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FEMA's Public Assistance Grant Program: Background and Considerations for Congress

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Summary

The Public Assistance Grant Program (PA Program) is administered by the Federal Emergency Management Agency (FEMA) and combines the authorities of multiple sections of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (P.L. 93-288, as amended, the Stafford Act). The PA Program is only available for states and communities that have received a major or emergency disaster declaration through the Stafford Act (and in a more limited fashion, Fire Management Assistance Grants). The PA Program provides grant assistance for eligible purposes, including

- Emergency work, as authorized by Sections 403, 407, and 502 of the Stafford Act, which provide for the removal of debris and emergency protective measures, such as the establishment of temporary shelters and emergency power generation.
- Permanent work, as authorized by Section 406, which provides for the repair, replacement, or restoration of disaster-damaged, publicly owned facilities and the facilities of certain private nonprofit organizations (PNPs). PNPs are generally eligible for permanent work assistance if they provide a governmental type of service, though PNPs not providing a “critical” service must first apply to the Small Business Administration for loan assistance for facility projects. At its discretion, FEMA may provide assistance for hazard mitigation measures that are not required by applicable codes and standards. As a condition of PA assistance, applicants must obtain and maintain insurance on their facilities for similar future disasters.
- Management costs, as authorized by Section 324, which reimburses some of the applicant’s administrative expenses incurred managing the totality of the PA Program’s projects and grants.

FEMA will either award PA grants based on the estimated federal share of the total eligible cost of the project or award grants on the federal share of actual eligible costs evidenced through documentation from the applicant/grantee.

The federal government provides a minimum of 75% of the cost of eligible assistance, and this cost-share can rise if certain criteria are met. The PA Program is appropriated for in the Disaster Relief Fund (DRF). Between FY2000 and FY2013, PA accounted for approximately 47% of all federal spending from the DRF. During this period, the PA Program provided approximately \$21.2 billion in federal grants for emergency work assistance, \$30.2 billion in permanent work assistance, and \$1.2 billion in management assistance. Approximately \$6.6 billion of these grant amounts was provided to PNPs for both emergency and permanent work.

The PA Program authorities were most recently significantly amended by the Sandy Recovery Improvement Act (Division B of P.L. 113-2, SRIA). SRIA established “alternative procedures” for PA Program assistance, which has allowed FEMA to implement a Public Assistance Alternative Procedures (PAAP) Pilot Program. These procedures revise a number of elements of the PA Program, such as allowing grants for large, permanent work projects (facility restoration projects over \$120,000) to be based on fixed estimates, as opposed to actual cost basis; and increasing the federal share of eligible costs when debris is removed more quickly by applicants.

Given the importance of PA Program assistance to communities recovering from disasters, and the amount of federal dollars spent on the assistance, Congress may consider several policy issues related to the PA Program. For example, Congress may consider

- Reviewing current FEMA policies implementing the authorizing statute and, when desired, codifying or overriding the policies through further clarification in law;
- Evaluating major forthcoming changes to the PA Program authorized by SRIA and an earlier law, the Disaster Mitigation Act of 2000 (P.L. 106-390);
- Weighing options for decreasing the improper use of PA assistance by applicants, perhaps by revising the conditions of management cost assistance or improving the collection of data in the PA Program;
- Expanding or restricting the eligibility of the PA Program, possibly to exclude certain PNPs from assistance or to grant assistance to privately owned facilities;
- Deciding if and how the PA Program should provide hazard mitigation assistance on facility restoration projects; and
- Defining the role of PA Program as it potentially overlaps with the disaster assistance authorities of other federal agencies.

