other voluntary organizations;\(^\text{278}\)
- Temporary repairs,\(^\text{279}\) which may consist of using blue tarps to cover damaged roofs, or plywood to cover damaged doors or windows, power restoration, or other essential temporary repairs that allow individuals and households to shelter in their residences pending permanent repairs; and
- Transitional Sheltering Assistance, which provides housing at participating hotels or motels to IHP-eligible applicants.\(^\text{280}\)

Following most disasters, survivors are able to return home within hours or days after the danger has passed. For some, however, disaster recovery transitions from emergency sheltering to temporary housing, which could include the use of available rental resources, the repair of rental resources to make them habitable, or direct housing assistance by FEMA through temporary housing units. Although the type of housing assistance provided is solely within FEMA’s discretion, communities play a major role in working with FEMA, the state/tribe, and voluntary agencies in identifying options appropriate for their community and the needs resulting from the particular event. Communities also play a major role in identifying locations for direct housing assistance (e.g., pad sites, applying the community’s zoning ordinances, etc.).

A community’s pre-disaster planning for shelter and housing can vastly improve its post-disaster response and recovery. If a community could see a need for Private Property Debris Removal,\(^\text{281}\) for example, identifying or establishing the codes that would provide access to private property to remove a public health and safety hazard

\(^{277}\) For additional sheltering options, see FEMA, Catastrophic Housing Annex to the 2012 Federal Interagency Operations Plan—Hurricane (2012), www.fema.gov/media-library-data/20130726-1854-25045-3570/catastrophic_housing_annex.pdf (describing options for how FEMA, in collaboration with the whole community, could provide temporary housing for up to 500,000 eligible households after a catastrophic disaster).


\(^{281}\) PAPPG, supra note 58, at 53.
is important. Similarly, if a community is remote or has very few rental resources and could see a need or desire for FEMA to establish a mobile home park to house survivors, pre-identifying site locations, and identifying or establishing the codes which would allow for the construction of such a park or the use of mobile homes in disaster response could ensure options are not foreclosed when they are later needed. It is also important that communities consider the impact of a mobile-home park in their community before requesting one. These group sites, although intended for a life of only 18 months, can generate substantial community opposition, litigation over siting issues, requirements for security and protection of residents, and eviction of tenants violating rules established for the community. In addition, attorneys should identify the financial burdens that a group site could impose on the tribe or local government, and carefully craft policies, programs, and documents to increase the likelihood of federal recognition and reimbursement of those costs.

Advance planning that includes all segments of the population can also save a community from costly litigation. Several communities have found themselves faced with litigation challenging their emergency preparedness plans for failure to accommodate individuals with disabilities and others with access and functional needs under the Federal Americans with Disabilities Act (ADA), Federal Rehabilitation Act of 1973, and other state-based requirements. Counsel should familiarize themselves with these cases and with guidance provided by the Department of Justice, to help their clients develop plans that fairly and equally address the evacuation and sheltering needs of their residents.

282. A FEMA group site is an option of last resort. However, when they are used, the location is provided by the state or local government, and must comply with federal, state, and local environmental, code, and historic preservation requirements. 44 CFR §§ 10.8, 206.117(b)(1)(ii)(C) (2016).
Privacy Act Protections

After an event which impacts a large segment of a community’s population, including individuals with limited income, language difficulties, disabilities, access and functional needs, or the myriad of concerns or problems that may face any number of residents, FEMA frequently receives requests for information from state and local government agencies and nonprofit organizations seeking to provide additional forms of disaster assistance or for law enforcement purposes. The Privacy Act of 1974 limits FEMA’s use and dissemination of personally identifiable information (PII). FEMA may only release PII from its records with the consent of the individual, under an exception to the Privacy Act or under a published “routine use.”

The Stafford Act requires FEMA to provide access to its IHP records to states if the purpose is to make available additional state and local assistance, and the information pertains only to individuals located in the requesting state. This is considered a congressionally mandated exception to the Privacy Act. Also, FEMA’s “routine uses” are published in the Federal Register in a Privacy Act System of Records Notice (SORN). These routine uses authorize the limited release of information to state, local, and private nonprofit organizations under limited circumstances and for limited purposes.

