

PUBLICATION

The Disaster Recovery Reform Act of 2018: Key Provisions Affecting FEMA Funding

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As Hurricane Michael continues to have a devastating impact in the Southeast, all of us at Baker Donelson first and foremost extend our thoughts to those affected by this historic storm. With the immediate dangers subsiding, but the full scope of the aftermath largely unknown, parts of the region now face a long and difficult recovery period. State and local governments, eligible private non-profit organizations, and entities that assist these stakeholders in applying for Federal Emergency Management Agency (FEMA) assistance are encouraged to visit Baker Donelson's Disaster Recovery and Government Services webpage for more information about our Disaster Recovery and Government Services practice, including critical checklists on disaster procurement and contracting. In addition, they should be aware of recently enacted changes to assistance application processes and funding.

Last week, Congress passed and the President signed into law the Disaster Recovery Reform Act of 2018 (DRRA). The DRRA, included as part of the Federal Aviation Administration Reauthorization Act of 2018, is being touted as the largest single piece of legislation to impact disaster response and recovery in decades. It touches multiple funding programs and responsible federal agencies, but includes major changes to processes and grant funding managed primarily by FEMA. Through the DRRA, Congress provides greater flexibility for applicants to build what they need rather than simply restore or replace what was damaged. It also mandates financial support for greater resiliency in rebuilding and mitigation and aims to improve expediency of the project process and dispute resolution.

Amendments made to the Stafford Act apply retroactively to disasters declared on or after August 1, 2017, but some elements reach as far back as 2004. The following summarizes key provisions applicable to FEMA's Public Assistance (PA) program:

- **Removal of Alternate Project Funding Reduction:** Previously, the Stafford Act provided that applicants that used FEMA funding for alternate projects (in lieu of repairing, restoring, reconstructing, or replacing the damaged facility) had to take a haircut on the federal share of the costs – states and local governments could only get 90 percent of the federal share, while private non-profits could get 75 percent. The DRRA amends the Stafford Act to remove the reduction in funding. An applicant can now choose to pursue an alternate project without facing a reduction in otherwise eligible assistance.
- **Relief from "Stacked" Mandatory National Flood Insurance Program (NFIP) Reductions:** Previously, the Stafford Act provided that assistance to repair or replace any facility in a Special Flood Hazard Area that was not covered by flood insurance must be reduced by the lesser of (1) the value of the facility on the date of the disaster, or (2) the insurance proceeds that would have been payable had the building been insured to the maximum extent available under the NFIP. This reduction had been applied to each individual building in the case of multi-unit campuses, such as large educational or medical facilities. The DRRA amends this requirement so that it "shall not apply to more than one building of a multi-structure educational, law enforcement, correctional, fire, or medical campus." This amendment is temporary: it applies to disasters declared between January 1, 2016 and December

31, 2018.

- **No Mandatory Use of Stafford Act Section 428 Alternative Procedures:** Stafford Act Section 428 provides that FEMA may implement alternative procedures to approve projects under the PA program. Under one such program, the Alternative Procedures Pilot Program for Permanent Work, FEMA and the applicant agree to a fixed cost estimate for a particular project, and the disaster assistance is capped by that fixed estimate. If the applicant's costs are below this cap, it can use excess funding for certain eligible purposes; if the costs exceed the cap, it may not request additional funding from FEMA. Participation is voluntary, but after Hurricanes Irma and Maria, applicants in Puerto Rico were required to opt into the program as a condition of assistance. The DRRRA confirms that the President may not condition the provision of federal assistance on participation in the alternative procedures allowed by Section 428. How this provision will be implemented in Puerto Rico remains unclear.
- **Estimates Under Section 428:** Significantly, the DRRRA also amends Section 428 to provide that fixed estimate grants made under the alternative procedures program are "presumed to be reasonable and eligible costs" (in the absence of fraud) once certified by a professionally licensed engineer and accepted by the FEMA Administrator.
- **Duplication of Benefits:** The Stafford Act contains a general prohibition against the receipt of benefits from more than one source for the same loss (a "duplication of benefits"). The prohibition applies to funding from any source, including insurance and through private party donations. The DRRRA amends the Stafford Act to permit the President to waive the general prohibition upon the request of a governor if doing so is in the public interest and will not result in waste, fraud, or abuse. This amendment applies to disasters declared between January 1, 2016 and December 31, 2021. It does not apply to work funded under Stafford Act Sections 406 or 408, but appears applicable primarily to debris removal and emergency protective measures, including rental assistance and sheltering programs funded under Section 403.
- **Management Costs:** Previously, the Stafford Act defined "management costs" as indirect and administrative expenses that are "not directly chargeable to a specific project." FEMA provides funding for management costs, according to a set percentage, to the state recipient which then determines how much, if any, will be passed through to subrecipients. Additionally, costs that are directly chargeable to a specific project – direct administrative costs – are reimbursed directly to subrecipients. The DRRRA simplifies this by grouping all into "management costs" and sets the following percentage rates for calculation of available funding:
 - FEMA's Hazard Mitigation Grant Program funding under Section 404: Up to 15 percent of the total amount of the grant award; of which up to 10 percent may be used by the recipient and 5 percent by the subrecipient.
 - FEMA's PA program including funding under Sections 403, 406, 407, and 502: Up to 12 percent of the total award under such sections; of which up to 7 percent may be used by the recipient and 5 percent by the subrecipient.

