AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

February 12, 2021

Tod Wells
Deputy Director of Public Assistance
Federal Emergency Management Agency
500 C Street, SW, Washington, DC 20472

Via http://www.regulations.gov
RE: Docket ID FEMA-2020-0038 Cost of Assistance Estimate in the Disaster Declaration Process for the Public Assistance Program

Dear Mr. Wells:

The American Public Power Association (APPA) welcomes the opportunity to submit comments regarding the Federal Emergency Management Agency's ("FEMA") Notice of Proposed Rulemaking ("NOPR") on Cost of Assistance Estimate in the Disaster Declaration Process for the Public Assistance Program.[1]

APPA is the national service organization representing the interests of not-for- profit, publicly-owned electric utilities throughout the United States ("public power"). More than 2,000 entities of state and local government operate public power systems providing nearly 15 percent of all kilowatt-hour sales to ultimate customers and operating in every U.S. territory and every state except Hawaii. Collectively, public power systems serve more than 49 million Americans.

Public power utilities strive to provide customers with reliable electric power at the lowest reasonable cost, consistent with good environmental stewardship. Ensuring the safety, reliability, and resilience of the electric delivery system is a central element of the public power business model. As such, APPA spends considerable time and effort supporting public power utilities in establishing and maintaining a culture of preparedness for natural or man-made, disasters.

In the late 1990's, APPA worked with the National Rural Electric Cooperative Association ("NRECA") to develop a joint mutual aid agreement that both municipal and cooperative electric utilities could sign to enter into a network that would be available to support response and recovery efforts if either type of system should require support.

Every year, public power utilities experience some degree of infrastructure damage due to events, such as ice storms, wildfires, tornadoes, floods, hurricanes, and earthquakes. If this damage is severe enough to be declared a disaster by the President of the United States, recovery costs are eligible for reimbursement through grants from FEMA. These grants[2] can amount to millions of dollars and are critical to the ability of public power utilities to recover from disasters, making FEMA's proposed changes an economically significant regulatory action of critical importance to APPA and its members.

[1] Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program, 85 Fed. Reg. 80719 (proposed Dec. 14, 2020) (to be codified at 44 C.F.R. 206).
[2] Specifically, those authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), 42 U.S.C. 5121-5207, and administered under FEMA's Public Assistance Program.

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While APPA supports FEMA's goals to reduce the number of disasters to which it must respond and to see states and localities increase their ability to mitigate against, respond to, and recover from disasters, **we oppose the NOPR as proposed.**

APPA opposes the NOPR because:

- The bulk of the financial effects of the change would be born largely by a handful of states;
- The new thresholds would abruptly and dramatically shift the number and size of disasters for which some states must prepare, while doing little to reduce the number of declared disasters in states with the highest incidence of disaster declarations;
- The NOPR taken as a whole would simply shift the responsibility of disaster recovery from the federal government to states and localities when other existing federal policies are serving to make taking those responsibilities more costly; and
- The NOPR fails to take into consideration Congress admonition that FEMA should give greater consideration to severe local impact or recent multiple disasters.

A complete discussion of those points follows.

<u>FEMA should not modify the PCI with Treasury's TTR index</u>

When determining whether to recommend the President declare a major disaster authorizing the public assistance program, FEMA proposes in the NOPR to raise the baseline per capita indicator (PCI) and to further adjust the PCI on a state-by-state basis depending on each state's total taxable resources (TTR). Specifically, it would:

- Adjust the PCI to reflect the failure to inflation adjust the PCI from 1986 to 1999;
- Further modify the PCI by multiplying it by the index of each state's hypothetical "total taxable resources" as estimated by the U.S. Department of Treasury (Treasury).

As part of a published regulatory impact analysis of the NOPR (RIA),[3] FEMA reviewed 585 presidentially-declared disasters from 2008 to 2017. In that RIA, FEMA estimated that inflation adjusting the PCI would have resulted in 13 of those 585 disasters failing to meet the new proposed minimum threshold for a disaster declaration. These 13 incidents included roughly $13 million in public assistance requests. FEMA further estimated that further modifying PCI by the TTR index would have resulted in another 146 disaster declarations failing to reach the minimum threshold. These 146 disasters included roughly $2 billion in public assistance requests. However, FEMA estimates that its cost savings from the proposal would be just $627 million over the next 10 years. It is unclear why there would be such a substantial difference between estimates of the NOPR's effect would have been from 2008 to 2017 and what it will be prospectively.