Attorneys and those who are granted the authority to access FEMA’s IHP records need to be cognizant of the legal implications that such access brings. Although FEMA may be authorized to release PII to a particular entity or individual, further release of that information by the recipient is generally not authorized. Unauthorized releases or improper uses of PII can result in civil actions and the FEMA-State Agreement clarifies that if a state or its agents or contractors releases PII in an unauthorized manner, the state is responsible for paying for any mitigation measures FEMA takes as a result. The individual who disclosed the information is also subject to potential criminal punishment under the Privacy Act. Finally, once records are released by FEMA, their further release may also be subject to state privacy laws, which may impose additional punishments for violation.

Attorneys should advise their clients regarding the consequences of improper release of information and help their clients identify the appropriate recipients and procedures for treatment of PII once it is received.

293. See 5 U.S.C. §§ 552a(g), (i) (2012).
Duplication of Benefits: Multiple Assistance Programs

After many disasters, local government, business, and other community leaders often identify additional sources of funds or organize charitable donation programs to help individuals and households who also may be eligible for the limited assistance provided by the IHP. Under the duplication of benefits rules, federal assistance is only available if it does not duplicate financial assistance received from insurance, other federal programs, “or any other source.” When local governments provide a supplemental assistance program, it is critical that they design it so that it does not duplicate federal assistance and result in an unintended and unfortunate, mandatory dollar-for-dollar reduction of federal benefits. This is an area in which an attorney should be involved and should contact FEMA staff for advice. FEMA has helped communities design supplemental assistance programs that do not violate duplication of benefit restrictions.

OTHER INDIVIDUAL ASSISTANCE PROGRAMS

In addition to the IHP, FEMA is authorized to implement, fund, and make available additional federal disaster assistance programs to families and individual survivors of presidentially declared disasters. A state or tribe may request these programs as part of its declaration request. These other programs are Disaster Case Management, Crisis Counseling Program, Disaster Legal Services, and Unemployment Assistance.

HAZARD MITIGATION ASSISTANCE

Hazard mitigation is any action taken to reduce or eliminate long-term risk to people and property from natural disasters. For example, hazard mitigation assistance could be used to buy out a community center located in a floodplain and convert the location to open space. It could be used to elevate or construct floodwalls around a police station. It could also be used to build tornado safe rooms for schools. FEMA provides hazard mitigation through three programs: the Hazard Mitigation Grant

295. Id. § 5189d.
296. Id. § 5183; 44 C.F.R. § 206.171 (2016).
Program (HMGP), Flood Mitigation Assistance (FMA), and Pre-Disaster Mitigation Grants (PDM). Together, these programs provide significant opportunities to reduce or eliminate potential losses to state, tribe, and local assets, promote individual and community safety and resilience, and promote community vitality after an incident.

Much of what was provided earlier in the discussion of the Public Assistance Program applies to hazard mitigation assistance. Both are subject to the Federal Uniform Administrative Requirements (i.e., the requirements discussed in the section titled “How Much Is Eligible: The Costs” apply). Also, both are subject to the same environmental and historic preservation requirements, and the HMGP is also eligible for management costs under 44 C.F.R. part 207.

As the definitions section of the Stafford Act applies generally to all programs authorized by the act, the definitions for “state,” “local government,” “private nonprofit,” and so on, are the same for public assistance, PDM, and HMGP. HMGP even applies public assistance regulations when determining eligible private nonprofits. Similarly, insurance requirements and the prohibition on duplication of assistance apply to public assistance, PDM, and HMGP. Topics previously discussed in this chapter are not restated here.