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Introduction

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq., henceforth the Stafford Act) confers upon the President a broad set of authorities “to alleviate the suffering and damage” of affected tribal, state, and local governments, as well as individual citizens, from disasters.¹ The Federal Emergency Management Agency (FEMA) of the Department of Homeland Security (DHS) has been given the responsibility of administering almost all of the President’s Stafford Act authorities through other law, a series of Executive Orders, and a DHS delegation.² FEMA has established the Public Assistance (PA) Grant Program by combining the authority of multiple sections of the Stafford Act. The PA Program provides financial grant assistance to states, tribes, and local communities both in the response to and recovery from significant disasters. Between FY2000-FY2013, the PA Program has provided \$52.6 billion in grant assistance to help communities pay for an array of eligible response and recovery activities, including debris removal, emergency protective measures, and the repair, replacement, or restoration of disaster-damaged, publicly owned facilities and the facilities of certain private nonprofit (PNP) organizations. The authorities of the PA Program were most recently significantly amended by the Sandy Recovery Improvement Act (Division B of P.L. 113-2, the Disaster Relief Appropriations Act, 2013; henceforth SRIA). For a brief legislative history of PA Program authorities, see **Appendix A**.

This report provides background on key elements of the PA Program, such as the eligibility of applicants, the types of assistance available, and the methods FEMA uses for awarding grant assistance. Summary analysis of federal obligations for PA Program assistance is also provided along important variables, such as the distribution of federal obligations across the PA Program eligible categories of work assistance. The report concludes with discussion of several policy issues that Congress may wish to consider when evaluating the PA Program in the future, including considerations of significant prospective changes to the PA Program and the role of the PA Program in the context of other federal agency disaster assistance authorities.

It is beyond the scope of this report to describe in full how FEMA administers the PA Program. FEMA has many publicly available resources that explain the complexity of the PA Program in greater detail than is provided in this report.³

¹ 42 U.S.C. §5121(b), Section 101(b) of the Stafford Act.

² Section 504(a)(1)(8) of the Homeland Security Act of 2002, as amended (6 U.S.C. §314) directs the Administrator of FEMA to assist “the President in carrying out the functions” of the Stafford Act and “carrying out all functions and authorities given to the Administrator under that Act.” In addition, Executive Order 12148, 44 FR 43239 (1979), as amended most recently by Executive Order 13286, 68 FR 10619 (2003), delegates Stafford Act authorities to the Secretary of DHS, who in turn has delegated these authorities to FEMA in DHS Delegation 9001.1. The President exclusively retains the authority to declare a major disaster or emergency under 42 U.S.C. §5170, Section 401 of the Stafford Act and 42 U.S.C. §5191, Section 501 of the Stafford Act, respectively.

³ FEMA provides a considerable number of resources through its website on the PA Program, including a step-by-step guide to the grant process, frequently asked questions, policy guidance on specific topics, etc., at <https://www.fema.gov/public-assistance-local-state-tribal-and-non-profit>. There is also a full guide to the PA Program, though this document has not been updated to account for changes made in recent legislation, most significantly SRIA. See FEMA, *Public Assistance Guide*, June 2007, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

Key Elements of the PA Program

This section of the report describes key elements of the PA Program, such as major eligibility considerations, the types of grant assistance provided, and the methods for disbursing grant funding.

Eligible Applicants

In order to be eligible for PA grants, an applicant's respective state or tribal government must first receive a major or emergency disaster declaration from the President through Stafford Act procedures.⁴ The key condition for receiving a declaration is that the disaster has consequences "beyond the capacity" of the affected state/tribe and local communities to manage. In a more limited fashion, PA grants are available to those areas receiving Fire Management Assistance Grants (often colloquially called FMAG or fire "declarations").⁵ In addition, PA grants are only available in the localities of the state (or the tribal associated lands) specified in the Stafford Act declaration.

Once the President has issued a disaster declaration, the primary grantee for all PA grants is the state or tribal government receiving the declaration.⁶ However, as subgrantees (or, by another name, applicants) PA grants are available to any tribal government, state, and local government entity in the affected area.⁷ Local government is broadly defined in the Stafford Act, and therefore grant assistance may be provided to local governmental bodies ranging from general purpose municipal city governments, school districts, public hospitals, public water and sewage authorities, to transportation districts.

