



Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding

Keith Bea

Specialist in American National Government

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Summary

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) authorizes the President to issue major disaster or emergency declarations in response to catastrophes in the United States that overwhelm state and local governments. Such declarations result in the distribution of a wide range of federal aid to individuals and families, certain nonprofit organizations, and public agencies. Congress appropriates money to the Disaster Relief Fund (DRF) for disaster assistance authorized by the Stafford Act. The Federal Emergency Management Agency (FEMA) within the Department of Homeland Security (DHS) administers most, but not all, of the authority the statute vests in the President.

The most recent significant action concerning the statute occurred in the closing months of the 109th Congress as a result of the congressional investigation on the response to Hurricane Katrina (August 2005). Senators inserted Stafford Act amendments into the FY2007 DHS appropriations legislation (Title VI of P.L. 109-295). These amendments expanded FEMA's authority to expedite emergency assistance to stricken areas, imposed new planning and preparedness requirements on federal administrators, provided new authority to regional offices, and increased federal assistance to victims and communities. More recently, Congress included a provision in the FY2010 appropriations legislation (P.L. 111-83) that allows retired law judges to arbitrate conflicts concerning the recovery of public infrastructure in the Gulf Coast due to Hurricanes Katrina and Rita. While not an amendment to the Stafford Act, this provision affects the administration of the FEMA appeals process under which applications for Stafford assistance are reconsidered. The decisions made to date by the arbitration panels resulted in an Administration request for supplemental funding for FY2010. That request is the subject of some debate in the 111th Congress.

Legislation pending in the 111th Congress would amend the statute. Among the proposals, H.R. 3377, the Disaster Response, Recovery, and Mitigation Enhancement Act of 2009, would authorize the President to modernize the integrated public alert system to ensure that warnings are disseminated to the public, provide health benefits to temporary or intermittent federal employees who provide disaster assistance, authorize the National Urban Search and Rescue Response System, and make other changes to the statute. Other pending bills would reauthorize a mortgage and rental assistance program terminated in 2000 (H.R. 888/S. 763), establish new eligibility criteria (H.R. 941, H.R. 1059, H.R. 1494, H.R. 2484, H.R. 4141, and S. 1069), and mandate establishment of a tracking and storage plan for housing units used by disaster survivors (H.R. 3437/S. 713).

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Overview of the Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) authorizes the President to issue major disaster, emergency, and fire management declarations, which in turn enable federal agencies to provide assistance to state and local governments overwhelmed by catastrophes.¹ The statute also authorizes the President to determine whether certain types of authorized assistance will be provided and the conditions under which the aid is distributed.

The Stafford Act comprises the following titles:

- Title I: findings, declarations, and definitions;
- Title II: preparedness and pre-disaster mitigation authority;
- Title III: administrative provisions;
- Title IV: major disaster assistance;
- Title V: emergency assistance;
- Title VI: emergency preparedness (previously the Civil Defense Act of 1950);
- Title VII: miscellaneous provisions.

Titles IV and V identify the types of assistance that may be provided, and, in some circumstances, the limitations on the aid.² Most of the presidential authority set out in Titles IV and V in the statute, with the exception of the authority to issue declarations, has been delegated to administration officials—currently the Secretary of the Department of Homeland Security (DHS)—through executive orders.³ Following the investigation into the response to Hurricane Katrina, Congress also authorized the Administrator to provide federal leadership before and after catastrophes, including “assisting the President in carrying out the functions” of the Stafford Act.⁴

Stafford Act definitions establish eligibility for assistance and the conditions that may be catalysts for presidential action. The definition of “major disaster” is relatively restrictive — “any natural catastrophe” including storms, earth movements and high water, and “regardless of cause, any fire, flood or explosion.”⁵ Presidents Bush and Obama issued 55 major disaster declarations in calendar year 2009.⁶ By comparison, the definition of “emergency” is broad, authorizing the

¹ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. “States” include U.S. territories and the District of Columbia. In addition to the assistance authorized by the Stafford Act, a wide range of disaster aid is provided by other federal agencies under statutory authority that specifically refers to disaster assistance, as well as under general assistance provisions. For information on the range of federal programs see CRS Report RL31734, *Federal Disaster Recovery Programs: Brief Summaries*, by Carolyn V. Torsell.

² See “Types of Assistance and Eligibility” in this report for information on the categories of aid available under Stafford Act authority.

³ U.S. President George W. Bush, “Amendment of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security,” E.O. 13286, Sec. 52, February 28, 2003.

⁴ The authority of the FEMA Administrator to assist the President were incorporated into the Homeland Security Act, as amended by P.L. 109-295, 120 Stat. 1398 (6 U.S.C. 314(8)).

⁵ 42 U.S.C. 5122(2).

⁶ President Bush issued declarations in January 2009 before President Obama took office. For information on declarations see “2009 Federal Disaster Declarations,” at <http://www.fema.gov/news/disasters.fema?year=2009>. For (continued...)

President to determine “any occasion or instance” when federal aid is needed by state and local governments to save lives and property or to address the threat of a catastrophe. In calendar year 2009, President Bush issued one emergency declaration for the presidential inauguration in the District of Columbia; President Obama issued six others in the remainder of the year, five for winter storms and one for a refinery explosion in Puerto Rico.⁷ The statute also authorizes the President to provide fire suppression assistance to prevent a forest or grassland fire from becoming a major disaster.⁸ President Obama issued 48 fire management declarations in 2009; President Bush issued one before leaving office, for a yearly total of 49 such declarations.⁹

Stafford Act assistance funding derives from appropriations made to the Disaster Relief Fund (DRF), administered by DHS.¹⁰ Federal assistance supported by the DRF, and authorized in Title IV (for major disasters) or Title V (for emergencies) provides grants for mass care for disaster survivors, the restoration of damaged or destroyed facilities, amelioration of the impact of future disasters, clearance of debris, and aid for those with uninsured critical needs. The statute also authorizes loans to communities that suffer significant revenue losses as a result of major disasters.¹¹ In addition, the statute authorizes unemployment assistance directly related to the event (administered by the Department of Labor) and allows federal agency heads to provide technical assistance, personnel, equipment and other resources to help state and local response and recovery efforts.

While the President may exercise discretion under authority of the statute, that authority is circumscribed by the act’s administrative provisions. Federal aid cannot duplicate that provided by other sources. Federal agency heads may waive administrative, but not statutory, requirements to expedite assistance. A federal coordinating officer, appointed by the President (or the designee), ensures that federal and non-federal assistance provided to major disaster or emergency areas is coordinated. Applicants for aid must purchase appropriate levels of insurance. Title III of the statute sets out these and other administrative requirements and limitations.

The 1974 Disaster Relief Act, as Amended

The Stafford Act consists of the text of the statute enacted by Congress in 1974 and that of a series of amendments approved over the past 35 years that have added administrative requirements, enhanced the types of assistance that may be provided, expanded eligibility to certain non-profit organizations, and coordinated Stafford assistance with other federal authorities.¹²

(...continued)

information on the declaration process see CRS Report RL34146, *FEMA’s Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

⁷ Ibid.

⁸ 42 U.S.C. 5187.

⁹ See <http://www.fema.gov/news/disasters.fema?year=2009>.

¹⁰ For current appropriations information see CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake and Chad C. Haddal. For historical information see CRS Report R40708, *Disaster Relief Funding and Emergency Supplemental Appropriations*, by Bruce R. Lindsay and Justin Murray.

¹¹ Congress appropriates funds for the community disaster loan program separate from the DRF.

¹² The Disaster Relief Act of 1974 was enacted in P.L. 93-288, 88 Stat 143 et seq. The 1988 amendments (P.L. 100-707, 102 Stat. 4689 et seq.), which retitled the 1974 statute to its current designation, constituted the most far reaching (continued...)

The act maintains a two-part orientation first established in a 1950 statute (superseded by the 1974 legislation), as follows: (1) federal assistance supplements state and local relief and recovery efforts and, (2) is triggered only by a presidential declaration that is preceded by a gubernatorial request for assistance.¹³

The scope of the statute has expanded considerably over the decades to provide a wide range of grants for the needs of individuals, families, certain community organizations, and state and local government operations. The congressional investigation initiated to address questions about the response to Hurricane Katrina, which struck in August 2005, culminated in enactment of amendments that established new levels of assistance, but perhaps more importantly, addressed administrative concerns. The following section highlights the more significant amendments adopted in 2006.

The 2006 Amendments

Through the Post-Katrina Emergency Management Reform Act of 2006 (Title VI, P.L. 109-295) and, to a lesser extent, the Security and Accountability for Every Port Act of 2005, known as the SAFE Port Act (P.L. 109-347), Congress expanded the authority of FEMA to provide assistance and imposed requirements on federal officials to ensure that effective pre-disaster preparation actions would be taken.¹⁴ Assistance for service animals and pets, pre-disaster authority, evacuation planning, and individual case management are some of the enhancements included in these amendments. While augmenting federal assistance authorities such as these, the amendments maintained state, local, and individual emergency management responsibility and accountability. In short, the Post-Katrina Act expanded the President's federal disaster assistance authority, but left the basic tenets of the Stafford Act (such as Presidential discretion, need for state requests, most restrictions on eligibility) unchanged.

The changes to the Stafford Act enacted by Congress in 2006 may be summarized as follows:

- **Expedited federal assistance.** The President is now authorized to support precautionary evacuation measures, accelerate federal emergency response and recovery aid, and provide expedited federal assistance (coordinated with the state to the extent possible) in the absence of a specific request from state officials.¹⁵
- **Aid to individuals with special needs.** Disabled individuals now receive federal housing assistance on sites that meet their needs, "whenever practicable," with the inclusion in the Stafford Act of the definition of "individual with a disability"

(...continued)

amendments until those enacted in 2006 in the Post-Katrina Emergency Management Reform Act (P.L. 109-295, 120 Stat. 1444-1457. In addition, the Disaster Mitigation Act of 2000 (P.L. 106-390, 114 Stat. 1552 et seq. established some cost cutting requirements and authorized a new hazard mitigation program. For a history of the evolution of the statute and federal emergency management as a policy area see Rubin, Claire, ed. *Emergency Management; The American Experience, 1900-2005*, Public Entity Risk Institute (<http://www.riskinstitute.org>), 2007.

¹³ The untitled 1950 statute is P.L. 81-875, 64 Stat. 1109-1111.

¹⁴ In addition to amending the Stafford Act, the Post-Katrina Emergency Management Reform Act amended the Homeland Security Act to expand the authority of the Administrator of FEMA and the mission of the agency. See P.L. 109-295, 120 Stat. 1395-1406.