How to Apply

Hazard mitigation grants are awarded to states and tribes. Local governments, tribes, state agencies, tribal agencies, and private nonprofits (for HMGP only) may apply as subrecipients through the state or tribe. Although eligible applicants can apply for

301. Id. § 4104c.
302. Id. § 5133.
303. See id. § 5123; see PAPPG, supra note 58, at 10 (providing more information regarding the eligibility of federally recognized Indian tribal governments).
305. HMAG, supra note 50, 70–73; HMA EHP Resource, supra note 210; 44 C.F.R. § 207.3 (2016). For FMA, management costs are eligible pursuant to 44 C.F.R. § 79.8(a)(1), and for PDM pursuant to HMAG, supra note 50, at 41–42, 54–55.
307. 44 C.F.R. § 206.434(a) (2016); HMAG, supra note 50, at 104.
309. HMAG, supra note 50, at 25; see also FEMA Job Aid, Federally-Recognized Tribes and Hazard Mitigation Grant Program—Option to Submit as an Applicant or Subapplicant, 1 (2017).
funding on behalf of individuals and businesses, individuals and businesses themselves may not apply for hazard mitigation assistance from FEMA.

The application consists of a scoping narrative, which describes the proposed activity and includes a statement of work, a schedule, and a cost estimate. The scoping narrative stipulates the deliverables, identifies the tasks required to complete the proposed activity, and defines the tasks to be accomplished. Additional information may be required for property acquisition or relocation for open space, wildfire mitigation, safe rooms, mitigation reconstruction, structural elevation, and flood risk reduction projects. The scoping narrative, if approved, will become part of the conditions of the award.\textsuperscript{310} If the applicant seeks management costs (available for HMGP only), they must be requested in the cost estimate.\textsuperscript{311}

Applications are first submitted to the state or tribe, who will review and prioritize submissions based on criteria that align with its mitigation plan, available funding, and project type. If the project is accepted, the state or tribe will submit it to FEMA for an eligibility determination based on cost-effectiveness, technical feasibility and effectiveness, mitigation planning, and environmental planning and historic preservation considerations.\textsuperscript{312} FEMA then selects eligible subapplications based on the priorities set by the applicant or program priorities, if applicable.\textsuperscript{313}

FEMA may only approve mitigation measures that are cost effective or involve the acquisition of structures that are "substantially damaged" and located in a riverine SFHA on a preliminary or effective Flood Insurance Rate Map (FIRM).\textsuperscript{314} The determination of cost-effectiveness is typically demonstrated by the calculation of a benefit-cost ratio, dividing total annualized project benefits by total annualized project costs. Projects whose benefits exceed their costs are cost effective.

Although the applications are similar, if an applicant would like to have a project considered under multiple hazard mitigation programs, the applicant must submit the project to each program separately.\textsuperscript{315}

**HMA Considerations for States, Tribes, and Local Governments**

Attorneys should ensure their clients have a currently approved mitigation plan, and if appropriate, participate in the National Flood Insurance Program (NFIP). Like the Public Assistance Program, a state or tribe must have a FEMA-approved, standard or

\textsuperscript{310}. HMAG, \textit{supra} note 50, at 58–64.
\textsuperscript{311}. 44 C.F.R. § 207.7 (2016); HMAG, \textit{supra} note 50, at 60, 102.
\textsuperscript{312}. HMAG, \textit{supra} note 50, at 6, 74–78.
\textsuperscript{313}. \textit{Id.}, at 77.
\textsuperscript{315}. HMAG, \textit{supra} note 50, at 55.
enhanced, mitigation plan to receive hazard mitigation assistance. However, unlike the Public Assistance Program, local governments and tribes applying as subrecipients must also have a mitigation plan to receive hazard mitigation assistance. A pre-disaster mitigation grant may be awarded to develop or revise a mitigation plan.

Similarly, failure to participate in the NFIP or properly insure a facility could jeopardize a community’s eligibility for mitigation assistance. Attorneys should be cognizant of the project’s location and flood insurance status. With the exception of projects to draft or revise mitigation plans, projects sited within the SFHA are only eligible if the jurisdiction in which the project is located participates in the NFIP. After implementation of the mitigation project, structures that remain in the SFHA must be insured under the NFIP for the life of the structure, regardless of transfer in ownership, in an amount at least equal to the project cost or to the maximum limit of coverage made available with respect to the property, whichever is less. FEMA policy provides required text that must be legally recorded in the land records to notify potential purchasers of this requirement.