⁴ Declarations are made through Section 401 and 501 of the Stafford Act (42 U.S.C. §§5170 and 5191, respectively). For an explanation and discussion of the disaster declaration process, see CRS Report R43784, *FEMA's Disaster Declaration Process: A Primer*, by (name redacted).

⁵ The President is allowed to provide assistance using Section 403 essential assistance authorities for FMAGs (see 42 U.S.C. §5187(c), Section 420(c) of the Stafford Act). This type of PA assistance is described in the "Emergency Work" section of this report. For more on FMAGs, see CRS Report R43738, *Fire Management Assistance Grants: Frequently Asked Questions*, coordinated by (name redacted).

⁶ Tribal governments are eligible to receive a disaster declaration either separately from, or as part of, a declaration made for the state in which the tribal lands primarily reside. See Section 401(b) of the Stafford Act (42 U.S.C. §5170(b)).

⁷ These terms are defined at 42 U.S.C. §5122, Section 102 of the Stafford Act. *State* means "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands"; *Indian Tribal Government* means "the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a et seq.)"; and *local government* means

(A) a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(B) an Indian tribe or authorized tribal organization, or Alaska Native village or organization, that is not an Indian tribal government as defined in paragraph (6); and

(C) a rural community, unincorporated town or village, or other public entity, for which an application for assistance is made by a State or political subdivision of a State.

PA grants are not available to private citizens or private companies,⁸ but they are available to certain owners of private nonprofit facilities (PNPs). The Stafford Act provides a full definition, with examples, of what constitutes an eligible PNP facility. The major condition of eligibility of a PNP is whether it falls into a specific set of facilities named in law,⁹ or if it otherwise provides an “essential service of a governmental nature to the general public.”¹⁰ This condition is included in the PNP definition in the law, and is expanded on in FEMA’s regulations and policy guidance.¹¹ The PNP must also be considered a nonprofit under the terms of the U.S. Internal Revenue Service or under state law.¹²

The eligibility of PNPs for PA assistance changes based on whether the PNP is determined to provide a critical service, which is a smaller subset of PNPs providing essential governmental services. Critical services include power, water, sewer, education, emergency medical facilities, and more.¹³ If the PNP provides a critical service, it may apply directly to the PA Program for grant assistance to repair and restore its facilities as if it were a tribal, state, or local governmental entity. If it does not provide such a critical service, but does provide an essential service of a governmental nature, the PNP is first required to apply for assistance from the Small Business Administration’s (SBA’s) Disaster Loan Program. If the PNP is denied assistance from SBA or the total amount of loan assistance is less than the PA eligible damage, the eligible PNP providing non-critical governmental services may then apply for assistance from the PA Program.¹⁴ Both critical and non-critical PNPs may receive emergency work assistance, as described later in the report.

Of recent interest to Congress, FEMA’s policy guidance instructs that PNP facilities are ineligible for assistance when their space is “dedicated to or primarily used for religious, political, athletic, recreational, or vocational purposes.”¹⁵ Currently, facilities owned by a religious entity are only eligible to the extent that the facility primarily provides an eligible, essential governmental service. For example, the school facilities of a church are generally eligible, so long as the primary purpose of the facilities is for secular education.¹⁶ Congress has considered legislation to

⁸ In limited circumstances, essential assistance through Section 403 of the Stafford Act (42 U.S.C. §5170b), especially emergency debris removal assistance, may be provided by FEMA to applicants to address public safety concerns on private property. The recipient of the grant assistance is not the private entity, though the work completed may benefit the private entity in the interest of saving lives, protecting and preserving property, or public health and safety.

⁹ Any “educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations,” as defined at 42 U.S.C. §5122(11)(A), Section 102(11)(A) of the Stafford Act.