¹⁵ P.L. 109-295, §681, 120 Stat. 1444, which amended Sec. 402 and 502 of the Stafford Act.

from the Americans With Disabilities Act of 1990.¹⁶ Also, durable medical equipment, such as that needed by the disabled, may be provided,¹⁷ and the FEMA Administrator must develop guidelines concerning the accommodation of individuals with disabilities with regard to emergency facilities and equipment.¹⁸ The amendments also prohibit discrimination toward the disabled, those with special needs, and those with limited proficiency in the English language.¹⁹ To assist the latter segment of disaster victims, the FEMA Administrator must ensure that information is made available to those with limited English proficiency, and must develop and maintain information on model language assistance as well as best practices for the state and local governments working with these individuals.²⁰ Also, the Pets Evacuation and Transportation Standards Act of 2006 authorizes grants to states for the improvement of emergency shelters to accommodate pets and service animals.²¹

- **Expanded assistance to disaster victims.** The President is authorized to provide transportation assistance to those displaced from their residences, including aid needed to move among alternative temporary shelters or to return to their original residence. The President may also provide case management services to state, local, or qualified private organizations that provide assistance to victims.²²
- **Housing assistance.** Seven provisions in the 2006 amendments expanded the scope of federal housing assistance to be made available to victims.²³ First, in order to be considered eligible for housing assistance, victims of major disasters or emergencies who are disabled must be unable to access or inhabit their homes.²⁴ Prior to enactment of the 2006 amendments the statute did not differentiate disabled access from that experienced by other disaster victims. Second, alternative housing sites provided to victims by the federal government must meet physical accessibility requirements.²⁵ Third, the amendments eliminated the statutory ceilings on financial aid to be provided for housing repair and replacement,²⁶ but did not eliminate the overall cap of \$25,000 that may be provided to each individual or household under Section 408.²⁷ Fourth, the

¹⁶ P.L. 109-295, §688(3), which amended Sec. 102, 120 Stat. 1448 of the Stafford Act. See housing assistance at 42 U.S.C. 5174(d)(1)(A).

¹⁷ P.L. 109-295, §689(b), which amended Sec. 403, 120 Stat. 1449 of the Stafford Act.

¹⁸ P.L. 109-295, § 689(a), 120 Stat. 1448-1449. For more information see CRS Report RS22254, *The Americans with Disabilities Act and Emergency Preparedness and Response*, by Nancy Lee Jones.

¹⁹ P.L. 109-295, §689a, 120 Stat. 1449.

²⁰ P.L. 109-295, §689e, new Stafford Act Sec. 616, 120 Stat. 1452. Note that Sec. 616 refers to the FEMA “Director,” not Administrator, the title created in the 2006 amendments.

²¹ P.L. 109-308, Sec. 3, Stafford Act amended Sec. 611, 120 Stat. 1725.

²² P.L. 109-295, §689f, new Stafford Act Sec. 425 and Sec. 426, 120 Stat. 1452-1453. Note that the SAFE Ports Act also added a new Sec. 425 to the Stafford Act (“Essential Service Providers”), codified at 42 U.S.C. 4189e.

²³ For information on federal disaster housing assistance see CRS Report R40810, *FEMA Disaster Housing: From Sheltering to Permanent Housing*, by Francis X. McCarthy.

²⁴ P.L. 109-295, §689(c), Stafford Act amended Sec. 408, 120 Stat. 1449.

²⁵ P.L. 109-295, §689(c), Stafford Act amended Sec. 408, 120 Stat. 1449.

²⁶ P.L. 109-295, §686, Stafford Act amended Sec. 408(c), 120 Stat. 1448.

²⁷ The Stafford Act provides for annual cost of living adjustments to the funding ceiling. Effective October 1, 2006, the maximum amount that may be provided to an individual or household under the IHP authority is \$28,800. See 71 *Federal Register* 59514.

amendments authorize the President to provide semi-permanent housing where no alternatives exist.²⁸ Fifth, the statute includes as newly eligible housing-assistance costs both utility costs (excluding telephone service) and security deposits.²⁹ Sixth, the disposal of temporary housing units (generally referred to as “FEMA trailers”) is to be coordinated with the Department of the Interior or other federal agencies to facilitate the transfer of the units to tribal governments.³⁰ Seventh, the amendments established a demonstration project, the Individuals and Households Pilot Program, to increase the use of existing rental housing to provide temporary housing for victims of major disasters. Through the pilot program, which expired December 31, 2008, the Administrator was to provide for the repair and improvement of multi-family rental properties in disaster areas to increase the rental stock available to disaster victims in the immediate area.³¹

- **Public assistance (PA) to state and local governments.** State or local governments or eligible private nonprofit-facility owners may apply for federal assistance to build a new facility in a different location if all parties determine that a damaged facility should not be repaired or replaced. Such assistance, known as the “in-lieu” contribution (a grant made in-lieu of replacing or repairing a facility that existed before the disaster), has been authorized since 1974 and consists of PA grants based on the federal estimate of the cost of repair or replacement.³² The 2006 amendment in the SAFE Ports Act deleted the clause that authorized an in-lieu grant for 90% of the federal share of the estimate of repairing or replacing the facility solely in areas with unstable soil. Now all stricken state and local governments, not just those in areas marked by unstable soil, may apply for a 90% in-lieu grant.³³ The SAFE Ports Act also authorized expedited payments for debris removal to state or local governments or to owners of qualified private nonprofit facilities.³⁴ In addition, the SAFE Ports Act amended the Community Disaster Loan (CDL) provisions by authorizing loans to local governments (capped at \$5 million) that, because of a major disaster, suffer significant losses in tax revenue.³⁵ Another PA change required the President, through the FEMA Administrator, to conduct a pilot program of incentives for local and state government involvement in debris removal and the acceleration of repair work.³⁶
- **Assistance to nonprofit organizations.** Three significant changes were adopted regarding the federal aid provided to private nonprofit organizations affected by a

²⁸ P.L. 109-295, §685, Stafford Act amended Sec. 408(c), 120 Stat. 1447.

²⁹ P.L. 109-295, §689d, Stafford Act amended Sec. 408, 120 Stat. 1452.

³⁰ P.L. 109-295, §689k, 120 Stat. 1456.

³¹ P.L. 109-295, § 689i, 120 Stat. 1454. Following the Midwest floods in May of 2008 the state of Iowa made use of the pilot program, as did Texas following Hurricane Ike in the fall of 2008.

³² P.L. 93-288, 88 Stat. 154, amended by P.L. 100-707, 102 Stat. 4699. In 1988 Congress reduced the in-lieu grant from 90% to 75% of the federal estimate and retained the 90% level solely for areas with unstable soil (P.L. 106-390, 114 Stat. 1563).

³³ P.L. 109-347, §609, Stafford Act amended Sec. 406, 120 Stat. 1942.

³⁴ P.L. 109-347, §610, Stafford Act amended Sec. 407, 120 Stat. 1942-1943.

³⁵ P.L. 109-347, §608, 120 Stat. 1942.

³⁶ P.L. 109-295, §689j, 120 Stat. 1455. The statute terminated the program in December 2008.

major disaster. First, the statute authorizes the President, within stated constraints, to define facilities that provide “essential services of a governmental nature to the general public.”³⁷ These provisions, similar to those in FEMA regulations, establish eligibility for museums, zoos, performing arts facilities, community arts centers, and other facilities that “provide health and safety services of a governmental nature” as long as they provide “essential services of a governmental nature to the general public,” as defined by the President.³⁸ Third, the amendments added the word “education” to the listing in the section of the law that defines critical services. Through this change, private nonprofit education organizations may apply directly for a FEMA grant without having to apply for a Small Business Administration loan.³⁹

- **Hazard mitigation.** Section 404 of the Stafford Act authorizes the Hazard Mitigation Grant Program (HMGP) for grants to states in which major disasters have been declared.⁴⁰ These funds must be used for activities that prevent future disasters or reduce their impact if they cannot be prevented. The Post-Katrina Act adjusted the percentage amounts for HMGP awards by establishing a scale that authorizes a higher percentage (15% of the total Stafford Act assistance in a state) for major disasters in which no more than \$2 billion is provided, 10% for assistance that ranges from more than \$2 billion to \$10 billion, and 7.5% for major disasters that involve Stafford Act assistance of more than \$10 billion to \$35.3 billion.⁴¹
- **Administrative changes.** The 2006 amendments authorize the President to appoint one Federal Coordinating Officer (FCO) for a multi-state event, in addition to deputy FCO’s as needed.⁴² Traditionally, one FCO has been named for each separate disaster declaration in each respective state. The statute also amends the Stafford Act by requiring that the President designate a Small State and Rural Advocate in FEMA to ensure that rural community needs are met in the declaration process and to help small states prepare declaration requests, among other duties.⁴³ Other administrative changes concern the authority and capabilities of organizations charged with the response to the major disaster site. The amendments authorize the President to establish at least three national response teams and others as deemed necessary (including regional response teams), and require that FEMA team members possess essential capabilities, training skills, and equipment.⁴⁴ In addition, the SAFE Ports Act amended the Stafford Act by adding a new definition, “essential service providers,” defined as persons affiliated with municipal governments or private entities who will help

³⁷ P.L. 109-295, § 688(1), Stafford Act amended Sec. 102(9), 120 Stat. 1448.

³⁸ Ibid. The regulations are found at 44 CFR §206.221(e)(7).

³⁹ P.L. 109-295, § 689h, Stafford Act amended Sec. 406, 120 Stat. 1453.

⁴⁰ 42 U.S.C. 5170c.

⁴¹ P.L. 109-295, §684, Stafford Act amended Sec. 404, 120 Stat. 1447.

⁴² P.L. 109-295, §687, Stafford Act amended Sec. 302, 120 Stat. 1448.

⁴³ P.L. 109-295, §689g, new Stafford Act Sec. 326, 120 Stat. 1453.

⁴⁴ P.L. 109-295, §633, Stafford Act amended Sec. 303, 120 Stat. 1421. Note that the statute refers to the “Director” of FEMA, whereas the position is identified elsewhere as “Administrator.”

restore essential services to a stricken area. Such workers are not to be impeded when they seek access to a disaster site.⁴⁵

Action in the 111th Congress

Legislation pending in the 111th Congress would continue to expand categories of federal assistance in the Stafford Act and, if enacted, make relatively minor adjustments to the statute. Selected examples of the pending legislation and summaries of the policy changes that would be incorporated into the statute are listed below:

- **H.R. 888 and S. 763:** Temporary mortgage and rental assistance would be authorized for victims in areas included in a major disaster declaration. Congress previously authorized the assistance from 1974 until enactment of the 2000 amendments which vitiated the provision as part of the efforts by the 106th Congress and the Clinton Administration to constrain federal emergency management costs.
- **H.R. 941 and S. 1069:** H.R. 941 would designate owners or operators of a private or investor-owned electric utility company serving low-income households to be eligible for grants for the repair or replacement of damaged facilities. S. 1069 would do the same for owners or operators of investor owned energy facilities, under certain conditions. As explained later in this report (see “Expanding Eligibility” section) this issue has been debated in the past as certain utilities that provide public services have no recourse to Stafford assistance.
- **H.R. 1239:** States could apply for grants to establish revolving loan funds to enable homeowners and businesses to undertake hazard mitigation activities. This legislation would amend the pre-disaster mitigation authority (Section 203 of the act). Experience gained under the mitigation efforts funded through a pilot program established through the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004 for severe repetitive loss properties in flood plains may be applicable to congressional consideration of this proposal.⁴⁶
- **S. 713 and H.R. 3437:** These two bills would modify existing disaster housing provisions. If enacted, H.R. 3437 would mandate that the FEMA Administrator develop lifecycle plans and tracking procedures for mobile housing units provided to individuals and households. Units found to be hazardous to the occupants’ health would be repaired before being used for disaster-related housing needs.⁴⁷ Similarly, but not as an amendment to the Stafford Act, S. 713 would mandate that the FEMA Administrator evaluate the existing stock of temporary housing units and plan for their disposition or storage.