**Hazard Mitigation Grant Program (HMGP)**

HMGP funding allows property owners to implement cost effective mitigation measures after a disaster to substantially reduce the risk of future damage, hardship, loss, or suffering from future disasters. Although the projects do not need to have been damaged by a presidentially declared event, or even be located in the declared area, HMGP funding is only available when authorized under a presidential major disaster declaration in the areas specifically designated in the declaration. In their declaration requests, states and tribes typically request HMGP assistance statewide or tribe-wide, since its use is not limited to only the area of disaster impact.

HMGP is provided in the form of a grant, the amount of which is based on the estimated total federal Stafford Act assistance for the particular declaration excluding administrative costs, applied to a sliding scale formula. In addition, FEMA will reim-

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316. 44 C.F.R. § 201.4(a) (2016).
318. 44 C.F.R. § 61.6 (2016).
322. The maximum replacement cost values for residential properties is $250,000 and for non-residential properties is $500,000. 44 C.F.R. § 61.6 (2016).
323. See id. § 5170c.
324. See id. § 5170c.
325. The sliding scale provides for up to 15 percent of the first $2 billion of estimated aggregate amounts of disaster assistance, up to 10 percent for amounts between $2 billion and $10 billion, and up
burse the state/tribe for management costs incurred (such as the cost to prepare the grant application), up to 4.89 percent of the federal share of projected eligible program costs.\footnote{324}{See 44 C.F.R. pt. 207 (2016). See infra Management Costs.}

A state/tribe will have an idea of the maximum amount of their HMGP funds within 35 days of the declaration. At that time, FEMA will provide an estimate of the maximum HMGP amount available, and will adjust that estimate until it locks in when the state/tribe is no longer allowed to identify new projects—12 months after the disaster.\footnote{325}{44 C.F.R. § 206.436(d) (2016); HMAG, supra note 50, at 100–01. FEMA may allow adjustments beyond 12 months in rare circumstances following a catastrophic disaster. Id.}

Between the initial estimate and 12-month lock in, FEMA will obligate up to 75 percent of the current estimate.\footnote{326}{Id. § 206.436(d)–(e).}

HMGP grants are subject to the cost-share rate established in the presidential declaration, as recorded in the FEMA-State or FEMA-Tribal Agreement.\footnote{327}{Id. § 206.434(b).}

Before a state or tribe can receive HMGP funds, they must have a state or tribe administrative plan, which is a procedural guide that details how the recipient will administer the program.\footnote{328}{Id. §§ 206.433(d), 206.437(a), (d).}

The administrative plan may become an annex or chapter to the recipient’s overall emergency response and operations plan or comprehensive mitigation program strategy.\footnote{329}{Id. § 206.437(c); HMAG, supra note 50, at 96–99.}

Local and Indian tribal governments applying for subgrants must have an approved local or tribal mitigation plan.\footnote{330}{44 C.F.R. § 206.434(b) (2016). An exemption to this requirement may be available in extraordinary circumstances. Id.}

HMGP applications must be submitted to FEMA within 12 months of the date of the declaration, with possible extensions of up to 180 days.\footnote{331}{Id. § 206.436(d)–(e).}

Work must be completed no later than 36 months from the close of the application period.

HMGP funds can be used for projects of “any nature that will result in protection to public or private property.”\footnote{332}{Id. § 206.434(d).} These include, but are not limited to, structural hazard control or protection projects, construction activities that will result in protection from hazards, retrofitting of facilities, property acquisition or relocation for open

to 75 percent for amounts between $10 billion and $35.333 billion. 44 CFR § 206.432(a)–(b) (2016). For states and tribes with enhanced plans, the eligible assistance increases to up to 20 percent for estimated aggregate amounts of disaster assistance not to exceed $35.333 billion. 44 CFR § 206.432(a)–(b) (2016); 42 U.S.C. § 5170c(a) (2016).
space, and the development or improvement of warning systems. Also, up to 7 percent of a state or tribe’s grant can be used for planning.333

Unlike mitigation assistance provided under the Public Assistance Program, which is only available to mitigate the damaged elements of a facility, HMGP funds may be used for undamaged facilities. Communities should consider integrating public assistance mitigation projects and hazard mitigation assistance projects whenever possible. For example, a school may have two wings. Wing A incurred flood damage, but Wing B did not. If desired, the community could elevate the entire school while repairing Wing A. Wing A could be elevated and repaired using public assistance grant funds, and Wing B could be elevated using HMGP funds.