¹⁰ As defined at 42 U.S.C. §5122(11)(B), Section 102(11)(B) of the Stafford Act.

¹¹ See 44 C.F.R. §206.221(e) and (f) for expansions on the statutory definitions for PNPs, and for a full explanation of FEMA policy on PNP eligibility, see FEMA, *Private Nonprofit (PNP) Facility Eligibility*, DAP 9521.3, July 8, 2007, at <http://www.fema.gov/media-library/assets/documents/89685>.

¹² Section VII.A.1 of FEMA, *Private Nonprofit (PNP) Facility Eligibility*, DAP 9521.3, July 8, 2007, at <http://www.fema.gov/media-library/assets/documents/89685>.

¹³ See 42 U.S.C. §5172(a)(3)(B), Section 406(a)(3)(B) of the Stafford Act, for an illustrative list of examples of what constitutes a critical service.

¹⁴ These requirements for critical versus non-critical service PNPs are established by 42 U.S.C. §5172(a)(3), Section 406 (a)(3) of the Stafford Act, and implemented by 44 C.F.R. §206.226(c). For more on the SBA program, see CRS Report R41309, *The SBA Disaster Loan Program: Overview and Possible Issues for Congress*, by (name redacted).

¹⁵ Section VII.D.3 of FEMA, *Private Nonprofit (PNP) Facility Eligibility*, DAP 9521.3, July 8, 2007, at <http://www.fema.gov/media-library/assets/documents/89685>.

¹⁶ See the example provided by FEMA of a fictional “Community Church School” at FEMA, *Private Nonprofit (PNP) Facility Eligibility*, DAP 9521.3, July 8, 2007, p. A2, at <http://www.fema.gov/media-library/assets/documents/89685>.

allow for the inclusion of “houses of worship” as an eligible category of PNP facilities, though doing so may present constitutional legal issues.¹⁷

Eligible Types of Assistance (Categories of Work)

To administer the PA Program and describe the PA Program’s many eligible types of assistance, FEMA combines the authorities of multiple sections of the Stafford Act into “categories of work.” As shown in **Table 1**, FEMA has two major groups of assistance: emergency work assistance, and permanent work assistance. Within these groups, there are categories of assistance labeled A through G. Neither the Stafford Act nor FEMA’s implementing regulations specifically identify these categories of work; rather these distinctions have been developed by FEMA in policy as a means of managing and implementing the PA Program.¹⁸ While a generally useful tool to classify the types of assistance available through the PA Program, the categories are not completely distinct and similar projects could be subjectively classified under different categories in different incidents (i.e., there is some “gray area” between the categories).

Table 1. Eligible Types of Assistance (Categories of Work) in the PA Program

	Categories	Stafford Act Authority
Emergency Work	A: Debris Removal	§§403(a)(3); 407; 502(a)
	B: Emergency Protective Measures	§§403(a)(3); 418; 419; 502(a)
Permanent Work	C: Roads and Bridges	
	D: Water Control Facilities	
	E: Buildings and Equipment	§406
	F: Utilities	
	G: Parks, Recreational Facilities, and Other Items	

Source: Federal Emergency Management Agency, *Public Assistance Guide*, FEMA 322, 2007, at <http://www.fema.gov/public-assistance-policy-and-guidance>; and CRS analysis of the Stafford Act.

Emergency Work

FEMA regulations define emergency work as “work which must be done immediately to save lives and to protect improved property and public health and safety, or to avert or lessen the threat of a major disaster.”¹⁹ The authorizing statute for emergency work is found in multiple provisions of the Stafford Act, primarily in Section 403.²⁰ Emergency work assistance is available to communities identified in both major and emergency disaster declarations. More limited emergency work assistance is also provided for areas receiving Fire Management Assistance

¹⁷ For a legal analysis and discussion of legislation, see CRS Report R42974, *Federal Aid for Reconstruction of Houses of Worship: A Legal Analysis*, by (name redacted).

