



Docket ID: FEMA-2016-0003

March 21, 2016

Administrator W. Craig Fugate
Federal Emergency Management Agency
U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

Dear Administrator Fugate,

The National Association of Counties (NACo) appreciates the opportunity to comment on the Federal Emergency Management Agency's (FEMA) Advanced Notice of Proposed Rulemaking (ANPRM) titled "Establishing a Deductible for FEMA's Public Assistance Program" and published on January 20, 2016. We commend the agency on its outreach on the proposal since its publication. NACo is the only national organization that represents America's 3,069 county governments; collectively, counties play a pivotal role in our nation's preparation for, response to, and recovery from natural disasters and are often the "first line of defense" when disasters strike. Given the importance of disaster recovery to county governments, we appreciate the opportunity to engage with FEMA on this proposal.

We have several concerns with the "disaster deductible" proposal as presented in the ANPRM:

- **The proposed deductible would potentially violate the Stafford Act's 75 percent federal contribution requirement:** the establishment through rulemaking of a deductible applicable to Public Assistance funds stemming from major disaster declarations would potentially violate the Robert T. Stafford Disaster Relief and Emergency Assistance Act's (the Stafford Act) requirement that the federal share of Public Assistance funds "shall be not less than 75 percent."
- **The current cost-sharing structure reflects Congressional intent, and problems outlined by FEMA are inevitable within threshold-based cost-sharing:** FEMA's rationale for the need for a deductible – that the current Public Assistance cost-sharing structure between federal, state and local governments is "somewhat at odds with the principle underlying the Stafford Act" – does not accurately reflect the financial contributions of state and local governments to the disaster recovery efforts of local communities. Perceived problems with the current cost-sharing structure, as highlighted in the ANPRM, are inevitable within threshold-based cost-sharing structures and, considered in context, are not at odds with Congress's intent.
- **Until FEMA moves away from its current reliance on per-capita damage indicators, changes to the Public Assistance cost-sharing structure would arbitrarily shift disaster recovery costs to state and local governments:** without ongoing comprehensive assessment of the capacity of various state and local governments to fund disaster recovery efforts, FEMA lacks the data needed to put forth proposals that aim to better reflect the core purpose of the Stafford Act's Public Assistance program – which is to provide federal assistance when a disaster is of such

severity and magnitude that effective response is beyond the capabilities of the state and affected local government. Without proper capacity assessment, proposals to change the current cost-sharing structure would likely lead to arbitrary shifts of additional disaster recovery costs to states and localities, which have less fiscal capacity and budgetary autonomy than the federal government.

For these reasons, which are elaborated upon below, NACo cannot support the proposed “disaster deductible” as outlined in the ANPRM. Moreover, we are concerned that, if implemented, the proposal would compromise the ability of state and local governments to aid communities in their efforts to recover from the most destructive of disasters – at a time when these disasters are increasing and becoming more costly due to factors largely outside the control of any level of government.

The proposed deductible would potentially violate the Stafford Act’s 75 percent federal contribution requirement

As stated in FEMA’s ANPRM, the Stafford Act “provides an orderly and continuing means of assistance by the Federal Government to State, Tribal, Territorial, and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters.”¹ Under the Stafford Act, the federal share of Public Assistance (PA) funds authorized by presidential disaster declarations “shall be not less than 75 percent.”²

Since the federal government’s established practice is to reimburse exactly 75 percent of state and local spending eligible for PA funds – i.e., the minimum amount allowable under federal law – FEMA’s establishment of a “disaster deductible” through the federal rulemaking process would potentially violate the Stafford Act. Such a violation might be avoided if the deductible were to apply only to the 25 percent state-local share of PA funds, thereby preserving the 75 percent federal share required by law. Application of the deductible in this manner would likely have the desired effect of incentivizing state and local mitigation activities.³

It is worth noting here that the statutory minimum federal share of 75 percent does not apply uniformly to federal assistance provided under the Stafford Act following presidential disaster declarations. In fact, Congress puts forth a statutory *maximum* of 75 percent for hazard mitigation funds authorized under the Stafford Act after major disaster declarations.⁴ This supports the notion that Congress intended for the federal government to fund the majority of PA-eligible activities following presidential disaster declarations.