APPA does not object to adjusting the PCI to reflect the failure to adjust it for inflation from 1986 to 1999. However, APPA strongly objects to the proposal to further modify the PCI with Treasury's TTR index.

[3] Fed. Emergency Mgmt. Agency, Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program: Notice of Proposed Rulemaking: Regulatory Impact Analysis (FEMA-2020-0038, RIN: 1660-AA99) (Nov. 2020).

FEMA Should Consider Alternative Financial Methods That Prevent Financial Effects Being Born Primarily by a Handful of States

According to FEMA's RIA, of the $2 billion in initial public assistance requests between 2008 and 2017 that would not have cleared the minimum threshold under the NOPR, $965 million (roughly 48 percent) would have been for incidents in just three states: California, New York, and Texas. In fact, California would have seen one out of every five dollars of initial requests denied under the new threshold. By comparison, the nationwide average cut to initial public assistance requests would have been just 3 percent. FEMA should ensure the distribution of impacts are considered and adjusted for appropriately to ensure small entities in disproportionately impacted states are adequately protected.

A Transition Period is Needed to Avoid an Abrupt Shift in the Number of Declared Disasters for Many States

As discussed above, of the 585 disasters declared in the last decade 159 would have failed to clear the NOPR's revised minimum threshold. That is roughly one out of every four incidents that would not have cleared the new minimum threshold. Without a doubt, this will reduce administrative expenses for FEMA and reserve resources for larger disasters. However, this relatively modest average number of denials of disaster requests masks significant state by state discrepancies in the scope of change. Thirteen states would have had more than half of all their declared incidents denied under the NOPR. The most extreme case, Arizona, would have seen every one of the four presidentially declared disasters for the state fail to exceed the minimum threshold under the NOPR. Clearly all these states have underlying disaster response capabilities, but such an abrupt shift in responsibility from the federal government to the states or territories seems unfair and perhaps dangerous – at least on such short notice.

There is also a question of equity. While some states would be forced to shoulder these additional burdens, others would see almost no effect at all. In fact, 19 states and territories would have had no incidents or just one incident that would have failed to clear the NOPR minimum thresholds. Again, this proposed unevenness of outcomes between states presents a real possibility for disproportionately negative impacts to small entities.

FEMA's Proposal to Shift Responsibility for Disaster Recovery Away from the Federal Government Should Consider State and Local Tax Implications

FEMA's stated purposes for the NOPR is to shift the responsibility of responding to smaller disasters to states and local governments.[4] FEMA justifies this move in part by arguing that states and localities have untapped resources in the form of untaxed taxable resources that could be used to offset the cost of such a response. In a vacuum, such an argument could be compelling. However, in recent years, the federal government has taken several steps to make tapping those resources more difficult. Specifically, in the Tax Cuts and Jobs Act of 2017 (TCJA), Congress capped the deduction for state and local taxes to raise roughly $80 billion a year in federal revenue.[5] Proponents said that the change was intended to pressure state and local governments to reduce taxes.[6]

[4] Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program, *supra* note 1, at 80720 (stating, "FEMA proposes to adjust these factors so that it may more closely adhere to the law which authorizes Federal disaster assistance only when an event 'is beyond the capabilities' of the State and affected local governments.").
[5] Jt. Comm. on Taxation, Estimated Budget Effects of the Conference Agreement for H.R. 1, the "Tax Cuts and Jobs Act," (JCX-67-17) at 2 (Dec. 18, 2017)
[6] *See, e.g.*, Joseph Lawler, Washington Examiner, "Kevin Brady: GOP Really Will Ax State and Local Deduction" (Oct. 4, 2017) (quoting U.S. House Committee on Ways and Means Chairman Kevin Brady).

FEMA now proposes that states – including those hardest hit by this policy change – should do more to shoulder the costs of disaster response based upon an estimation of the taxes that they theoretically could raise. However, FEMA fails to account for the fact that any state and local tax increases will be subject to federal tax. Likewise, the TCJA raised an estimated $17 billion in federal tax revenues by preventing states and localities from better handling their finances by issuing tax-exempt advance refunding municipal bonds.[7] While we understand that FEMA has no authority over tax policy, the ability to respond to FEMA's policy is directly and substantively affected by tax policy and so we must raise it here. If FEMA moves forward with its proposal to have states and localities shoulder more of the burden for disasters, it should, at a minimum, amend the proposal to reflect the fact that the value of TTR is reduced by the federal taxes imposed on state and local taxes on that TTR.

FEMA Should Provide Sufficient Remedies for Small Entities.

