

Disaster Recovery, Hazard Mitigation, And the Stafford Act

- The American Public Power Association (APPA) supports a safe harbor from *Federal Acquisition Regulation* (FAR) requirements for debris removal and emergency protective measures eligible for Federal Emergency Management Administration (FEMA) grants. Under such a proposal, compliance with state, tribal, or local government procurement requirements that promote full and open competition would constitute compliance with federal procurement requirements for purposes of the Stafford Act.
- APPA supports legislation that would allow certain hazard mitigation projects that commence prior to FEMA approval to qualify for hazard mitigation funding. Only land acquisitions and projects that are “categorically exempt” under the National Environmental Policy Act would qualify for this exemption.
- APPA supports legislation requiring FEMA to pay interest to public power utilities that take out loans to cover costs that are eventually repaid by FEMA.
- APPA will also work to ensure that legitimate emergency protective measures taken by public power utilities in response to the COVID-19 pandemic are reimbursed by FEMA.
- APPA strongly opposes FEMA’s rule to allow itself to pause the three-year limit on attempts to “claw back” public assistance payments to public power utilities.

Background

The federal government provides assistance to state and local governments for major disasters or emergencies that disrupt the normal functioning of governments and communities. This public assistance is primarily provided and overseen by the Federal Emergency Management Agency (FEMA) under authorization of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (P.L. 93-288, as amended). The Stafford Act also authorizes FEMA to assist in planning for disasters and emergencies and for disaster mitigation planning, design, and investments.

Categories of assistance that public power utilities generally receive include debris removal, emergency protective measures, and utility restoration and reconstruction. Public power utilities also receive assistance in planning and design for hazard mitigation and in making disaster mitigation investments.

In some instances, FEMA will decide that public assistance was not appropriate after payment has already been made. In those instances, it can seek to recover (or “deobligate”) such payments either directly or through an administrative offset of future federal payments. Deobligation can result because FEMA has discovered that the type of project is not appropriate, that the payment was duplicative, or quite often, because the recipient failed to follow the FAR, a 1,917-page document of rules for making purchases with assistance funds. In fact, the Department of Homeland Security’s Office of Inspector General has said that if procurement requirements are not followed, FEMA can and should seek deobligation “even if costs were otherwise reasonable, and the grantee or sub-grantee otherwise accomplished the purpose of the grant” (OIG-16-126-D, Sept. 2, 2016).

The Disaster Assistance Improvement Act of 2018 (P.L. 115-254) provides that FEMA may only seek to deobligate funds if it has notified the recipient of its intent to do so within three years of the transmission of the final expenditure report for the specific project. However, FEMA upended the intent of this three-year limit in a rule published on October 11, 2020, and reaffirmed on June 2, 2021, by allowing itself to pause the new statute of limitations whenever it has additional questions about a project's final report.

FEMA and the Pandemic

All 50 states and four territories remain under a presidentially declared emergency and disaster (effective January 20, 2020) as a result of the COVID-19 pandemic. Under this designation, public assistance grants are available to state and local governments for “Category B Emergency Protective Measures.” According to FEMA, these expenses include spending on emergency health care aid, such as vaccinations, supplies, tests, and personal protective equipment.

In providing critical service to customers, the top priorities for public power utilities throughout the pandemic were securing the physical and logistical resources needed to operate while keeping workers and customers safe. These steps kept the power on for critical infrastructure throughout public power communities, including hospitals, fire departments, and police stations. They also allowed residents to transition to remote working from home and therefore help stop the spread of the virus. FEMA defines qualifying emergency protective measures as those taken by the community “before, during, and after a disaster to save lives, protect public health and safety, and prevent damage to improved public and private property.” Public power utilities seeking to recover the costs of these extraordinary steps have met with resistance from some FEMA personnel.

Congressional Action

As introduced, H.R. 1917, the Hazard Eligibility and Local Projects Act, would have allowed certain hazard mitigation projects that commence prior to FEMA approval to qualify for hazard mitigation funding. The bill, however, was amended and approved in the 117th Congress's final days to allow this exception only for acquisition and demolition projects (P.L. 117-332).

In April 2021, Representatives Neal Dunn (R-FL) and Darren Soto (D-FL) introduced H.R. 2669, the FEMA Loan Interest Payment Relief Act, to reimburse public power utilities and rural electric cooperatives for interest expenses on loans to cover costs that will eventually be repaid by FEMA. Senator Marco Rubio (R-FL) introduced a companion bill (S. 2212) in June 2021. The measure, however, failed to advance.

APPA Contact

John Godfrey, Senior Government Relations Director, 202-467-2929 / jgodfrey@publicpower.org

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government and protect the interests of the more than 49 million people that public power utilities serve and the 96,000 people they employ.