⁴⁵ P.L. 109-347, §607, new Stafford Act Sec. 425, 120 Stat. 1941. Note that the Post Katrina Act also added a new Sec. 425 (“Transportation Assistance”) to the Stafford Act.

⁴⁶ 42 U.S.C. 4102a

⁴⁷ The Chair of the Transportation and Infrastructure Committee, Representative Thompson, sponsored H.R. 3437. Mr. Thompson has reportedly asked FEMA to halt the sale of trailers to the public, citing health hazards identified in congressional investigations. See Rob Margetta, “Experts Ponder Expanded Role for FEMA in Foreign Disasters,” *CQ Homeland Security*, Jan. 14, 2010, at <http://homeland.cq.com/hs/display.do?docid=3279089&sourcetype=31>.

- **H.R. 3466:** The President would be authorized to consolidate funds for public infrastructure restoration for disasters involving “extensive and widespread damage and destruction” with no cost share required from state or local governments.⁴⁸
- **S. 764:** The ceiling on the amount to be available for individual and household assistance for lower income residents in states with high costs of living would be increased to a base of \$50,000, from \$25,000, to be adjusted annual for inflation.
- **H.R. 3377:** A number of changes would be made to the Stafford Act through this legislation. Funding would be authorized through FY2012 for the Pre-Disaster Mitigation program (described below in this report), the Administrator of FEMA would be required to modernize and modify the existing federal public warning and alert system, the Mortgage and Rental Assistance program would be reauthorized, temporary or intermittent employees who provide disaster assistance would be eligible for federal health benefits, the National Urban Search and Rescue Response system would be authorized, the Disaster Relief Fund would be authorized, and grants for hazard mitigation would be increased if states meet minimum building code standards.⁴⁹

Enacted Legislation

While no amendments to the Stafford Act have been enacted to date in the 111th Congress, two public laws should be noted for the measures they include that affect administration of the statute. First, provisions in a supplemental appropriations statute for FY2009 authorized the FEMA Administrator to extend the payment for case management programs related to Hurricanes Katrina and Rita and mandated a 90/10 cost share for public assistance stemming from Hurricane Ike, storms in Kentucky and Kansas, among other purposes.⁵⁰ Second, the FY2010 appropriations statute for DHS authorizes the reemployment of retired administrative law judges to settle disputes related to the arbitration panels established in the American Recovery and Reinvestment Act of 2009 in order to expedite recovery from Hurricanes Katrina and Rita. This change in procedure is discussed at the end of this report, see “Appeal Process” section, below.⁵¹

⁴⁸ This issue received attention in a hearing held during the first session of the 111th Congress. See U.S. House, Transportation and Infrastructure Committee, Subcommittee on Economic Development, Public Buildings, and Emergency Management, hearing, *Post Katrina: What it Takes to Cut the Bureaucracy*, July 27, 2009, transcript and statements at <http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=960>.

⁴⁹ Portions of this bill are comparable to H.R. 6658 ordered to be reported from the House Committee on Transportation and Infrastructure in the 110th Congress, but not considered by the full House nor the Senate.

⁵⁰ P.L. 111-32, 123 Stat. 1882-1883.

⁵¹ P.L. 111-83, 123 Stat. 2185; P.L. 111-5, 123 Stat. 164.

Overview of Stafford Act Declarations

Major disaster and emergency declarations are two of the five types of actions that may be taken under authority of the Stafford Act.⁵² The other three include fire management declarations, the provision of defense resources before a major disaster is declared, and the decision to pre-position supplies and resources.⁵³

Prior to a Disaster

Three types of declarations (or commitments) may be made under Stafford Act authority before a catastrophe occurs. First, at the request of a governor, the President may direct the Department of Defense (DOD) to commit resources for emergency work essential to preserve life and property in “the immediate aftermath of an incident” that may result in the declaration of a major disaster or emergency (discussed below).⁵⁴ The statute does not define the term “incident.” According to regulations, upon receiving a gubernatorial request for such assistance, the FEMA Associate Director may determine that DOD aid is necessary to save lives and protect property.⁵⁵

Second, the Stafford Act authorizes the President to provide fire management assistance in the form of grants, equipment, personnel, and supplies to supplement the resources of communities when fires on public property or on private forests or grasslands threaten destruction that might warrant a major disaster declaration.⁵⁶ Implementation of this authority, which has been delegated to FEMA officials, requires that a gubernatorial request be submitted while an uncontrolled fire is burning. To be approved, state applications must demonstrate that either of the two cost thresholds established by FEMA through regulations has been reached.⁵⁷ The thresholds involve calculations of the cost of an individual fire or those associated with all of the fires (declared and

⁵² The text of the statute and pertinent regulations are presented in CRS Report RL33030, *The Budget Reconciliation Process: House and Senate Procedures*, by Robert Keith and Bill Heniff Jr. For further discussion of Stafford Act declarations, see CRS Report RL34146, *FEMA’s Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

⁵³ Whereas the first two pre-event actions are specifically authorized by the Stafford Act, the pre-event actions are inferred from general authority. Following an investigation into the response to Hurricane Andrew in 1992 the General Accounting Office (now the Government Accountability Office) reported that “Current federal law governing disaster response does not explicitly authorize federal agencies to undertake preparatory activities before a disaster declaration by the President, nor does it authorize FEMA to reimburse agencies for such preparation, even when disasters like hurricanes provide some warning that such activities will be needed.” U.S. General Accounting Office, *Disaster Management: Improving the Nation’s Response to Catastrophic Disasters* (Washington: July 23, 1993), p. 3.

⁵⁴ The statute reads “During the immediate aftermath of an incident which may ultimately qualify for assistance under this title or title V of this Act ... the Governor of the state in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such request to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days.” 42 U.S.C. 5170b(c).

⁵⁵ 44 CFR 206.35(c).

⁵⁶ Sec. 420 of the Stafford Act, 42 U.S.C. 5187.

⁵⁷ Regulations are found at 44 CFR 204.1 et seq.

non-declared) in a state each calendar year.⁵⁸ FEMA officials determine whether a fire management assistance declaration will be issued.⁵⁹

Third, when a situation threatens human health and safety, and a disaster is imminent but not yet declared, the Secretary of DHS may pre-position employees and supplies. DHS monitors the status of the situation, communicates with state emergency officials on potential assistance requirements, deploys teams and resources to maximize the speed and effectiveness of the anticipated federal response and, when necessary, performs preparedness and preliminary damage assessment activities. A related provision enacted in 2006 authorizes the FEMA Administrator to provide evacuation preparedness assistance to non-federal officials.⁶⁰

After a Catastrophe Occurs

The Stafford Act authorizes the President to issue two types of declarations—major disaster and emergency—after an incident overwhelms state and local resources.⁶¹

Major Disaster Declarations

After receiving a request from the governor of an affected state for a major disaster declaration, the President may take one of three possible actions: issue a major disaster declaration or an emergency declaration, or decline the request.⁶² Major disaster declarations may be issued after a natural catastrophe “(including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought)” or, “regardless of cause, [after a] fire, flood or explosion.”⁶³

Regulations further specify the factors considered by FEMA in evaluating a gubernatorial request for a major disaster declaration. The factors considered to determine whether federal PA assistance is needed include an assessment of the per capita impact of the disaster within affected states;⁶⁴ insurance coverage in force; the presence and impact of hazard mitigation measures; the cumulative impact of disasters over the previous year; and, whether federal aid authorized by statutes other than the Stafford Act would better meet the needs of stricken areas.⁶⁵ Factors

⁵⁸ 44 CFR 204.51.

⁵⁹ 44 CFR 204.24.

⁶⁰ P.L. 109-295, §632, 120 Stat. 1421.

⁶¹ For more information on the declaration process see CRS Report RL34146, *FEMA’s Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

⁶² For criteria considered in the declaration of a major disaster, see 44 CFR 206.48. The gubernatorial request for a declaration is forwarded to the President through FEMA officials. Only the President may issue a major disaster declaration.

⁶³ 42 U.S.C. 5122(2).

⁶⁴ Each year FEMA issues a notice that identifies the threshold to be used as one factor to be considered in the determination of whether PA or IA or both will be made available after a major disaster declaration has been issued. The regulations establish a minimum threshold of \$1 million in PA damages for each state; see 44 CFR 206.48(a)(1). Major disasters declared on or after October 1, 2005, would generally be expected to reach the threshold of \$1.18 per capita for PA assistance to be authorized; see 70 FR 58734. However, the statewide threshold is not the sole factor. Assessments consider concentrations of damages in local jurisdictions even if statewide damages are not severe. Countywide impacts from major disasters declared on or after October 1, 2005, would generally be expected to reach the threshold of \$2.94 per capita for PA assistance to be authorized; see 70 FR 58734.

⁶⁵ Citations to emergency assistance statutory authorities administered by agencies other than the Department of (continued...)

considered to determine whether federal IHP assistance is needed include concentration of damages; number of injuries, deaths, or the extent to which essential services are disrupted; the impact on special populations that require higher levels of assistance; the extent to which voluntary agencies are able to meet the needs of victims; insurance coverage; and, measurements of needs such as disaster housing needs approved, number of homes destroyed or damaged, financial assistance required, and others.⁶⁶

Emergency Declarations

The declaration process for emergencies is similar to that used for major disasters, but the criteria (based on the definition of “emergency”) are less specific.⁶⁷ Whereas all major disaster declarations require a gubernatorial request and, generally, findings and certifications as summarized above, emergency declaration requirements are less rigorous. For example, the President may issue an emergency declaration without a gubernatorial request if primary responsibility rests with the federal government.⁶⁸ Also, specific thresholds or calculations of past averages are not considered, but FEMA officials do assess whether “all other resources and authorities available to meet the crisis are inadequate” before recommending that the President issue an emergency declaration.⁶⁹

Types of Assistance and Eligibility

The Stafford Act identifies the universe of eligible applicants (e.g., states, local governments, owners of certain private nonprofit facilities, individuals, or families). However, not all persons or entities affected by a catastrophe are eligible for Stafford Act assistance even if the President issues a declaration. FEMA officials determine the need for assistance after a major disaster or emergency declaration is issued. Aid is provided only to those persons or entities determined to need the assistance. For example, a family with adequate insurance and alternative housing options might not be considered eligible to receive financial aid. A unit of local government that suffers damages to some facilities, but not to the extent considered necessary pursuant to FEMA regulations and guidelines, might not receive funds to rebuild infrastructure.