FEMA is rightfully concerned[8] about the NOPR's effect on smaller entities and asked for comments on this issue in particular noting that 79 percent of the entities affected by the proposed rule would be "small entities" as defined under the Regulatory Flexibility Act. APPA shares this concern. First, we are concerned about the widely disparate treatment small entities would face under the NOPR, particularly in larger states where the TTR index is high. By way of example, according to the RIA, flooding that struck Vermont in the summer of 2008[9] and did an estimated $961,000 in damages to be covered by public assistance, primarily to roads, would have exceeded the proposed thresholds and so qualified as a disaster. Conversely, wildfires that tore through southern California in the fall of 2008[10] with an estimated $66 million in damages and assistance to be covered by public assistance grants -- including the destruction of 745 homes and major damage to another 124 – would not have cleared the modified threshold (FEMA-1810-DR). From the perspective of the NOPR, that disparate treatment is justified because California had the size and TTR to handle the wildfires by itself, whereas Vermont did not have the size or TTR necessary to handle the floods by itself. From the perspective of a small entity, the wildly disparate circumstances that would be considered a "disaster" by FEMA could hardly seem fair.

Beyond such equity issues, even if larger states theoretically have the resources to respond to smaller events, we remain concerned that smaller entities may fall through the cracks. Again, using California as an example, the state has 306 cities with a population of less than 50,000, and roughly 100 with a population of 10,000 or less. In all, 5.6 million people live in these cities. But under the revised thresholds one of California's smaller cities could be leveled by a disaster, but still not qualify as a national disaster. This would certainly strain California's resources and also raise significant equity issues. This is not just an issue for very large states. For example, of the 590 cities and other "incorporated places" in Oklahoma, 579 have a population of less than 50,000, and 543 with a population of less than 10,000. Yet under the NOPR, of the 27 incidents between 2008 and 2017 that qualified as a disaster, 11 would not have exceeded the new thresholds. That's a substantial shift in responsibility from the Federal government to the state, and one where we would be concerned that incidents affecting smaller jurisdictions might "fall through the cracks."

Congress itself anticipated this issue in the Disaster Recovery Reform Act (DRRA).[11] Specifically, DRRA required FEMA to "give greater consideration to severe local impact or recent multiple disasters. Further, the Administrator shall make corresponding adjustments to the Agency's policies and regulations

[7] Jt. Comm. on Taxation, *supra* note 5 at 4.
[8] Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program, *supra* note 1 at 80739.
[9] Fed. Emergency Mgmt. Agency, Vermont Severe Storms and Flooding (FEMA-1778-DR) (declared July 15, 2008).
[10] Fed. Emergency Mgmt. Agency, California Wildfires (FEMA-1810-DR) (declared Nov. 18, 2008).
[11] Disaster Recovery Reform Act of 2018, 42 U.S.C. 5121, Division D (2018).

regarding such consideration."[12] However, FEMA states in a footnote in the NOPR that "…the DRRA did not amend section 401 of the Stafford Act which requires that the President determine that an event, to qualify as a major disaster warranting Federal assistance beyond the capabilities of the State and the affected local government.… So while the President must give consideration to the impact of an event on local governments, he must also determine that the event exceeds the capabilities of the State."[13] This would appear to mean that FEMA views the consideration of recent multiple disasters and local impacts as never changing the outcome of the disaster declaration decision in situations where the state threshold has not been met. APPA strongly believes this would be contrary to the clear Congressional intent reflected in the DRRA.

Additional Improvements

If FEMA intends to proceed with this NOPR, we would strongly urge phasing it in over time to allow states to develop the operational and financial resources to fill in the gap left by the proposal.

Second, as discussed above Federal tax policy was amended in 2017 with the specific intention of making it more costly for state and local governments to raise taxes and refinance existing debt. FEMA should amend the NOPR to reflect the fact that the value of TTR is reduced by the federal taxes imposed on state and local taxes on that TTR.

Finally, FEMA must be mindful that states with greater resources also likely have proportionately greater responsibilities, taxing their ability to respond when smaller entities are adversely affected by events. APPA believes FEMA could address this issue by responding to Congress' direction in the DRRA to give greater consideration to severe local impact or recent multiple disasters.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

Alex Hofmann
Vice President, Technical and Operations Services American Public Power Association
2451 Crystal Drive, Suite 1000
Arlington, VA 22202

[12] Disaster Recovery Reform Act of 2018, *supra* note 11, § 1232.
[13] Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program, *supra* note 1 at 80730.