Frequently, states and tribes have long lists of mitigation projects competing for the limited HMGP funds. Attorneys can increase their clients’ likelihood of approval by clearly articulating the risk and problem that will be alleviated by the project. Application packages should explain the benefit to the community and show broad community support. In addition, the package should “frontload” program eligibility requirements, such as environmental and historic preservation, cost-effectiveness, and impact on floodplains, in the project scoping and overall decision-making process.334

Traditionally, FEMA reviews and approves all applications and modifications. Under the Program Administration by States Pilot Program, recipients who elect to participate may conduct agreed-upon reviews like the Benefit Cost Analysis without seeking approval from FEMA. Additionally, participating recipients could have increased control of changes to statements of work, cost overruns and underruns, reimbursement claims to subrecipient communities, and local mitigation plans.335

**Flood Mitigation Assistance (FMA)**

Unlike the other programs discussed herein, FMA is authorized by the National Flood Insurance Act of 1968, not the Stafford Act.336 FMA funding is available to states, tribes, and local governments for flood hazard mitigation projects as well as plan development, but a local government must apply as a subrecipient through its state or tribe. The grant is subject to a cost share, which is typically 75 percent federal/25 percent nonfederal, but the federal share may be increased for repetitive loss and severe repetitive loss properties.337

333. *Id.*
FMA grants may only be awarded to a state or community once every five years, and are subject to financial caps. For example, the total amount of project grant funds that may be provided to any state, including all communities located in the state, will not exceed $20,000,000 during any five-year period. However, that limit may be waived by FEMA in any five-year period in which a presidential major disaster or emergency for flood conditions is declared in the state. Applications for FMA may be submitted using the mitigation eGrants system on the FEMA grants portal during the annual application period, which follows a notice of funding opportunity announcement posted to www.grants.gov. Except for planning grants, work must not have begun—projects involving any activities that have already been initiated or completed are not eligible.

Subapplicants for FMA assistance must be participating in the NFIP to be eligible, and properties must be insured by the NFIP to be eligible. After award, flood insurance must be maintained for the life of the mitigated structure.

Pre-disaster Mitigation Grants (PDM)

PDM provides grants to help states, territories, tribes, and local governments implement a pre-disaster natural hazard mitigation program to reduce overall risk to the population and structures from future hazard events. It can be used for cost-effective mitigation projects and planning activities that are designed to reduce injuries, loss of life, and damage or destruction of property.

The amount of funds distributed for PDM varies, as it is subject to annual congressional appropriation. The grant is subject to a cost share rate that is typically 75 percent federal/25 percent nonfederal, but small impoverished communities may be

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339. Id.
341. 44 C.F.R. § 79.6(c)(2) (2016).
342. Id. §§ 79.2(c), 79.6(a), 79.6(c)(2).
343. HMAG, supra note 50, at 49.
eligible for up to a 90 percent federal cost share. Applications must be submitted using the mitigation eGrants system on the FEMA Grants Portal during the annual application period, which follows a notice of funding opportunity announcement posted to www.grants.gov.

Local governments may be subrecipients of PDM, and like FMA assistance, must apply to their applicant state, tribe, or territory for consideration. Only one application will be accepted from each state, tribe, or territory. Each application may have multiple sub-applications, including one management cost sub-application for applicant management costs. The number of sub-applications is generally limited, with the acceptable number identified in the annual notice of funding opportunity.

CLOSEOUT, AUDITS, THE INSPECTOR GENERAL, AND RECOVERY OF FUNDS

Public assistance and hazard mitigation assistance are subject to closeout requirements upon project completion. Both the recipient and subrecipient must provide documentation to show that:

› The approved scope of the grant was completed;
› All obligated funds were liquidated in a manner consistent with the approved grant award;
› All financial, performance, and other reports required by the terms and conditions of the grant award are submitted not later than 90 calendar days after the end date of the period of performance;
› All balances of unobligated cash paid in advance, and not authorized to be retained by the non-federal entity for use in other projects, were refunded to the grantor; and
› Any real and personal property acquired with federal funds or received from the Federal Government is accounted for in accordance with 2 C.F.R. §§ 200.310, 200.316 and 200.329.