Congress could reassess the federal/state-local cost share structure put forth under the Stafford Act and conclude that the 75 percent federal reimbursement minimum for PA funds should be decreased or altogether eliminated. Until Congress takes such action, however, proposals that would aim to

¹ <https://www.federalregister.gov/articles/2016/01/20/2016-00997/establishing-a-deductible-for-femas-public-assistance-program>

² 42 U.S.C. 5172 (b)(1)

³ Another means of avoiding violation of the Stafford Act while implementing a deductible would be to require state and local governments to satisfy the deductible as a condition of presidential disaster declarations, but FEMA states in its ANPRM that the proposed deductible would apply following a declaration, and a pre-declaration deductible would likely present other legal issues.

⁴ 42 U.S.C. 5170c (a)

effectuate a similar change through the rulemaking process run the risk of violating the statute. The disaster deductible is one such proposal.

The current cost-sharing structure reflects Congressional intent, and problems outlined by FEMA are inherent in threshold-based cost-sharing

In the ANPRM, FEMA suggests that a deductible is needed because the current federal/state-local cost-sharing structure applicable to PA funds is “somewhat at odds with the principle underlying the Stafford Act that there is a level of disaster activity which the affected State, Tribal, or Territorial government can handle on its own.” In support of this argument, FEMA proposes the following example:

For simplicity, consider a State that is subject to the \$1 million minimum threshold. An event that causes \$999,999 in Public Assistance-eligible damage will most likely not warrant a major disaster declaration and the State and affected Tribal and local governments will need to fund all \$999,999 in disaster costs without any supplemental Federal assistance. However, an incident that causes exactly \$1 million in damage in the same State likely will result in a major disaster declaration. Once declared, FEMA will reimburse \$750,000 under the typical 75% Federal cost share arrangement and the State will only need to fund \$250,000. FEMA is arguably supplanting \$750,000 that the State should be fully capable to handle itself.

We would argue that this example paints an incomplete picture of the current PA disaster recovery cost-sharing structure under the Stafford Act and is not persuasive justification for proposed changes to that structure. Any cost-sharing mechanism triggered by a specific threshold will produce isolated hypothetical scenarios that in practice would seem suboptimal.⁵ In the example put forth by FEMA, the cost-sharing outcome might be perceived as suboptimal because the state-local share would be significantly greater if the disaster had been slightly less damaging.⁶ This is a problem inherent to threshold based cost-sharing, and scenarios can be created to demonstrate other problems:

Consider a state that is subject to the \$1 million minimum threshold. An event that causes less than \$1m in Public Assistance-eligible damage will most likely not warrant a major disaster declaration and the State and affected Tribal and local governments will need to fund up to \$999,999 in disaster costs without any supplemental Federal assistance. In a given year, a State and affected Tribal and local governments could suffer five or ten of these disasters, and conceivably fund up to \$9,999,990 in disaster costs without any supplemental federal assistance.

Given that the purpose of the Stafford Act is to “provide an orderly and continuing means of assistance by the Federal Government to State, Tribal, Territorial, and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters,” this outcome would seem to be suboptimal, to say the least. But this problem is, again, part and parcel of threshold-based cost-sharing structures, and potentially a more troubling and likely problem than FEMA’s hypothetical scenario, because the vast majority of natural disasters that occur in our country do not in practice meet the presidential declaration threshold. According to FEMA, “a great many disasters are handled

⁵ NACo appreciates that the Stafford Act prohibits reliance on arithmetic formulas in assessing eligibility for PA funds and that FEMA takes other factors into consideration.

⁶ It is worth noting here that in the scenario put forth by FEMA, the cost-share outcome is precisely as Congress intended under the Stafford Act. If the outcome is “at odds” with the Stafford Act, the legislation is, in a sense, at odds with itself.

successfully at the State and local levels with the assistance of voluntary agencies and private agencies. Although the exact number of disasters successfully handled without requests for Federal assistance is not known, it is estimated at 3,500 to 3,700 annually.”⁷

Meanwhile, presidential disaster declarations occurred only an average of 35 times per year between 1953 and 2014, and never exceeded 99 declarations in a single year during that period.⁸ In other words, for every 100 disasters that strike local communities, one is declared a major disaster eligible for federal assistance.

In this context, the statutory requirement that the federal government provide the majority of funding for PA-eligible activities following major disaster declarations seems very much in line with the Stafford Act’s purpose of providing “an orderly and continuing means of assistance by the Federal Government to State, Tribal, Territorial, and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters.”