(...continued)

Homeland Security are identified in Table 2 of CRS Report RL33064, *Organization and Mission of the Emergency Preparedness and Response Directorate: Issues and Options for the 109th Congress*, by Keith Bea.

⁶⁶ Refer to the table in regulations (44 CFR 206.48(b)(6)) for computed averages of individual assistance needed for small, medium and large states, based upon losses incurred from 1994 to 1999.

⁶⁷ A Stafford Act “emergency” is “any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” 42 U.S.C. 5122(1).

⁶⁸ “The President may exercise any authority vested in him by ... this title with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected state, if practicable. The President’s determination may be made without regard to subsection (a) of this section.” 42 U.S.C. 5191(b).

⁶⁹ 44 CFR 206.37(2).

The type of assistance made available varies from one disaster to another and among eligible applicants within a state, commensurate with decisions by FEMA officials on the extent of damage and the eligibility of applicants. For instance, under a major disaster declaration, local jurisdictions with large numbers of damaged or destroyed residences might be eligible for assistance under the Individual Assistance (IA) program, whereas those with severely damaged infrastructure but relatively few damaged homes might be eligible only for assistance under the PA program. Similarly, if a local government had extensive debris in public rights-of-way due to a disaster, but very little damage to public facilities, a determination might be made to provide assistance only for debris removal activities under the PA program. On the other hand, areas severely devastated by a catastrophe are often eligible for both IA and PA.

The Stafford Act authorizes the President to make the initial determination of eligibility for federal relief and recovery assistance through the issuance of either a major disaster or emergency declaration. The following subsections summarize the types of assistance authorized under each.

Major Disaster Assistance

A major disaster declaration authorizes the President to direct that the following types of federal disaster assistance may be provided, depending upon the specific needs of the stricken areas:

- *General federal assistance* supports state and local governments in that it facilitates the distribution of consumable supplies; authorizes federal agency heads to provide resources (with or without reimbursement) to support evacuations, response and recovery efforts; and, provides a range of technical and advisory help.⁷⁰
- *Essential assistance* authorizes federal agency heads to distribute aid to victims through state and local governments and voluntary organizations, perform life- and property-saving assistance, clear debris, and conduct search and rescue missions, among other immediate response services. (The statute also allows Governors to request the use of Department of Defense resources before a major disaster or emergency declaration is issued.)⁷¹
- *Hazard mitigation* grants are provided to each state in which a major disaster declaration is issued to reduce risks and damages that might occur in future disasters.⁷²

⁷⁰ Sec. 402 of the Stafford Act, 42 U.S.C. 5170a.

⁷¹ Sec. 403 of the Stafford Act, 42 U.S.C. 5170b. FEMA has established two categories of public assistance (PA) emergency work under Section 403 authority—debris removal (Category A) and emergency protective measures to save lives and property (Category B).

⁷² Sec. 404 of the Stafford Act, 42 U.S.C. 5170c. The Hazard Mitigation Grant Program (HMGP), authorized by Section 404 of the Stafford Act (42 U.S.C. 5170c), funds activities that reduce the impacts of future disasters. For more information see CRS Report R40471, *FEMA's Hazard Mitigation Grant Program: Overview and Issues*, by Natalie Keegan. A second hazard mitigation program, the Pre-Disaster Mitigation (PDM) program, is authorized in Title II of the Stafford Act (42 U.S.C. 5133). For more information see CRS Report RL34537, *FEMA's Pre-Disaster Mitigation Program: Overview and Issues*, by Francis X. McCarthy and Natalie Keegan.

- *Federal facilities* may be repaired, restored, replaced, or reconstructed, if necessary, before legislation is enacted. If necessary, such construction may be undertaken before appropriations are approved if funds can be transferred from accounts dedicated to other purposes.⁷³
- *Repair, restoration, and replacement of damaged facilities* is administered through the Public Assistance (PA) program. Public facilities and infrastructure systems owned by state and local governments, as well as private nonprofit facilities that provide essential services, may be repaired or rebuilt. Applicants may also seek contributions for other facilities or hazard mitigation measures in lieu of repairing or restoring damaged facilities;⁷⁴
- *Debris removal* may be funded through the use of federal resources or through grants to state or local governments or owners of private nonprofit facilities.⁷⁵
- *Assistance to individuals and households* administered through the Individual and Household Program (IHP), includes financial grants to rent alternative housing, direct assistance through temporary housing units (mobile homes), and limited financial assistance for housing repairs and replacement. Financial assistance for uninsured medical, dental, funeral, personal property, transportation, and other expenses (referred to as Other Needs Assistance (ONA)) is also authorized.⁷⁶
- *Unemployment assistance* is available to individuals unemployed as a result of the major disaster, for up to 26 weeks, as long as they are not entitled to other unemployment compensation or credits.⁷⁷
- *Grants to assist low-income migrant and seasonal farmworkers* are provided by the Secretary of Agriculture (total limited to \$20 million annually) “where the Secretary determines that a local, state or national emergency or disaster” has resulted in a loss of income or inability to work.⁷⁸
- *Food coupons and food distribution* for low-income households unable to purchase nutritious food;⁷⁹

⁷³ Sec. 405 of the Stafford Act, 42 U.S.C. 5171. The statute also mandates that federal agencies evaluate and take action to mitigate natural hazards.

⁷⁴ Sec. 406 of the Stafford Act, 42 U.S.C. 5172. Private nonprofit facilities that provide “critical services” (power, water, sewer, wastewater treatment, communications, and emergency medical care) may receive grants. Owners of other facilities that provide essential, but not critical services, must first apply for a Small Business Administration (SBA) loan, and may then receive grants if they are ineligible for such a loan or require aid above the amount approved by the SBA. The permanent work supported under this authority has been designated by FEMA as follows: “Category C,” roads and bridges; “Category D,” water control facilities; “Category E,” buildings and equipment; “Category F,” utilities; and “Category G,” parks, recreational facilities, and other items. For more information see U.S. Department of Homeland Security, Federal Emergency Management Agency, “Public Assistance Guide-FEMA Publication 322,” available at <http://www.fema.gov/government/grant/pa/paguided.shtm>, visited August 1, 2006.

⁷⁵ Sec. 407 of the Stafford Act, 42 U.S.C. 5173. Debris removal grants authorized by Section 407 are provided to states and are separate from the Category A debris removal PA assistance authorized by Section 403.

⁷⁶ Sec. 408 of the Stafford Act, 42 U.S.C. 5174. [Sec. 409, food coupons and distribution, was redesignated Sec. 412.]

⁷⁷ Sec. 410 of the Stafford Act, 42 U.S.C. 5177. For background information see CRS Report RS22022, *Disaster Unemployment Assistance (DUA)*, by Julie M. Whittaker and Alison M. Shelton.

⁷⁸ 42 U.S.C. 5177a.

⁷⁹ Sec. 412 of the Stafford Act, 42 U.S.C. 5179.

- *food commodities* for emergency mass feeding;⁸⁰
- *legal services* for low-income individuals;⁸¹
- *crisis counseling assistance and training* grants for state and local governments or private mental health organizations to provide services or train workers;⁸²
- *community disaster loans* to local governments that lose tax or other revenues needed for governmental services;⁸³
- *emergency communications* to establish temporary communications during “or in anticipation of an emergency or major disaster,”⁸⁴ and,
- *emergency public transportation* to provide transportation to essential places.⁸⁵

Each major disaster declaration specifies the type of incident covered, the time period covered, the types of disaster assistance available, the units of local government (generally counties, parishes, and independent cities) included in the declaration, and the name of the federal coordinating officer. As the effects of the catastrophe subside over time, the initial major disaster declaration may be amended to modify the types of assistance to be provided and the areas (generally counties) included in the major disaster declarations.

Emergency Declaration Assistance

Considerably less assistance is authorized to be provided under an emergency declaration in comparison to that authorized for a major disaster declaration. The types of *emergency assistance* authorized to be provided under an emergency declaration include the following:

- activities to support state and local emergency assistance;
- coordination of disaster relief provided by federal and non-federal organizations;
- technical and advisory assistance to state and local governments;
- emergency assistance through federal agencies;
- debris removal through grants to state and local governments (Section 407);
- grants to individuals and households for temporary housing and uninsured personal needs (Section 408); and
- distribution of medicine, food, and consumables.⁸⁶

⁸⁰ Sec. 413 of the Stafford Act, 42 U.S.C. 5180.

⁸¹ Sec. 415 of the Stafford Act, 42 U.S.C. 5182.

⁸² Sec. 416 of the Stafford Act, 42 U.S.C. 5183.

⁸³ Sec. 417 of the Stafford Act, 42 U.S.C. 5184.

⁸⁴ Sec. 418 of the Stafford Act, 42 U.S.C. 5185.

⁸⁵ Sec. 419 of the Stafford Act, 42 U.S.C. 5186.

⁸⁶ Section 502 of the Stafford Act, 42 U.S.C. 5192.

Funding Caps and Cost Shares

Before federal assistance is provided under Stafford Act authority contractual agreements between FEMA and the state must be finalized. These agreements set forth the terms under which FEMA will obligate and distribute disaster assistance funding to the state for redistribution to eligible applicants (e.g., local governments).

Pursuant to Stafford Act requirements, federal assistance programs are limited either to a fixed dollar amount or to a percentage of eligible costs. All parties use the agreements to establish federal, state, and local cost shares pursuant to statutory requirements and allowances. The Stafford Act stipulates that the minimum federal assistance for certain eligible activities “shall be not less than 75% of the eligible cost of such assistance.”⁸⁷ Other provisions specify ceilings, rather than floors, for federal aid. Specific cost share requirements set out in the statute include the following.

- *Essential assistance:* The federal share must be at least 75% of eligible costs.⁸⁸
- *Repair, restoration, or replacement of public facilities:* In general, at least 75% of eligible costs must be provided, but this threshold may be reduced to 25% if a facility has previously been damaged by the same type of disaster and mitigation measures have not been adopted to address the hazard. Federal aid generally will be reduced if facilities in flood hazard areas are not covered by flood insurance. Cost estimation requirements must be adhered to, but the President may approve costs that exceed the regulatory limitations. “Associated costs,” such as the employment of national guard forces, use of prison labor, and base and overtime wages for employees and “extra hires,” may be reimbursed. The President must notify congressional committees with jurisdiction before providing more than \$20 million to repair, restore, or replace facilities.⁸⁹
- *Debris removal:* The federal share must be at least 75% of the eligible costs.⁹⁰
- *Individual and household assistance:* Temporary housing units may be provided directly to victims of disasters, without charge, for up to 18 months, unless the President extends the assistance “due to extraordinary circumstances.” Fair market rents may be charged at the conclusion of the 18 month period.⁹¹ The

⁸⁷ The Stafford Act, as amended (P.L. 100-707), Sections 403(b), 403 (c)(4), 406(b), and 407(d). The same 75% minimum is also applicable to presidential emergency declarations (42 U.S.C. 5193, Section 503(a)). Neither the statute nor the regulations impose a formula for the distribution of cost-share requirements among state and local governments. Some states, for example, have established a 15% local and a 10% state match combination; other states equally divide the required cost share—12.5% each for the state and for each local government that receives Stafford Act assistance.