In addition, all FEMA disaster assistance is subject to audit by the DHS Office of the Inspector General (OIG). The audits are conducted mainly to determine

348. See 42 U.S.C. § 5161 (2012); 44 C.F.R. §§ 79.9, 204.64, 204.116, 206.207, 206.438(c), 207.8 (2016).
whether the recipient and/or subrecipient expended and accounted for FEMA funds according to federal regulations and FEMA guidelines.\textsuperscript{349}

Audits may occur at any time, before or after closeout, but are initiated within the documentation-retention periods for the applicable program.\textsuperscript{350} IHP recipients are required to retain receipts or bills for three years to demonstrate how all of the funds received were used to meet their eligible disaster-related need.\textsuperscript{351} Public assistance and hazard mitigation assistance recipients and subrecipients must maintain documentation supporting their expenditures for “three years after the date of transmission of the final expenditure report.”\textsuperscript{352} The recipient and subrecipient’s “books, documents, papers, and records . . . relating to any activity undertaken or funded” under the Stafford Act must be available for inspection.\textsuperscript{353} Any funds improperly received, spent for ineligible purposes, or not properly documented are subject to recovery by FEMA, through de-obligation, administrative offset, or recoupment.\textsuperscript{354}

For state, tribe, and local government audits, at the conclusion of an audit, the OIG auditors present the results of their draft final audit to FEMA, state/tribe officials, and the subrecipient, requesting comments on the audit findings. The OIG auditors then submit their final audit report, including proposed recommendations for action, to the appropriate FEMA official, typically the regional administrator. Even if the OIG auditors recommend that FEMA de-obligate significant portions of the disaster assistance grant and recover funds from the recipient, the recipient cannot yet appeal the OIG audit report. The final agency decision is by FEMA/DHS; appeal is only ripe if the FEMA official implements the OIG recommendation.\textsuperscript{355}

FEMA’s authority to recover funds from states, tribes, and local governments is, however, limited. FEMA is prohibited from directly recovering payments unless, within three years after the recipient submits its final expenditure report for the recipient’s or subrecipient’s work for the disaster or emergency, FEMA notifies the recipient of its intent to recover the payments.\textsuperscript{356} Even if notice is not given within that three-
year period, FEMA has indicated that it will still pursue administrative offset (a reduction in future federal payments to the recipient), as required by the Debt Collection Improvement Act of 1996 (as amended), unless (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.\(^{357}\)

As with all federal programs, knowingly filing false, fictitious, or fraudulent claims with respect to federal assistance is subject to the criminal penalties in 18 U.S.C. section 287.

FEMA, as grantor, has a privity relationship with the recipient, state, or tribe. The state or tribe then has a privity relationship with its subrecipients. Accordingly, when FEMA recovers public assistance or hazard mitigation assistance, even if the recovery is associated with a subgrant, it recovers those funds from the state or tribe. Attorneys representing states and tribes who provide subgrants to other entities should review their state laws and subgrant agreements for their authority to recover funds from the subrecipient after a FEMA de-obligation or administrative offset.

### APPEALS, ARBITRATION, AND JUDICIAL REVIEW

The Stafford Act provides for administrative appeals from disaster-assistance decisions as follows: "[a]ny decision regarding eligibility for, from, or amount of assistance under this title may be appealed within 60 days after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance."\(^{358}\)

The 60-day filing requirement is a statutory requirement. As a result, FEMA may not waive or extend this deadline, so it is very important to comply with this requirement and to document compliance. Record the date on which the applicant is notified of the assistance decision, and file the appeal within 60 days from that date. For subaward applicants or recipients, official notification of assistance decisions is received from the state or tribe, since the state or tribe acts as the administrator of all FEMA disaster assistance subawards. To be appealable, there must be an actual decision: appellants cannot appeal from oral guidance or from recommendations in an inspector general’s audit report.