¹⁸ Descriptions of the subcategories can be found in FEMA, *Public Assistance Guide*, FEMA 322, 2007, at <http://www.fema.gov/public-assistance-policy-and-guidance>.

¹⁹ 44 C.F.R. §206.201(b).

²⁰ 42 U.S.C. §5170b. Emergency work is also authorized by Sections 418, 419, and 502(a) of the Stafford Act, 42 U.S.C. §§ 5185, 5186, and 5192(a), respectively.

Grants (FMAGs). As subdivided by FEMA, it includes two categories of assistance, debris removal and emergency protective measures, which are described below. As shown later in **Table 5**, CRS analysis of project data from FY2000 to FY2013 indicates that approximately 35% of all PA projects were for emergency work. These emergency work projects accounted for 41%, or \$21.2 billion, of the total federal obligations for assistance in the PA Program during the time period.

*Debris Removal*²¹

When a disaster strikes a community, it can produce a large volume of debris ranging from tree limbs, destroyed cars, chemicals and other hazardous materials, building materials, etc. Debris can have immediate impacts such as blocking emergency routes, and can also inhibit a community's overall recovery and prevent the safe return of residents to their homes if they were evacuated. Managing the debris removal process is a fundamental challenge in responding to any disaster, and is guided by a number of regulatory requirements.²²

So long as it is in the public interest, FEMA provides grant assistance to communities for both the actual removal of the debris and the management of the process writ large, as authorized by Section 403(a)(3)(A) and Section 407 of the Stafford Act.²³ This assistance, under Category A of the PA Program, is available both for emergency and major disaster declarations.²⁴ Working with the applicant, FEMA will estimate the amount of debris following a disaster in order to provide eligible grantees expedited payments of 50% of the initial estimate for full anticipated debris removal costs.²⁵ Eligible PNPs may receive assistance for the removal of debris on their eligible facilities. FEMA has established extensive policy guidance specifically on debris removal assistance, as the process for debris removal is relatively distinct from much of the rest of PA Program assistance.²⁶

The Sandy Recovery Improvement Act (SRIA) established a set of alternative procedures for debris removal assistance provided by the Stafford Act.²⁷ This new section of the Stafford Act reauthorizes similar authorities to those granted by the PA Pilot Program established by the Post-Katrina Emergency Management Reform Act (PKEMRA),²⁸ and as have been recommended in the past by the DHS Inspector General (IG).²⁹ The alternative procedures are intended to

²¹ For more on how debris is managed after a disaster, see CRS Report RL34576, *Managing Disaster Debris: Overview of Regulatory Requirements, Agency Roles, and Selected Challenges*, by (name redacted).

²² Ibid.

²³ 42 U.S.C. §§5170b(a)(3)(A) and 5173, respectively. See also Sections 403(a)(3)(A) and 502(a)(5) of the Stafford Act.

²⁴ 42 U.S.C. §5192(a)(5), Section 502(a)(5) of the Stafford Act authorizes the provision of debris removal assistance in accordance with Section 407 of the Stafford Act for emergency declarations.

²⁵ 42 U.S.C. §5173(e), Section 407(e) of the Stafford Act.

²⁶ See FEMA, *Public Assistance Debris Management Guide*, FEMA-325, July 2007, at <http://www.fema.gov/pdf/government/grant/pa/demagde.pdf>. See also FEMA, *Public Assistance Debris Monitoring Guide*, FEMA-327, October 2010, at https://www.fema.gov/pdf/government/grant/pa/fema_327_debris_monitoring.pdf.

²⁷ Section 1102 of P.L. 113-2, 127 Stat. 41; as codified at 42 U.S.C. §5189f(e)(2), Section 428(e)(2) of the Stafford Act.

²⁸ Section 689j of Division B of P.L. 109-295, 120 Stat. 1455. For more on the PKEMRA PA Pilot program, see FEMA, *Public Assistance Pilot Program: Fiscal Year 2009 Report to Congress*, May 20, 2009, at <http://www.fema.gov/library/viewRecord.do?id=3683>.