⁸⁸ 42 U.S.C. 5170b(b).

⁸⁹ 42 U.S.C. 5172. The statute provides that “base and overtime wages for the employees” and hires of state and local governments may be reimbursed under this authority (42 U.S.C. 5172(a)(2)(C)). Regulations, however, specify that “straight- or regular-time salaries and benefits” of permanent employees (referred to as “force account labor costs”) are not eligible if they are engaged in activities associated with essential assistance (Sec. 403) or debris removal grants (Sec. 407). See 44 CFR 206.228(a)(4).

⁹⁰ 42 U.S.C. 5173(d).

⁹¹ 42 U.S.C. 5174(c). Financial assistance to build permanent or “semi-permanent” housing may be provided in insular areas outside the continental United States “and in other locations” where temporary housing alternatives are not available.

federal share of housing assistance is 100%. Financial assistance is also provided for uninsured medical, dental, funeral, transportation, personal property, and other needs; the federal share for this assistance is capped at 75% of eligible costs; the total amount that may be provided under the Individuals and Household Program (IHP) cannot exceed \$25,000 (adjusted annually).⁹²

- *Small project grants:* If the estimated costs of assistance for facility repair or replacement (Section 406), essential assistance (Section 403), debris removal (Section 407), or emergency assistance (Section 502) do not exceed \$35,000 (adjusted annually), a small project grant may be issued.⁹³
- *Emergency declaration assistance:* Federal assistance must constitute at least 75% of eligible costs. Expenditures made under an emergency declaration are limited to \$5 million per declaration unless the President determines that there is a continuing need; Congress must be notified if the \$5 million ceiling is breached.⁹⁴

In instances where the state-local match is unduly burdensome due to factors such as the impact of the disaster or the fiscal condition of the state and its units of local government, the President may waive some or all of the cost-sharing requirement for PA programs. However, the President may not waive the 25% state-local requirement for assistance provided under the Individual Assistance (IA) Program, except for insular areas.⁹⁵ As noted previously in this report, Congress statutorily waived the cost share provision for assistance provided after specified disasters.⁹⁶

If a state or a local government believes that the economic impact from the disaster warrants, officials may contact FEMA to request a reduction in their portion of the federal cost-share. The regulations specify that an adjustment in the cost-share requirement may be made “whenever a disaster is so extraordinary that actual federal obligations under the Stafford Act, excluding FEMA administration cost, meet or exceed” specified thresholds.⁹⁷ (The costs incurred are based on Stafford Act obligations for the disaster and may differ from those of the preliminary damage assessment.⁹⁸)

⁹² 42 U.S.C. 5174. FEMA has established a limitation of \$27,200 for IHP assistance to an individual or household in each emergency or major disaster declared after October 1, 2005. See 70 FR 58735. (The 2006 amendments deleted the caps on housing repair and replacement.)

⁹³ 42 U.S.C. 5189. FEMA has established a limitation of \$57,500 for small project grants for major disaster or emergencies declared after October 1, 2005. See 70 FR 58735.

⁹⁴ Sec. 503 of the Stafford Act, 42 U.S.C. 5193.

⁹⁵ 48 U.S.C. 1469(a)(d).

⁹⁶ P.L. 111-32, 123 Stat. 1882-1883.

⁹⁷ 44 CFR 206.47(b).

⁹⁸ Due to the difficulty of conducting preliminary damage assessments immediately after a disaster occurs, it is not unusual for amendments to be made to the disaster declaration providing more assistance to affected areas once the greater degree of damage has become known and verified.

Hazard Mitigation Assistance

Under the Hazard Mitigation Program Grant (Section 404 or HMGP) and the Pre-Disaster Mitigation grant (Section 203 or PDM) authorities the federal government provides grants to state and local governments to reduce the impact of future disasters.⁹⁹ HMGP funds are allocated to each state in which a major disaster has been declared. The funds generally may be used for any eligible hazard mitigation activity in the state (consistent with the Governor's request and Presidential designation), not necessarily related to the catastrophe that led to the declaration. PDM grants, by comparison, are applied for pursuant to criteria established in Section 203 and are not related to major disaster declarations.

Section 404 Hazard Mitigation Grants

HMGP funding was first authorized in the 1988 amendments to the 1974 statute.¹⁰⁰ Congress has amended Section 404 four times since 1988 to (1) increase the share of federal assistance and authorize property acquisition grants,¹⁰¹ (2) stimulate state mitigation planning,¹⁰² (3) reduce the maximum amount of federal aid,¹⁰³ and (4) establish a sliding scale for the awards.¹⁰⁴ Money for HMGP derives from the Disaster Relief Fund (DRF, discussed in the next section of this report), not from line item appropriations. The current statutory provisions do not address what percentage would be used to determine hazard mitigation funding for disasters that exceed \$35.333 billion. It would appear that special legislation would need to be enacted to provide mitigation funding for any disaster in excess of that amount.

Pre-Disaster Mitigation Grants

During the Clinton Administration FEMA initiated a new program titled Project Impact to stimulate pre-disaster mitigation efforts.¹⁰⁵ Congress appropriated funds, generally \$25 million per year, in the mid-1990s, to support Project Impact activities. The 105th Congress considered, but did not approve, legislation to authorize funding for pre-disaster mitigation grants.¹⁰⁶ The issue carried over to the 106th Congress, which approved legislation to expand federal pre-disaster

⁹⁹ For more information see CRS Report R40471, *FEMA's Hazard Mitigation Grant Program: Overview and Issues*, by Natalie Keegan and CRS Report RL34537, *FEMA's Pre-Disaster Mitigation Program: Overview and Issues*, by Francis X. McCarthy and Natalie Keegan.

¹⁰⁰ P.L. 100-707, Sec. 106(a), 102 Stat. 4698-4699. For more information see CRS Report

¹⁰¹ 1993 amendments in P.L. 103-181, §§2(a), 3, 107 Stat. 2054.

¹⁰² 2000 amendments in P.L. 106-390, Title I, §104(a), 114 Stat. 1558.

¹⁰³ 2003 amendments in P.L. 108-7, Title IV, §417, 117 Stat. 525.

¹⁰⁴ 2006 amendment in P.L. 109-295, Title VI, Subtitle E, Sec. 684, 120 Stat. 1447.

¹⁰⁵ For background on Project Impact see U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *Disaster Mitigation, Preparedness and Response*, hearing, 105th Cong., 2nd sess., January 28, 1998 (Washington, GPO, 1988).

¹⁰⁶ See U.S. Congress, Senate Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety, *Federal Emergency Management Agency Reforms*, hearing, 105th Cong., 2nd sess., July 23, 1998 (Washington: GPO, 1999).

mitigation assistance in order to reduce federal disaster relief costs, save lives, and protect property through enactment of the DMA of 2000.¹⁰⁷

The pre-disaster mitigation (PDM) grant program established by the DMA is intended to reduce losses and suffering “resulting from natural disasters” and provide a source of funding to ensure “the continued functionality of critical services and facilities after a natural disaster.”¹⁰⁸

Assistance is authorized to help state and local governments implement “pre-disaster hazard mitigation measures that are cost-effective and are designed to reduce injuries, loss of life, and damage and destruction of property, including damage to critical services and facilities under the jurisdiction of the states or local governments.”¹⁰⁹ Successful applicants must demonstrate the ability to develop “effective public-private natural disaster hazard mitigation partnerships. The legislation, according to FEMA, “emphasizes the importance of strong state and local planning processes and comprehensive program management at the state level.”¹¹⁰ Funding appropriated for PDM grants remains available until expended.¹¹¹

Disaster Relief Fund

Congress appropriates money to the Disaster Relief Fund (DRF) to ensure that the federal assistance described earlier in this report is available to help individuals and communities stricken by severe disasters.¹¹² Funds appropriated to the DRF remain available until expended. Such accounts are referred to as “no-year” accounts.¹¹³ Appropriations to the DRF generally evoke little controversy. Supplemental appropriations measures are generally required each fiscal year to meet the urgent needs of particularly catastrophic disasters. While the hurricane season of 2009 (June through October) resulted in no major disaster declarations for named hurricanes, 56 severe storms during calendar year 2009 caused a level of destruction sufficient for the President to invoke Stafford authority.¹¹⁴ In addition to the appropriation of \$1.6 billion in regular appropriations for FY2010 to meet the needs associated with those and previous declarations, the Obama Administration has requested supplemental funding for FY2010 to pay for Gulf Coast recovery projects that have been the subject of decisions by an arbitration panel established pursuant to a congressional mandate. The “Appeal Process” section at the end of this report discusses the impact of the panel’s actions on the appropriation of supplemental FY2010 funds for the DRF.

Questions have been raised in the past concerning the increased cost of federal disaster assistance authorized by the Stafford Act as the categories of aid and eligibility for federal disaster

¹⁰⁷ Sec. 102, P.L. 106-290, 114 Stat. 1553-1557, 42 U.S.C. 5133.

¹⁰⁸ Sec. 101(b), P.L. 106-390, 42 U.S.C. 5133.

¹⁰⁹ 114 Stat. 1554.

¹¹⁰ U.S. Federal Emergency Management Agency, “Hazard mitigation planning and Hazard Mitigation Grant Program,” *Federal Register*, vol. 67, no. 38, February 26, 2002, pp.8843-54.

¹¹¹ See P.L. 108-334, the FY2005 Department of Homeland Security Appropriations Act, 118 Stat. 1313.

¹¹² Information on disaster funding is available in: CRS Report R40708, *Disaster Relief Funding and Emergency Supplemental Appropriations*, by Bruce R. Lindsay and Justin Murray.

¹¹³ For background on this and other types of federal budget accounts, see CRS Report 98-410, *Basic Federal Budgeting Terminology*, by Bill Heniff Jr.

¹¹⁴ The listing of declarations is found at <http://www.fema.gov/news/disasters.fema?year=2009#sev1>. Tropical storm/depression Ida, which did not reach hurricane status, led to declarations in two states.

assistance have expanded. For example, over the past five decades, Congress has expanded the basic authority first enacted in 1950 to include housing, grants for the repair of infrastructure, aid to individuals, loans to communities for lost revenue, and other needs. Congress has previously explored the issue of rising federal disaster assistance costs and reliance upon supplemental appropriations.¹¹⁵ See “Reducing Federal Expenditures,” for a discussion of this topic.

Mission Assignments

The DRF is the source of funding for “mission assignments” made by FEMA to other federal agencies. By this mechanism the federal government is able to provide assistance after a disaster by tasking any federal agency to undertake an activity necessary to save lives, protect property, or provide other assistance authorized by the Stafford Act. Mission assignments eliminate the need for Congress to appropriate specific amounts of money to many federal agencies. Instead, this instrument enables FEMA to task and reimburse other federal agencies for the assistance they undertake after the President issues a declaration.