Effective appeals comprehend and address the rationale for denial of assistance, are understandable to non-experts, and include copies of relevant documents to support the appellant’s position.

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\(^{357}\) Id.

\(^{358}\) 42 U.S.C. § 5189a(a) (2012).
Public Assistance

With one exception, all public assistance applicants are subject to the broad appeal authority quoted earlier, and the full spectrum of appeal options. The one exception applies to applicants who received grants based on capped estimates through the Alternative Procedures Permanent Work pilot program. Pilot program recipients may appeal, just not solely for additional costs on fixed subgrants.

FEMA’s regulations provide for two levels of public assistance appeal. The “first appeal” is filed with the state for review before the state forwards the appeal, with the state’s recommendation, to the appropriate FEMA regional administrator for consideration. The only regulatory requirements governing the substance of a FEMA appeal are that the appeal “shall contain documented justification supporting the appellant’s position, specifying the monetary figure in dispute and the provisions in federal law, regulation, or policy with which the appellant believes the initial action was inconsistent.” Applicants are free, and even encouraged, to provide new information on first appeal.

An applicant dissatisfied from the first appeal decision can then file a “second appeal.” The second appeal is also submitted to the state, which then transmits the appeal and the state’s recommendation to FEMA for a decision by the FEMA assistant administrator for the recovery directorate. The administrative record closes following a first appeal decision—appellants are not allowed to provide additional information in a second appeal, unless requested by FEMA.

For certain public assistance determinations related to Hurricanes Katrina and Rita, or those that were subject to the Dispute Resolution Pilot Program, applicants have the choice of binding arbitration in lieu of second appeal. Katrina/Rita

359. Id.
362. Id. § 206.206(a).
367. Id. § 206.210. The Dispute Resolution Pilot Program began August 16, 2013, and ended December 31, 2015. No cases were ever filed.
Representing States, Tribes, and Local Governments Before, During, and After a Presidentially Declared Disaster

An applicant dissatisfied with FEMA’s second appeal decision has a daunting task in seeking judicial review, and an even steeper climb seeking judicial review of an arbitration decision. First, the United States and its agencies are immune from suit except to the extent it waives sovereign immunity and unequivocally expresses its consent to be sued. Second, 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, any discretionary function or duty” of a federal agency or federal employee carrying out the act’s provisions. This language has been construed by courts to deny review of discretionary Stafford Act assistance determinations, absent constitutional violations. Similarly, courts have ruled that FEMA’s decisions involving the allocation and deployment of limited governmental resources (i.e., grant funds) are the type of administrative judgment that the discretionary function exception was designed to immunize from suit. On the other hand, courts have agreed to review FEMA assistance decisions on the merits where FEMA exercised its discretion to approve and pay out funds under the Public Assistance Program, and then sought return of the funds after they were spent.

**Individuals and Households Program**

Individuals and households may appeal any determination of eligibility for assistance within 60 days after the date FEMA notified the applicant of the award or denial of assistance. Unless the appeal relates to other needs assistance from a state- or

369. A decision of the majority of the panel constitutes a final decision, which is not subject to judicial review except as permitted by 9 U.S.C. § 10 (2012), 44 C.F.R. § 206.210(p)(3) (2016).
373. United Power Assoc. v. FEMA, 2000 WL 33339635, at *2–3 (citing Graham v. FEMA, 149 F.3d 997 (9th Cir. 1998)).
374. See Pub. Util. Dist. No. 1 v. FEMA, 371 F.3d 701 (9th Cir. 2004); Haw. v. FEMA, 294 F.3d 1152 (9th Cir. 2002). See also 42 U.S.C. § 5205(c) (2012) (outlining restrictions on retroactive disallowance).
tribe-managed program, the appeal is to be submitted to the applicable FEMA regional administrator. If it relates to state- or tribe-managed ONA, the appeal is submitted to the state or tribe. The regional administrator will issue a final appeal determination within 90 days.