Until FEMA moves away from its current reliance on per-capita damage indicators, changes to the Public Assistance cost-sharing structure would arbitrarily shift disaster recovery costs to state and local governments

In 2012, the Government Accountability Office (GAO) published a report titled “Federal Disaster Assistance: Improved Criteria Needed to Assess a Jurisdiction’s Capability to Respond and Recover on Its Own.”⁹ In this report, GAO states that:

According to FEMA and state emergency management officials, FEMA has primarily relied on a single indicator, the statewide per capita damage indicator, to determine whether to recommend that a jurisdiction receive PA funding. In fiscal year 2012, the per capita indicator is \$1.35. Thus, a state with 10 million people would generally have to incur \$13.5 million in estimated eligible disaster damages to public structures for FEMA to recommend that a disaster declaration for PA is warranted.

GAO goes on to state that this indicator has remained artificially low for a number of years, and that if it had been indexed to inflation or to per capita personal income, it would be double or triple its current level. A higher indicator level would result in proportionally fewer presidential disaster declarations; GAO estimates that, had the above-mentioned indexing taken place, major disaster declarations would have decreased by 25-44 percent in the period between 1986 and 2012.

Two or three-fold increases to the per capita damage indicator currently relied on by FEMA in its recommendations on presidential disaster declarations would unquestionably be detrimental to local communities attempting to recover from disasters. Moreover, such increases would not serve the purpose of the Stafford Act’s assistance programs – which is “to provide federal assistance when a disaster is of such severity and magnitude that effective response is beyond the capabilities of the state and affected local government”¹⁰ – because the existing indicator is not a qualitative assessment of state or local capacity to recover from disasters. Some states and localities that meet the indicator after a disaster may have the capacity to fund recovery efforts on their own, while others that do not meet

⁷ A Citizen’s Guide to Disaster Recovery <https://training.fema.gov/emiweb/downloads/is7complete.pdf>

⁸ Stafford Act Declarations 1953-2014: Trends, Analyses, and Implications for Congress
<https://www.fas.org/sgp/crs/homesec/R42702.pdf>

⁹ <http://www.gao.gov/assets/650/648162.pdf>

¹⁰ 42 U.S.C. 5170 (a)

the indicator may be unable to fund recovery efforts. The indicator allows these outcomes because it focuses almost exclusively on quantitative population metrics and is unable, for example, to distinguish between two similarly-populated jurisdictions with vastly different fiscal capacities.¹¹

A disaster deductible would similarly fail to serve the “beyond the capabilities of [states and local governments]” purpose of the Stafford Act so long as the presidential disaster deductible process continues to rely in whole or in significant part on a per capita damage indicator. Without a means of comprehensively and accurately assessing the fiscal capacity of state and local governments in disaster recovery, FEMA does not have the data needed to put forth proposals that would alter the current PA cost-sharing structure, and any such proposals will likely produce arbitrary shifts of federal disaster recovery costs to state and local governments.

This is especially problematic because state and local governments lack the fiscal capacity of the federal government and are often under budgetary constraints that prevent them from appropriating more state or local funds to disaster recovery. Moreover, local governments are often prohibited from raising additional revenue through taxation. As a result of these factors, counties are routinely faced with difficult budgetary choices that require them to forego needed services for our residents. We are concerned that the establishment of a disaster deductible would worsen this situation by requiring greater state and local contribution to community disaster recovery efforts.

Conclusion

After much discussion and reflection, NACo cannot support FEMA’s disaster deductible proposal as outlined in the ANPRM because the proposal would potentially violate the Stafford Act’s 75 percent minimum federal-share requirement, rests upon flawed arguments about the current federal/state-local cost-sharing system, and would likely result in unjustified shifting of disaster recovery costs to state and local governments, which are less equipped to bear these costs than the federal government. Taken together, we are concerned that proceeding with the proposal would ultimately compromise our nation’s ability to recover from disasters.

NACo appreciates the opportunity to respond to FEMA’s ANPRM and looks forward to continued engagement on the common goal of sustainably keeping our communities safe from disasters and helping these communities return quickly and efficiently to normal life after disasters strike.

Sincerely,



Matt Chase
Executive Director

¹¹ While FEMA has the authority to take qualitative factors into consideration when making major disaster declaration recommendations, experience has demonstrated that the agency relies heavily on the per capita damage indicator. According to the GAO report mentioned earlier, 244 of 246 disaster declaration requests between 2008 and 2011 had PA damage estimates that met or exceeded the PA indicator. The report states that the indicator is “essentially being used as an eligibility threshold.”