

Disaster Recovery, Hazard Mitigation, And the Stafford Act

Background

Most emergencies are handled at the local level, without assistance from the state or federal government. However, major disasters or emergencies disrupt the normal functioning of governments and communities and special federal measures are necessary and appropriate to expedite the rendering of aid, emergency services, and recovery. 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 provide assistance in planning for disasters and emergencies and in 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. However, given the appropriate life-safety emphasis on getting power restored as quickly as possible, the ability to pause to consider how to rebuild systems with increased resiliency is often impaired. As a result, while FEMA has provided roughly \$12 billion in hazard mitigation funding since 1989, just \$435 million was for electric utility protective measures—and of that \$435 million, roughly \$185 million was for public power utility protective measures (rural electric cooperatives received the remaining \$250 million), according to an American Public Power Association (APPA) analysis of FEMA data.

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 federal procurement rules when making purchases with assistance funds. These rules can be found in the *Federal Acquisition Regulation* (FAR), a 1,917-page

document that includes requirements related to: competition and acquisition planning; contracting methods and contracting types; socioeconomic programs; general contracting requirements; special contracting categories; and contract management. Meeting these requirements is difficult in any instance, more so when normal governmental functions have been disrupted by a major disaster or emergency. Nonetheless, FEMA routinely seeks to deobligate funds given to states, tribal governments, and localities, including public power utilities, based upon failure to follow these rules, often years after the disaster. 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 subgrantee otherwise accomplished the purpose of the grant” (OIG-16-126-D, Sept. 2, 2016).

Congress sought to limit the time in which FEMA could deobligate funds in the Disaster Assistance Improvement Act of 2018 (P.L. 115-254). Under this new provision, which APPA strongly supported, 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. This statute of limitations does not apply to deobligations announced prior to the October 5, 2018, enactment of the new law. However, in a proposed rule published on October 11, 2020, FEMA would upend the intent of the new law by allowing itself to pause the new statute of limitations whenever it has additional questions about a project’s final report. The act also provides a permanent funding source for pre-disaster mitigation assistance, equal to six percent of disaster-related public assistance provided each year.

FEMA and the Pandemic

On March 13, 2020, President Trump declared the COVID-19 coronavirus pandemic a national emergency, allowing states to request a 75 percent federal/25 percent state cost-share for spending on emergency health care aid, such as vaccinations,

supplies, and tests. Then on March 23, President Trump began granting governor's requests for major disaster designations for states. As of April 11, 2020, all 50 states and four territories had declared a major disaster as a result of the pandemic. These designations date back to January 20, 2020, and have authorized reimbursements for Category B — Emergency Protective Measures.

In providing critical service to customers, the top priorities for public power utilities throughout the pandemic have been securing the physical and logistical resources needed to operate while keeping workers and customers safe. Just some of the out-of-the-ordinary steps public power utilities have taken in response to the pandemic include:

- Redesigning work procedures and work sites to meet CDC recommendations;
- Acquiring resources — including testing, personal protective equipment (PPE), and other equipment;
- Building virus contact tracing programs and applications;
- Slowing and altering construction work, and work schedules, to minimize the possibility of infection spread;
- Quarantining and isolating workers in their homes or on site to ensure reliability; and
- Partnering with local organizations or setting up shops internally to create and manufacture PPE and sanitizer.

These steps kept the lights 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.”

However, on September 1, 2020, FEMA announced that state and local costs of responding to the pandemic would, as of September 15, be considered an ongoing operational cost and not eligible for public assistance.¹ This shift in policy has not had a huge effect on public power utilities, which for the most part already made the investments needed to operate safely. More troubling, though, is that public power utilities seeking reimbursement from FEMA for these initial costs are now also reporting pushback from FEMA representatives about whether these expenses are eligible for public assistance. For example, some utilities report FEMA officials saying that the costs of

sequestering control room staff will not qualify for public assistance.

APPA believes that the additional steps taken in specific response to the COVID-19 pandemic by public power utilities to keep their workers and customers safe while keeping the lights on are absolutely the sort of expenditures Congress intended to be covered as an emergency protective measure for which reimbursement should be provided. FEMA must reimburse public power utilities for these legitimate expenses and it must provide clear guidance to this effect to its case managers.

Congressional Action

On December 17, 2019, the House approved by a vote of 409-7 H.R. 2548, the Hazard Eligibility and Local Projects Act. Sponsored by Representatives Lizzie Fletcher (D-TX) and Pete Olson (R-TX), the legislation would have allowed 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 have qualified for this exemption. A companion bill (S. 3285) was introduced on February 12, 2020, by Senators Thom Tillis (R-NC) and Doug Jones (D-AL).

On November 17, 2020, the House passed by voice vote the FEMA Assistance Relief Act of 2020 (H.R. 8266), which would have increased the federal cost share for Stafford Act public assistance grants in 2020. The bill would have raised the federal share from 75 percent to not less than 90 percent for emergencies and disasters declared by the President in 2020. For COVID-19-related declarations, the bill would have shifted the federal share to 100 percent. Senators Jeff Merkley (D-OR) and Ron Wyden (D-OR) introduced a companion bill (S. 4627) on September 17, but the Senate did not act on the bill before the 116th Congress adjourned. APPA strongly supported the bill.

On November 2, 2020, Representatives Neal Dunn (R-FL) and Darren Soto (D-FL) introduced H.R. 8701, the FEMA Loan Interest Payment Relief Act. The legislation was an update of an earlier bill, H.R. 5059, that would have allowed FEMA to pay interest on loans used by public power utilities to cover costs that would eventually be repaid through FEMA public assistance grants. H.R. 8701 would have:

- Made payment of interest on loans to cover such costs mandatory, not optional;
- Allowed rural electric cooperatives to also benefit;
- Reduced the minimum reimbursed interest rate (from twice the prime rate to simply the prime rate); and

¹ FEMA provided a narrow exception to this new rule for costs incurred by medical, emergency, and food emergency operations.

- Extended the provision to include interest on loans to cover costs incurred in the five years preceding the date of enactment.

APPA strongly supported this legislation, which unfortunately was not enacted in the 116th Congress, but will likely be reintroduced and considered in the 117th Congress.

APPA Position

APPA would like to see improvements to the Stafford Act beyond those enacted in 2018. For example, the association proposes a safe harbor from FAR requirements for debris removal and emergency protective measures. Under this proposal, state, tribal, or local government 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 strongly supported H.R. 2548/S. 3285, H.R. 8266/S. 4627, and H.R. 5059 from the 116th Congress and will work to see them reintroduced and considered in the 117th Congress.

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. That includes working with its members to help them better advocate for themselves before FEMA. APPA will also make this case before the appropriate authorizing committees of Congress and before FEMA itself.

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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 to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.