²⁹ See Department of Homeland Security, Office of Inspector General, *FEMA's Oversight and Management of Debris* (continued...)

incentivize the faster completion of projects while saving local and federal monies. As implemented currently by FEMA in pilot program guidance,³⁰ the alternative procedures for debris removal allow:

- Use of a sliding scale for the federal share of debris removal based on the time it takes to finish debris removal. FEMA is to provide a larger federal share of the eligible cost the quicker an applicant removes the debris. For debris removed by a subgrantee within 30 days of the disaster, the federal share is 85% (a 10% increase from the minimum 75%); and within the next 60 days (i.e., days 30-90 post-disaster), 80% of the federal share.
- Applicants to recycle debris and use the proceeds from such recycling without reducing the awarded amount of grant assistance. FEMA has created several eligible uses for the proceeds, including using it to meet the grantee cost share requirement and to improve future debris removal operations.
- Reimbursement of state, tribal, and local governments or owner/operators of private nonprofits for the base and overtime wages of their own employees that are performing or administering debris removal projects.
- Provision of financial incentives for applicants with a FEMA-approved debris removal plan and one or more prequalified debris removal contracts prior to a disaster. FEMA is providing a one-time 2% cost share adjustment for a single disaster declaration for all debris removal work completed within 90 days if the applicants have a debris removal plan and at least one prequalified debris removal contract in place.

Emergency Protective Measures

Emergency protective measures (Category B) is perhaps the broadest eligible form of assistance in the PA Program, as it includes all activities that are “undertaken by a community before, during, and following a disaster that are necessary to ... eliminate or reduce an immediate threat to life, public health, or safety; or eliminate or reduce an immediate threat of significant damage to improved public or private property through cost-effective measures.”³¹ Examples of eligible activities include the establishment of temporary shelters and community service facilities, critical power generation, demolition of unsafe buildings, operation of emergency communications systems, and more.³² In addition to assistance that applicants, including PNPs, may receive for the emergency protection of their own eligible facilities, applicants may also receive grant assistance to provide emergency protective measures for the general public during the preparedness for or response to a disaster, such as volunteer fire departments for search and rescue operations. Regulations on emergency protective measures³³ are expanded upon

(...continued)

Removal Operations, OIG-11-40, February 2011, http://www.oig.dhs.gov/assets/Mgmt/OIG_11-40_Feb11.pdf.

³⁰ See FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Debris Removal*, Version 2, June 27, 2014, <https://www.fema.gov/media-library/assets/documents/33376?id=7776>.

³¹ FEMA, *Public Assistance Guide*, June, 2007, p. 71, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

³² *Ibid.*, pp. 71-78.

³³ Generally, 44 C.F.R. §206.225.

considerably by numerous policy documents, ranging from policies on the eligibility of building inspection costs to the eligibility of removing hazardous stumps.³⁴

SRIA specified that the President may reimburse both the base and overtime pay and benefits of permanent employees of state, tribal, and local governments for emergency protective measures.³⁵ FEMA anticipates implementing this legislative change through the regulatory process, but has not done so as of the date of publication of this report.³⁶ Under past regulations and policy directives, FEMA determined that, in general, *only* the overtime wages of permanent employees working for the state and local governments were eligible for reimbursement (that is, *not* the base pay and benefits or “straight time” of an employee).³⁷ In contrast, FEMA had determined that the full cost of contract labor for this work is eligible for reimbursement. This change made by SRIA did not impact the treatment of wages for private nonprofits, and it continues to allow the reimbursement of overtime and hazardous duty pay of all state and local permanent employees conducting emergency protective measures, consistent with past FEMA policy.