For example, FEMA’s Operation Blue Roof, the program that funds the installation of blue tarps to temporarily repair damaged residential roofs, is mission assigned to the U.S. Army Corps of Engineers (USACE). The Corps of Engineers obtains and distributes the tarps, hires the contractors, and ensures that all applicable federal regulations are followed. Other activities that may fall under FEMA mission assignments to other federal agencies include search and rescue, disease prevention and control, and health and medical support.

Issues for the 111th Congress

As noted above, pending legislation would amend provisions of the Stafford Act concerning eligibility for assistance, the types of assistance to be provided by the federal government, and administration of the emergency management process. Members of the 111th Congress might elect to consider the following in assessing whether further legislative changes are required.

Expanding Eligibility

The 1988 amendments to the Disaster Relief Act of 1974 added certain private nonprofit organizations that provide essential government services to the category of eligible recipients of Stafford Act public assistance.¹¹⁶ Prior to that change, only state and local governments were eligible for the aid. Pending legislation before the 111th Congress would make further changes to the Stafford Act by enabling certain organizations or persons to receive assistance for which they are not currently eligible.

¹¹⁵ U.S. Congress, Senate Bipartisan Task Force on Funding Disaster Relief, *Federal Disaster Assistance*, S.Doc. 104-4, 104th Cong., 1st sess., (Washington: GPO, 1995). The House convened a task force that issued an unpublished report. Following completion of the task force efforts, some Members introduced a concurrent resolution (H.Con.Res. 39, 104th Congress) seeking a “fundamental overhaul of federal disaster policies.” See also U.S. Congress, House Committee on the Budget, Task Force on Budget Process, *Budgetary Treatment of Emergencies*, hearing, 105th Cong., 2nd sess., June 23, 1998 (Washington: GPO, 1998).

¹¹⁶ P.L. 100-707, 102 Stat. 4699. The 2000 amendments further modified the language concerning private nonprofit facilities by requiring that the facilities provide “critical services.” See P.L. 106-390, 114 Stat. 1562.

The most significant proposals would breach the long-standing bright line that has divided public and for-profit entities. Private for-profit organizations and property owners have not been deemed eligible for grants authorized by the statute since enactment of the 1950 statute and in subsequent amendments. Instead, Congress has directed that owners and operators of private, for-profit institutions must rely on pre-paid insurance or loans. The devastation caused by Hurricane Katrina to all components of many communities, and the recognition that community recovery is tied not only to public institutions but to private sector entities that provide essential services and employment, has revived interest in the issue of expanding eligibility for Stafford Act assistance to certain for-profit entities.

In addition to adding new organizations to the category of entities eligible for public assistance, some bills pending in the 111th Congress would take a different approach to extending Stafford Act assistance. Currently, only property owners are eligible to receive financial assistance for the repair or replacement of housing, as follows:

- H.R. 1059 would extend eligibility to the heirs of deceased property owners. Another approach is to modify the definition of the term “major disaster” to include other types of catastrophes.
- H.R. 1131 would authorize the President to issue such a declaration after instances of terrorist attacks, contamination, or most broadly, “or other catastrophic event.”¹¹⁷
- Other bills (H.R. 3377 and H.R. 3453) would take a different approach; they would require that Administration officials revise and update the criteria currently used to determine whether a major disaster declaration will be issued.
- Also, one bill (H.R. 4297) would require that the President consider the needs of rural areas marked by less dense land development in determining eligibility for assistance. Revisions to the criteria for declarations could result in expanded eligibility for aid, or, as discussed below, possibly lead to reduced federal expenditures.

Some might contend that any such expansion of eligibility would result in considerably higher federal disaster relief expenditures as private, for-profit entities, newly designated property owners, or entire states would increasingly turn to federal grants in lieu of relying upon insurance policies or agreeing to repay loans. Accordingly, opponents of the proposals might argue that just as the 2000 amendments expanded certain federal assistance (largely through the establishment of a new pre-disaster hazard mitigation program) and reduced costs in some areas, the pending legislation should balance increased aid proposals with cost-cutting measures.¹¹⁸

¹¹⁷ The phrase “other catastrophic event” is comparable to definitional language replaced in the 1988 amendments. From 1950 through 1988 the phrase “or other catastrophe” appeared in the definition of major disaster. (See 54 Stat. 1109 for the 1950 text.) In 1988 Congress modified the definition to more itemize the types of “natural” catastrophes that might result in a declaration and inserted “regardless of cause, any fire, flood or explosion” in place of the broader “other catastrophe” phrase (see 102 Stat. 4690 for the revised and current text).

¹¹⁸ Title I of P.L. 106-390 authorized the pre-disaster mitigation program; Title II, “Streamlining and Cost Reduction,” sought to reduce costs by authorizing the President to establish management cost rates, allowing states to administer their hazard mitigation (Section 404) grant programs, imposed restrictions on the awarding of grants to private non-profit organizations, limited community development loans to \$5 million, and made other changes.

Others would contend that amendments that would expand the boundaries of eligibility are appropriate as state and local governments struggle with budget problems, property owners face increased costs of credit, and policyholders face more expensive insurance premiums and more stringent insurance requirements. Also, they may contend that just as some of the facilities newly designated as eligible for public assistance funds in 1988, notably educational and health care institutions, provide services comparable to those available through public or non-profit organizations, the institutions identified in the pending legislation also provide public services critical to a community's revival. Such a conclusion, it might be argued, is consistent with congressional findings in the statute.¹¹⁹

As discussed below, precedent exists for the provision of such assistance. On at least two occasions, Congress appropriated funds to help private corporations deemed to be particularly affected after disasters—when utility companies' electricity lines were damaged in 1998 ice storms, and when other companies lost infrastructure in the terrorist attacks of 2001 in New York City. A third instance, involving the Texas Medical Center, directly involves Stafford Act eligibility criteria. The first two instances involved appropriations made outside of Stafford Act authority, the third consisted of special designation under the Stafford definition.

Private Utilities after the 1998 Ice Storms

In the early winter months of 1998, an ice storm resulted in the destruction of electricity distribution infrastructure as heavily laden trees collapsed on miles of poles and wires.¹²⁰ Private utilities owned and maintained the infrastructure. To address concerns that the private utilities would have to pass on the costs of repairs to customers, Congress included funding in the omnibus appropriations act for FY1999 (P.L. 105-277) for the Community Development Block Grant (CDBG) program administered by the Department of Housing and Urban Development (HUD). The act directed that funds would be provided “for disaster relief, long-term recovery, and mitigation in communities affected by Presidentially-declared natural disasters designated during fiscal years 1998 and 1999.”¹²¹ According to news reports, disagreement arose between the Secretary of HUD and Members of Congress over the use of the appropriated funds because the statute did not specify how the funds would be used.¹²²

Private Utilities after the 2001 Terrorist Attacks

The destruction of much of the infrastructure around and under the World Trade Center on September 11, 2001, resulted in the appropriation of billions of dollars in federal assistance to New York City. The communications networks owned by private for-profit corporations were not eligible for assistance under the Stafford Act. Congress appropriated \$783 million for a range of

¹¹⁹ 42 U.S.C. 5121(b). The findings and declarations provision of the statute notes that the federal assistance is to, among other purposes, provide “programs for both public and private losses sustained in disasters.” 42 U.S.C. 5121(b)(6).

¹²⁰ For background on the storm, see Senator Olympia Snowe, “The Ice Storm of 1998,” remarks in the Senate, *Congressional Record*, vol. 144, February 11, 1998, S609-S612.

¹²¹ 112 Stat. 2681-579. The full text of the provision that appropriated funds after the ice storms follows in the appendix to this memorandum.

¹²² Steve Campbell, “Ice Storm Aid Pittance Seen as ‘Betrayal’,” *Press Herald* online, November 22, 1998, at <http://www.portland.com/sunews/story2.htm>, visited November 23, 1998; Charles Davant, “Congress Hastens Maine Ice Storm Relief,” *Bangor Daily News*, May 12, 1999; site archived.

rebuilding efforts in Lower Manhattan, for economic revitalization and reconstruction in order to facilitate redevelopment, “including the restoration of utility infrastructure.”¹²³ The conference report accompanying the legislation provided the following statements regarding this appropriation:

The conference agreement includes an emergency appropriation of \$783,000,000 for assistance to properties and businesses, including restoration of damaged infrastructure, and for economic revitalization activities in the areas of New York City affected by the September 11, 2001 terrorist attacks, instead of \$750,000,000 as proposed by the House and Senate.

The conferees recognize the tremendous human losses suffered by those businesses located in the World Trade Center, particularly those firms which suffered the greatest loss of life in the attacks. Because of the conferees’ strong desire to support the redevelopment of the areas of New York City affected by the attacks and to encourage those businesses most devastated by the attacks to remain in New York City, the conferees have provided a \$33,000,000 increase over the request. The conferees expect that these additional funds will be made available to assist those firms located in New York City at the time of the terrorist attacks which suffered a disproportionate loss of its workforce and who intend to re-establish their operations in New York City.

The conferees concur with the language included in the House report encouraging the Lower Manhattan Development Corporation to consider the needs of utility companies and other institutions affected by the World Trade Center attacks.¹²⁴

Private Health System after 2001 Tropical Storm Allison

In early June, 2001, President Bush issued a major disaster declaration for the state of Texas due to flooding associated with Tropical Storm Allison.¹²⁵ The Texas Medical Center (TMC), a health care complex that includes 13 hospitals as well as medical and nursing schools, suffered considerable damage.¹²⁶ The TMC, however, was not eligible for Stafford Act assistance because of its for-profit status. Through a provision included in an omnibus appropriations statute, TMC was declared eligible for Stafford Act assistance, as follows:

That notwithstanding any other provision of law, for disaster declaration FEMA-1379-DR and hereafter, the Texas Medical Center is to be considered for FEMA Public Assistance and Hazard Mitigation grants as if it were an eligible applicant.¹²⁷

¹²³ 116 Stat. 890.

¹²⁴ U.S. Congress, Conference Committees, 2002, *Making Supplemental Appropriations for Further Recovery from and Response to Terrorist Attacks on the United States for the Fiscal Year Ending September 30, 2002, and for Other Purposes*, conference report to accompany H.R. 4775, H.Rept. 107-593, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 180.

¹²⁵ Information is available at U.S. Federal Emergency Management Agency, “Texas Severe Storms & Flooding: Declared June 9, 2001,” at <http://www.fema.gov/news/event.fema?id=115>, visited January 28, 2008.

¹²⁶ Summary information is available at Ellen Parson, “1,000-Year Flood Paralyzes Texas Medical Center,” September 1, 2002, at http://www.ecmweb.com/mag/electric_year_flood_paralyzes/index.html, visited January 28, 2008.