FEMA strongly advocated for this change as absolutely critical to allow state recipients and applicants to take on a greater share of the administrative burden of disaster grants.

- **Statute of Limitations on Recoupment of PA Under Stafford Act Section 705:** Stafford Act Section 705 contains a statute of limitations applicable to efforts by the federal government to recover

disaster assistance paid to a state or local government. FEMA had previously interpreted the clock as starting with the state's transmission to FEMA of the final expenditure report for *all* projects an applicant received under a declared disaster or emergency. This provision did little to protect applicants from late deobligations as this report is often submitted many years after an event – after the very last of an applicant's projects were closed out. The DRRRA amends the Stafford Act to instead start the clock on a project-by-project basis. FEMA is now prohibited from initiating any action to recover assistance after "the date that is 3 years after the date of transmission of the final expenditure report for project completion as certified by the grantee." Significantly, this amendment applies retroactively to disasters declared on or after January 1, 2004 and terminates any pending action that would now be prohibited under amended Section 705(a).

- **Right of Arbitration:** The DRRRA amends the Stafford Act to grant a right of arbitration to any applicant disputing a FEMA decision regarding the eligibility for or repayment of assistance where the amount in dispute is more than \$500,000, or more than \$100,000 for applicants in rural areas. Arbitrations will be conducted before the Civilian Board of Contract Appeals using a process similar to that previously open only to applicants impacted by Hurricanes Katrina and Rita in 2005. Arbitration may be requested at any time after FEMA issues a first appeal determination, as long as FEMA has not issued a decision on second appeal.
- **Increased Funding for Hazard Mitigation:** The DRRRA provides that, with respect to each major disaster, the President may set aside from the Disaster Relief Fund an amount equal to six percent of the estimated aggregate amount of the grants to be made under Sections 403, 406, 407, 408, 410, 416, and 428 in order to provide technical and financial assistance. At the rate and intensity of the occurrence of disaster events, this is likely to equate to billions of dollars in mitigation funding in a given year (including for the 2017 and 2018 seasons). Because the allocation is made by statute, there is no need for a separate legislative appropriation for these funds.
- **Codes and Standards:** Previously, the Stafford Act only required payment of eligible costs for the repair, restoration, reconstruction, or replacement of a facility based on its pre-disaster design and "in conformity with codes, specification, and standards...applicable at the time which the disaster occurred." Often, however, applicants found themselves having to rebuild to codes and standards applicable at the time the actual work was done, which differed from the codes and standards applicable at the time of the disaster. This resulted in significant costs for the applicant that were not eligible for reimbursement. The DRRRA amends the Stafford Act to fund work consistent with "the latest published editions or relevant consensus-based codes, specifications, and standards that incorporate the latest hazard-resistant designs and establish minimum acceptable criteria for the design, construction, and maintenance of residential structures and facilities that may be eligible for assistance under this Act for the purposes of protecting the health, safety, and general welfare of a facility's users against disasters." This amendment applies retroactively to "disasters declared on or after August 1, 2017, or disasters in which a cost estimate has not yet been finalized for a project, or for any project for which the finalized cost estimate is on appeal." It is not clear how this language will apply to codes and standards (such as setbacks and height restrictions) that are not based on making structures more resilient to disaster damage.
- **Closeout Incentives:** The FEMA Administrator is directed to develop incentives and/or penalties to motivate state, local, or tribal governments to close out expenditures and activities on a timely basis. The DRRRA is silent on what form these incentives or penalties may take, but the provision is to be implemented by regulation, which could take several years. The overall objective of this change is to improve closeout practices and expedite disaster program closeout. This provision demonstrates Congress's concern with FEMA's inability to close disasters in a timely manner.

As FEMA moves to implement these amendments, it will be forced to make substantial changes to existing policies. We anticipate major modifications to FEMA's Public Assistance Program and Policy Guide and other FEMA policy statements, such as FEMA's Recovery Policy on Stafford Act Section 705. We will be monitoring FEMA's issuance of new policy interpretations and issuing additional client alerts as these become available.

For more information on this or other matters involving FEMA or disaster recovery, please contact [Ernie Abbott](#), [Wendy Huff Ellard](#), [Michelle Zaltsberg](#), or any of the members of Baker Donelson's [Disaster Recovery and Government Services Team](#).