FEMA implemented a novel use of emergency protective measures authority during the response to Hurricane Sandy. Emblematic of the potentially flexible nature of the underlying statute, FEMA designed the Sheltering and Temporary Essential Power (STEP) Pilot Program to restore the basic habitability of individual residences, thereby allowing people to “shelter” in their own homes as opposed to using other government-funded temporary facilities or receiving rental assistance for hotels and hotel-like accommodations.³⁸ However, consistent with other PA assistance, the grant assistance provided by FEMA (a maximum of \$10,000 per residence) was *not* provided directly to individuals, but rather was provided to eligible PA applicants such as local governments to reimburse them for the emergency protective measure work done on residences. In other words, the grant was provided to local governments, who in turn used the funding for essential repair to private residences (essentially passing through the assistance). In a rapid response audit of the STEP Pilot Program, the DHS IG found that the program was innovative but consistent with the authorities of the Stafford Act and “may substantially reduce the overall long-term costs associated with sheltering and disaster housing.”³⁹ However, the IG also noted that by the very nature of it being a pilot program, the STEP Pilot Program was more vulnerable to waste, fraud, and abuse.⁴⁰ GAO reiterated these concerns, noting that FEMA did not require sufficient collection of data on recipients of STEP assistance that would enable FEMA to

³⁴ See 9500 policies at FEMA’s website at <http://www.fema.gov/9500-series-policy-publications>.

³⁵ Section 1108(b) of SRIA (127 Stat. 47), as codified at 42 U.S.C. §5170b(d), Section 403(d) of the Stafford Act.

³⁶ For updates on the status of implementing all SRIA changes, see FEMA’s website at <https://www.fema.gov/sandy-recovery-improvement-act-2013>.

³⁷ See primarily 44 C.F.R. §206.228(a)(2) and FEMA, *Labor Costs—Emergency Work*, FEMA Recovery Policy RP9525.7, November 16, 2006, at http://www.fema.gov/pdf/government/grant/pa/9525_7.pdf. An exception to this standard is provided in 44 C.F.R. §206.202(f)(1)(ii), which allows for the reimbursement of the base salaries of a host-state’s permanently employed staff who are supporting evacuations or shelters.

³⁸ See FEMA, *Sheltering and Temporary Essential Power (STEP) Pilot Program*, November 16, 2012, <https://www.fema.gov/media-library/assets/documents/29829>.

³⁹ This potential benefit of the STEP Pilot Program has yet to be audited further, and cannot be readily confirmed. In theory, by obligating assistance through the STEP Pilot Program, fewer people may have sought and received more expensive assistance through the Transitional Shelter Assistance (TSA) Program (another eligible cost under Section 403 of the Stafford Act). See Department of Homeland Security, Office of Inspector General, *FEMA’s Sheltering and Temporary Essential Power Pilot Program*, OIG-13-15, December 7, 2012, p. 3, at http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-15_Dec12.pdf.

⁴⁰ *Ibid.*

determine if these same recipients were receiving assistance through other FEMA programs in violation of program guidance and restrictions on the duplication of benefits.⁴¹ GAO, reporting on FEMA-provided data, found that as much as \$418 million was spent through the STEP Pilot Program in the aftermath of Hurricane Sandy.⁴² FEMA is conducting its own internal review of the STEP Pilot.

Direct Federal Assistance

Given that a disaster can significantly exceed the management capabilities of communities, the Stafford Act grants the President broad authority to

direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations.⁴³

In addition, at the request of the governor or tribal chief executive, federal government agencies may be tasked with providing emergency work assistance whenever states, tribes, and local governments cannot provide the assistance themselves or through contract support. Collectively, this type of assistance is generally referred to as *direct federal assistance*.⁴⁴ Prior to providing this assistance, FEMA requires grantees and applicants to agree to a number of conditions, including that the federal government is indemnified from damages and any claims against the federal government arising from the assistance provided.⁴⁵