**Hazard Mitigation Assistance**

The same statutory appeal language applies to HMGP as to public assistance.\(^{376}\) Similarly, appeals follow a two-level process. The regional administrator will consider first appeals and the assistant administrator for the mitigation directorate will determine second appeals.\(^{377}\)

For PDM and FMA, FEMA may notify applicants that it will consider additional information in support of a subapplication.\(^{378}\) However, FEMA will only reconsider a determination of a subapplication evaluated on a competitive basis when there is an indication of a substantive technical or procedural error by FEMA. In that case, only information provided in the submitted subapplication will be reconsidered.\(^{379}\) FEMA will reconsider determinations of noncompliance, additional award conditions, or its decision to terminate a federal award.\(^{380}\)

Like public assistance, applicants dissatisfied with a final appeal decision are limited in their ability to seek judicial review, as the HMA programs are discretionary programs.

**CONCLUSION**

States, tribes, and local governments require capable and constructive legal work to minimize the cost and impact of damaging natural or man-made events. This work should begin before an event looms on the horizon, by:

- Reviewing or drafting mutual aid agreements with other states, tribes or communities;
- Encouraging contracting strategies that can be used in a disaster environment—including pre-identified (and properly competed) contracts that may be used immediately after an event to assist with life-saving measures such as evacuation, emergency medical, sheltering, or debris removal (after the

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377. Id., § 206.440; HMAG, supra note 50, at 113.
378. See generally HMAG, supra note 50, at 78.
379. Id., at 77.
380. Id., at 83.
emergency phase of the event has passed, these contracts will likely need to be recompeted to ensure proper scope and reasonable cost;

❯ Familiarizing yourself with the FSA or FTA and reviewing your client’s sub-grant agreement template, as appropriate;

❯ Reviewing procurement procedures to ensure they comply with 2 C.F.R. part 200.

❯ Reviewing and/or drafting building and zoning codes to encourage mitigation and prevention, and support disaster response and recovery;

❯ Reviewing and/or drafting evacuation and sheltering plans (do they include seniors; children; individuals with disabilities, and others with access and functional needs; those from religious, racial, and ethnically diverse backgrounds; people with limited English proficiency; people with service animals and pets?);

❯ Reviewing and/or drafting plans for debris removal, housing solutions, medical care, infrastructure repair/restoration (including mitigation and improvements to build back stronger), communication with the community; community service restoration; coordination/collaboration with the private sector and voluntary organizations;

❯ Reviewing and/or drafting emergency procedures, requirements, regulations, or ordinances necessary to implement post-event recovery plans (e.g., hazardous materials and other debris disposal, authorization for mobile home park construction or placement of mobile homes, etc.);

❯ Reviewing the state, tribe, or community’s hazard mitigation plan;

❯ Reviewing and/or drafting a continuity of operations plan, which may include devolution leadership, operational coordination, and decision-making structures;

❯ Ensuring information sharing laws accommodate disaster-related coordination needs;

❯ Identifying, familiarizing one’s self with, and, if applicable, revising the applicable state, tribal, and local emergency operations plans, laws, rules, and regulations; and

❯ Ensuring the client’s resources are properly insured:

   ○ Determine if the facility received a prior public assistance award. If the facility received a prior public assistance award, it must be insured for the type of incident that caused the damage, and for the amount of the prior public assistance grant, to be eligible for future public assistance awards.

   ○ Identify the facility’s flood risk, whether it is insured for flood and whether the community participates in the National Flood Insurance Program.

   ○ If your client is self insured, check to be sure the self-insurance plan is properly documented and funded.
Once an event occurs, attorneys can help their clients properly follow and document the procedures required by FEMA to ensure communities maximize the federal funding for which a community is eligible. Gathering all supporting documentation, communicating the ways that projects meet eligibility requirements, and presenting information in a clear and concise manner can save a client invaluable time and resources.

Finally, attorneys need to know who to call for help with legal issues unique to the disaster environment. Developing a legal specialist in emergency management law will provide a knowledgeable source of guidance in times of crisis. Developing a working relationship with counsel in other jurisdictions including the state emergency management agency, and FEMA regional counsel is also important. FEMA has ten regions, each staffed with at least two attorneys. Although they may not provide legal advice to anyone other than FEMA, regional counsel in the applicant’s assigned FEMA region can be a resource for information about FEMA programs and federal resources.