¹²⁷ P.L. 108-7, 117 Stat. 514. No recorded debate exists relative to the merits of this provision.

Policy Options

Members of Congress might elect to take action on or in opposition to the legislation noted above in order to expand eligibility for Stafford Act assistance. Another option available to Members of Congress is to consider the integration of existing loan authority with the grant-in-aid provisions in the Stafford Act. Congress already moved in this direction in 2000 with the requirement that public assistance grants be available to certain non-profit facilities “only if” they provide critical services (defined in the statute) or the owner or operator has applied for a Small Business Administration (SBA) loan and has been found ineligible for such aid or has received the maximum amount of assistance possible through such a loan.¹²⁸ Congress might elect to consider modifying the thresholds for assistance by authorizing grants for businesses before they obtain loans at the maximum level or eliminating the requirement that they be found ineligible for such aid. One research organization cited the need for a legislative change such as this as follows:

Currently, there are no federal grants programs — only loans — to assist small business. We further recommend converting some federal assistance for small businesses from loans to grants in order to ease the burden of loan repayments following a catastrophe. The amount of grants versus loans could be weighted depending upon the size and history of the business.¹²⁹

The integration of the SBA disaster loan authority and the Stafford Act grant-in-aid assistance authority has previously been considered by Congress decades ago. First, when President Richard Nixon proposed the establishment of a Department of Community Development, the integration of “the disaster relief programs of the SBA and the Farmers Home Administration” were expected to be integrated with the transfer of emergency preparedness and disaster relief functions.¹³⁰ Congress did not act on President Nixon’s proposal. Next, when President Jimmy Carter successfully reorganized federal emergency management authorities in 1978 through the creation of FEMA, the loan-making authority and resources of the SBA were viewed as separate activities from those moving into FEMA. In questioning Administration officials on the Carter proposal, one Senator argued for the separation of FEMA’s coordination authority from the SBA loan authority as follows:

I would think that, first of all, we would have for the first time in the government a single accountable public official with broad coordinative authority over all disaster relief programs. We are not going to be duplicating staffs in agencies such as the Farmers’ Home Administration or Small Business Administration, who are very expert in making loans and following up and managing loans. But we are going to have a place in the government where overall policies can be developed ... I think we will be able to address overall emergency related policies, including those of programs that are actually carried out by other agencies.¹³¹

¹²⁸ 42 U.S.C. 5172(a)(3)(A), enacted in P.L. 106-390, 114 Stat. 1562.

¹²⁹ Moss, Mitchell L. and Charles Shelhamer, New York University. *The Stafford Act: Priorities for Reform*. The Center for Catastrophe Preparedness and Response, 2007, p. 19, available at http://www.nyu.edu/ccpr/pubs/Report_StaffordActReform_MitchellMoss_10.03.07.pdf.

¹³⁰ U.S. Congress, House, Committee on Government Operations, Subcommittee on Legislation and Military Operations, *Reorganization Plan No. 1 of 1973*, hearing, Feb. 26, 1973, 93rd Cong., 1st sess., U.S. Govt. Print. Off., p. 37.

¹³¹ U.S. Congress, Senate, Committee on Governmental Affairs, Subcommittee on Intergovernmental Relations, *Reorganization Plan No. 3 of 1978 (Disaster Preparedness)*, hearing, June 20, 1978, 95th Cong., 2nd sess., U.S. Govt. Print. Off., p. 8.

Members of the 111th Congress might elect to reopen the debate on whether loan authority, including that currently administered by the SBA, might be recast to address concerns raised in the discussion on whether Stafford act grant-in-aid eligibility might be expanded.

Reducing Federal Expenditures

The need for federal assistance after a disaster, particularly one of catastrophic magnitude, may lead some Members and other officials to promise “whatever it takes” to restore the area to its pre-disaster condition. The knowledge that families have been disrupted, livelihoods compromised, and basic governance threatened stimulate congressional action to ensure that past precedents are followed and, at times, additional aid is provided. Such assistance, however, requires the expenditure of revenues that might arguably be used elsewhere for other urgent purposes. For years Congress has wrestled with the competing goals of providing disaster assistance and controlling expenditures. The debate, often muted in the face of devastating losses, continues today.

In light of the ongoing discussions in the 111th Congress to reduce the federal deficit and federal expenditures, Members of Congress may wish to consider changes to the Stafford Act that would reduce federal expenditures. One of the most straightforward, and arguably difficult option, is to eliminate or reduce some of the benefits authorized by the statute. That option would require an examination of the components of the Stafford Act, their relative costs, and the effect of enacting changes to current benefits.¹³² Should Members elect to consider other options, they may wish to consider past efforts to reduce expenditures.

Perhaps the most extensive effort to evaluate the range of federal disaster assistance programs and identify alternative financing approaches involved a Senate bipartisan task force. Following the high costs associated with Hurricane Andrew in 1992, Senators formed the Bipartisan Task Force on Funding Disaster Relief to compile information on federal policies and programs, identify costs, and discuss budgetary options. The final report issued by the Task Force included a discussion of one proposal to modify disaster assistance policies: establish more explicit and/or stringent criteria for providing federal disaster assistance.¹³³

¹³² Comprehensive data on federal emergency management funding are not collected on a regular basis. To the extent known, the most comprehensive collection of such data comprised expenditure information from fiscal years 1977 through 1993. A similar compilation has not been published. In constant dollars, federal disaster recovery costs totaled almost \$87 billion, or slightly more than \$5 million annually. The next most costly category involved hazard mitigation efforts, with a total of \$27 million, or \$1.6 million annually. Preparedness and response expenditures totaled less than \$4 billion each for that period, or annual costs of less than \$200 million. See U.S. Senate. Bipartisan Task Force on Funding Disaster Relief. *Federal Disaster Assistance, Report of the Senate Task Force on Funding Disaster Relief*, 104th Cong., 1st sess., Document No. 104-4 (Washington: GPO, 1995), Table 1.1, p. 5.

¹³³ U.S. Senate. Bipartisan Task Force on Funding Disaster Relief. *Federal Disaster Assistance, Report of the Senate Task Force on Funding Disaster Relief*, 104th Cong., 1st sess., Document No. 104-4 (Washington: GPO, 1995), p. 69. the report also discussed two other options: “emphasize hazard mitigation through incentives or rely more on insurance.” The former is discussed earlier in this report as hazard mitigation authority exists in the Stafford Act. Greater reliance on pre-paid insurance policies raises issues beyond the scope of the Stafford Act.

Criteria for Assistance

Declarations

The Senate Bipartisan Task Force report focused on the criteria considered by the President in deciding whether a major disaster or emergency declaration would be issued. The policy that currently guides the decision process is set out in statute and regulations, and provides for discretionary judgment as well.¹³⁴ As some analysts have concluded, however, the criteria have not always been well documented or consistent.

Pending legislation in the 111th Congress (H.R. 3377 and H.R. 3453) would mandate updating of the existing regulatory criteria used to determine whether major disaster declaration assistance (and what type of assistance) is to be provided. Such an examination may lead to the tightening of requirements that could result in reduced federal expenditures. Conversely, less stringent requirements would result in expanded eligibility and assistance levels.

The issue of which criteria are used by the President to issue a declaration has been the focus of some analytical studies. Questions have been raised about whether federal aid is needed at all after some catastrophes. Some have contended that political considerations, as much as estimates of need, contribute to the costs of disaster relief as well. One 2002 study by economists Thomas A. Garrett and Russell S. Sobel purported: “States politically important to the president have a higher rate of disaster declaration by the president, and disaster expenditures are higher in states having congressional representation on FEMA oversight committees. Election year impacts are also found.” Another study, which built upon the 2002 paper, examined presidential disaster declarations from 1981 through 2004 and found that “... the greater the electoral prize and the more competitive the statewide presidential contest, the more likely it is that a state will receive a presidential disaster declaration even after controlling for actual need.”¹³⁵ Another, earlier perspective on the issue appeared in a 1989 study completed by Government Accountability Office (GAO) that also considered the effects of politics on disaster declarations. After examining presidential declaration data from the perspective of the party affiliation of governors and members of state congressional delegations, the authors concluded that there “were no indications that party affiliation affected White House major disaster declaration decisions.”¹³⁶

Members of Congress may elect to consider amending the Stafford Act to reduce the discretion exercised by the President in issuing the declarations. Such amendments might include establishing quantitative measures of need, damage thresholds higher than those currently used, or mandating that such declarations be subject to congressional review.

Individual and Family Eligibility

Stafford Act assistance for individuals (and the assistance authorized under the predecessor legislation since 1950) has never been means tested. All residents of areas included in major

¹³⁴ For information on the declaration criteria and procedures see CRS Report RL34146, *FEMA's Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

¹³⁵ Andrew Reeves, “Political Disaster? Presidential Disaster Declarations and Electoral Politics,” Abstract, unpublished paper, August 29, 2005, available at <http://sws1.bu.edu/areeves/papers/fema.pdf>.

¹³⁶ U.S. General Accounting Office, *Disaster Assistance: Timeliness and Other Issues Involving the Major Disaster Declaration Process*, GAO/RCED-89-138, May 25, 1989, pp. 1, 4.

disaster or emergency declarations remain eligible for assistance, providing the President (through administrative officers) determine that the assistance is to be provided. Disaster survivors must provide an indication of need and assurance that federal aid will not be duplicative, but they do not have to meet income or other requirements.¹³⁷ It is arguable that the destruction of paper records and the need for victims to evacuate an area with scant or no proof of their income or other means of support, overwhelms any argument for means testing.

However, legislation pending in the 111th Congress would establish increased individual and household assistance for disaster victims with annual incomes below \$100,000. One might argue that if federal officials could obtain this information to assess the needs of lower income households for more assistance, similar information could be used to identify those with higher incomes in order to establish a maximum threshold for assistance.

In the face of record deficits and calls to reduce federal spending, Members of Congress may elect to evaluate the advantages and disadvantages of enacting a means test before housing or other needs assistance (referred to as ONA) are to be provided pursuant to Section 408 of the Stafford Act. Some may argue that means testing should not be used after a disaster when the full extent of losses is unknown, seemingly wealthy households will face new expenses, and administrative workloads will increase. Others may contend that such thresholds would result in lower federal expenditures, be consistent with the existing provision that federal aid not duplicative assistance from other sources, and encourage individuals and families to allocate personal resources to unanticipated needs.

Appeal Process

The most significant action taken by the 111th Congress regarding Stafford Act policy involves the authority of the U.S. Civilian Board of Contract Appeals to finalize decisions on public assistance applications. The FY2010 appropriations legislation for the Department of Homeland Security authorized the temporary reemployment of retired administrative law judges to preside over arbitration proceedings involving disputes of public assistance applications that exceed \$500,000 in total costs.¹³⁸ Through this legislation Congress sought to expedite action on public assistance applications in the Gulf Coast that have been pending for years in order to stimulate recovery efforts in Louisiana, Alabama, Mississippi, and Texas associated with Hurricanes Katrina and Rita in 2005. Implementing regulations issued by FEMA outline the standard appeal process and summarize the conditions under which cases in appeal would be subject to the process established by Congress.¹³⁹

¹³⁷ The establishment of means testing for individuals differs from the current policy used by the President and administration officials to establish criteria to determine whether declarations will be issued in states, and, if so, the considerations given to determine which counties will be included in the declaration. For information on such capacity and need measures see CRS Report RL34146, *FEMA's Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

¹³⁸ The temporary reemployment authorization is found at Section 566, P.L. 111-83, 123 Stat. 218. The authorization for arbitration panels is found at Section 601, P.L. 111-5, 123 Stat. 164.

¹³⁹ U.S. Department of Homeland Security, Federal Emergency Management Agency, "Arbitration for Public Assistance Determinations Related to Hurricanes Katrina and Rita (Disasters DR-1603, DR-1604, DR-1605, DR-1606, and DR1607)," 74 *Federal Register* 44761-44769, August 31, 2009.

From December 2009 through March 3, 2010, the Civilian Board of Contract Appeals issued 14 rulings on disputed applications.¹⁴⁰ The first five decisions set out the scope of the panel's authority.¹⁴¹ Of the remaining nine decisions, one resulted in FEMA's favor (CBCA 1760), due to the lack of timeliness of the appeal, while seven were decided in favor of the appellants. The parties reached settlement in one decision (numbered CBCA 1781), obviating the need for a panel decision. Perhaps the most significant decision made during this period involved the disposition of Charity Hospital in New Orleans. In short, the panel ruled in favor of the appellants, and determined that FEMA should award almost \$475 million for the replacement of the hospital (CBCA 1741).

Impact of Panel Decisions on Funding

The decisions to date by the appeals panel have influenced the debate between the Administration and Congress on appropriations for the DRF. Administration officials have determined that the funds appropriated for FY2010 will prove insufficient for the Fund, in part due to the decision involving Charity Hospital and the expectation that other appeals will also result in increased demands for DRF assistance. On February 12, 2010, the President submitted a second supplemental FY2010 budget request for an additional \$1.5 billion for the DRF, in addition to the \$3.6 billion supplemental included in the FY2011 submission to Congress. This total supplemental of \$5.1 billion, according to the Administration, would be expected to meet needs in the current fiscal year, including "arbitration panel decisions likely to impact the Disaster Relief Fund in a previously unexpected manner."¹⁴² After Senate defeat on March 9, 2010 of a proposal to include the supplemental in legislation (H.R. 4123) that would extend expiring tax provisions, Members of Congress are considering other legislative vehicles for the FY2010 supplemental funding.

Summary of Issues on Appeals Process

While limited to appeals of decisions associated with Hurricanes Katrina and Rita, the congressional action indicates some degree of dissatisfaction with the standard appeals process established through regulation under the broad statutory guidance in the Stafford Act.¹⁴³ As opined by a former General Counsel for FEMA, the decision by Congress to authorize the

¹⁴⁰ The Board rulings are presented at http://www.cbca.gsa.gov/2009FEMA/2009FEMA.htm#October_2009.

¹⁴¹ The first five rulings, found at the cite noted immediately above, are numbered CBCA 1739, 1741, 1775, 1783, and 1757.

¹⁴² The White House, *FY2010 Supplemental Proposal in the FY2011 Budget*, p. 4 of the document found at http://www.whitehouse.gov/omb/assets/budget_amendments/supplemental_02_12_10.pdf.

¹⁴³ Section 423 of the statute (42 U.S.C. 5189a) provides that any decision concerning Title IV (major disaster) assistance may be appealed within 60 days, requires that a decision be issued within 90 days, and that mandates that rules be issued "for the fair and impartial consideration of appeals under this section." The regulations allow eligible applicants, subgrantees, or grantees to first appeal a FEMA decision concerning an application for public assistance. Such appeals must be reviewed by grantees and then given to the FEMA regional director. If that appeal is denied, applicants may submit second round appeals to a FEMA Assistant Administrator for Disaster Assistance. The regulations set out time constraints on appellants and FEMA officials and authorize FEMA officials to, at their discretion, "submit the appeal to an independent scientific or technical person or group" with expertise in technical matters. "The decision of the FEMA official at the next higher level shall be the final administrative decision of FEMA." 44 CFR 206.206.

arbitration process reflects “congressional belief that the appeal process for FEMA’s public assistance program was broken ...”¹⁴⁴

The issue before Congress is whether the appeal process requires a “fix,” and whether that modification should take the form of a statutory change.

The regulations issued by FEMA implementing the arbitration process identified the criteria to be considered in determining whether public assistance applications could be submitted to the arbitration process as follows: large projects that exceed the \$500,000 statutory threshold, applicants who remained eligible to file an appeal under the standing regulations (44 CFR 206.206) and withdrew their appeal, and those applicants that met specified time frames and deadlines. The regulation vested final determinative authority with the majority of arbitration panel members.¹⁴⁵ According to the statement accompanying the final rule, approximately 44 appeals were pending in Mississippi and Alabama (Hurricane Katrina), Texas (Hurricane Rita) and Louisiana (both hurricanes) when the agency published the regulation. Also, 2,188 projects were awaiting initial rulings and were estimated to be subject to the process. Accordingly, FEMA expected that 127 appeals would be forthcoming out of the 2,188 large projects eligible for the arbitration process.¹⁴⁶ The actual number of appeals submitted to arbitration, however, are far below the estimate. According to the former General Counsel for FEMA, “More than a dozen applicants have elected arbitration”¹⁴⁷

At least three topics may be explored by Members of Congress if they elect to debate the need for a statutory change.

- First, would an arbitration panel or other determinative party outside of FEMA be designated to participate in the appeals process, or should appeals continue to be heard and decided upon solely by FEMA administrators? It may be argued that only FEMA officials are most familiar with the details of public assistance grants, the application requirements, and comparable applications.¹⁴⁸ The cost estimates, circumstances unique to that particular disaster (such as the availability of skilled contractors and material), need for modifying initial damage projections, and

¹⁴⁴ Ernest Abbott, President, FEMA Law Associates, PLLC, *FLASH Newsletter*, vol. 4, Issue 11, April 2009, p. 1.

¹⁴⁵ U.S. Department of Homeland Security, Federal Emergency Management Agency, “Arbitration for Public Assistance Determinations Related to Hurricanes Katrina and Rita (Disasters DR-1603, DR-1604, DR-1605, DR-1606, and DR1607),” 74 *Federal Register* 44761-44769, August 31, 2009.

¹⁴⁶ The regulations note that FEMA funds slightly more than 5,000 large projects per year, and that almost 6% of those projects result in appeals. *Ibid*, p. 44765.

¹⁴⁷ Ernest Abbott, President, FEMA Law Associates, PLLC, *FLASH Newsletter*, vol. 4, Issue 13, December 2009, p. 1. Statistics on the number of projects submitted for arbitration have been requested from FEMA, but have not been provided as of the date of this report.

¹⁴⁸ In one decision the administrative judges questioned the quality of the investigative work undertaken by FEMA by including the following opinion of FEMA’s substantiation of the denial for the replacement of Charity Hospital in New Orleans. “The FEMA representatives who testified at the hearing were less experienced and less credible than the BKA and RSMeans representatives. They had spent far less time in the building than had the BKA witnesses. Unlike the BKA and RSMeans witnesses, most of them were unlicensed. To the extent that FEMA relied on information in making the estimates on which version 3 of Project Worksheet 2175 was based, at least some of that information was incomplete; FEMA witnesses acknowledged that their estimates were subject to increase if FP&C presented appropriate proof that the facility’s dimensions and disaster-related damages were greater than assumed by FEMA.” CBCA 1741-FEMA, *In the Matter of State of Louisiana, Facility Planning and Control*, found at http://www.cbca.gsa.gov/2009FEMA/DANIELS_01-27-10_1741-FEMA_STATE_OF_LOUISIANA_FACILITY_PLANNING_AND_CONTROL.pdf.

other factors arguably require considerable knowledge of the public assistance grant program.¹⁴⁹ Others may contend that this familiarity of the process and ownership of required information complicates efforts by appellants to even determine whether they should seek arbitration or appeal a FEMA decision, and may not meet the statutory mandate that rules “provide for the fair and impartial consideration of appeals under this section.”¹⁵⁰ For example, the quality of information available to appellants may be questioned, as summarized by the former FEMA General Counsel, “The rules assume that an applicant has the information and documentation required to establish eligibility at the outset of the arbitration process.... In fact, FEMA frequently is the only party with information that allows applicants to understand and respond to the disallowance of cost in an appeal (or an arbitration). And FEMA’s responsiveness to FOIA [Freedom of Information Act] requests is notoriously slow — generally requiring a number of months.”¹⁵¹ One option that Members might consider involves enacting an amendment that would mandate that FEMA maintain and provide applicable information to the appellants within the time frame established for an applicant deciding to file an appeal. Another option would maintain the current appeals process but provide for a final determinative authority outside of FEMA, perhaps through the permanent establishment of an arbitration panel comparable to that established by the 111th Congress, through the Federal Arbitration Association, or an arbitrator assigned to the matter through the Federal Arbitration Act (9 U.S.C. 1 et seq.)

- Second, the arbitration panel established pursuant to the American Recovery and Reinvestment Act of 2009 is solely authorized to consider appeals related to the Stafford Act public assistance program. As noted previously in this report, assistance is also provided to individuals and households for housing and uninsured needs, and the statute provides for appeal regulations that address decisions related to any assistance provided under the authority of Title IV.
- There is no provision for public review or consideration of the arbitration panel process. Congress might elect to consider whether the proceedings should remain closed.

¹⁴⁹ Summary information on the requirements imposed on public assistance applicants is found at http://www.fema.gov/government/grant/pa/9580_5.shtm.

¹⁵⁰ 42 U.S.C. 5189a(c). The House committee report that accompanied the legislation containing this provision noted “The Committee intends that the President explore all available options to obtain a fair determination, including the consideration of alternative dispute resolution mechanisms to the extent they may be appropriate. The Committee intends to carefully oversee the implementation of this section.” U.S. Congress, House, Committee on Public Works and Transportation, *Disaster Relief and Great Lakes Erosion Assistance*, 100th Cong., 2nd sess., H. Rpt. 100-517, March 15, 1988, p. 11. According to FEMA documentation available from the author of this report, the appeals provision derived from a proposal authored by then-Representative Tom Ridge; FEMA reportedly opposed the inclusion of the provision in the statute. Unpublished document by Arthur Bennett of FEMA, *Legislative History of P.L. 100-707 and Proposed Amendments to Disaster Relief Act of 1974, 1980-1987*, pp. 90-91.

¹⁵¹ Ernest Abbott, President, FEMA Law Associates, PLLC, *FLASH Newsletter*, vol. 4, Issue 12, September 2009, p. 2.

Author Contact Information

Keith Bea
Specialist in American National Government
kbea@crs.loc.gov, 7-8672