Permanent Work

In the section of the Stafford Act authorizing permanent work assistance, it states that the President may provide financial assistance to grantees to help to restore eligible facilities

on the basis of the design of such facility as it existed immediately prior to the major disaster and in conformity with current applicable codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or by the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) shall, at a minimum, be treated as the net eligible cost of such repair, restoration, reconstruction, or replacement [italics added].⁴⁶

Therefore, eligible federal costs associated with restoring permanent facilities generally fall into three groups:

- Costs associated with restoring the facility to its predisaster design. In regulations and implementing policy, FEMA has expanded the definition of predisaster

⁴¹ U.S. Government Accountability Office, *FEMA Has Improved Disaster Aid Verification but Could Act to Further Limit Improper Assistance*, GAO-15-15, December 2014, pp. 32-34, at <http://www.gao.gov/assets/670/667469.pdf>.

⁴² *Ibid.*, p. 12.

⁴³ 42 U.S.C. §§5170a(1) and 5192(a)(1), Sections 402(1) and 502(a)(1) of the Stafford Act, respectively.

⁴⁴ 44 C.F.R. §206.208.

⁴⁵ 44 C.F.R. §206.208(b)(1)(ii).

⁴⁶ 42 U.S.C. §5172(e), Section 406(e) of the Stafford Act.

design to mean that the repaired/replaced facility should have the same function and relative capacity of the previous facility.⁴⁷

- Costs associated with improvements made to the facility to bring it into conformity with current codes, specifications, and standards. These codes and standards must also be found to be “reasonable” by FEMA, be in effect at the time of the disaster, and be applied uniformly across the community prior to the disaster, among other requirements.⁴⁸ Prior to 1999, FEMA considered eligible the costs associated with repairing/replacing facilities to meet a new building code, adopted after a disaster, so long as the project had not yet been approved by FEMA. This allowed grantees to adopt new standards and have the cost of meeting those standards shared by the PA Program. However, this policy was reformed and restricted by regulation when FEMA reassessed its legal interpretation of the statute.⁴⁹
- Costs associated with complying with the President’s floodplain and hazard mitigation criteria or other federal laws, as explained later in the report.⁵⁰

Permanent work assistance is only available in areas receiving a major disaster declaration, and is not available to communities receiving emergency declarations or FMAGs. In order to receive permanent work assistance, eligible grantees must also have a FEMA-approved state or tribal mitigation plan in accordance with regulatory requirements. This restriction does not affect receipt of emergency work assistance through the PA Program.⁵¹

The subcategories of permanent work (Categories C through G) refer to the types of facilities eligible for restoration. For example, utilities (Category F) can include water treatment plants and delivery systems; power generation and distribution facilities, including natural gas systems, wind turbines, generators, substations, and power lines; sewage collection systems and treatment plants; and communications.⁵² As shown later in **Table 5**, CRS analysis of project data from

⁴⁷ Predisaster design is defined in regulations (44 C.F.R. §206.202(k)) as “the size or capacity of a facility as originally designed and constructed or subsequently modified by changes or additions to the original design. It does not mean the capacity at which the facility was being used at the time the major disaster occurred if different from the most recent designed capacity.” See also FEMA, *Public Assistance Guide*, June, 2007, p. 79, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

⁴⁸ See 44 C.F.R. §206.226(d). For more on the eligibility of improvements to meet codes and standards, see FEMA, *Public Assistance Guide*, June, 2007, pp. 33-35, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

⁴⁹ FEMA believed there were unintended consequences of the pre-1999 policy, including “protracted delays in repairing eligible projects as applicants debate the adoption of codes and standards that will affect eligible damaged facilities and the amount of Federal assistance they will receive.” See the notice of public rulemaking for an explanation at FEMA, “Disaster Assistance; Restoration of Damaged Facilities,” 61 *Federal Register* 55262, October 25, 1996; and the final rule at FEMA, “Disaster Assistance; Restoration of Damaged Facilities,” 63 *Federal Register* 5895, February 5, 1998.

⁵⁰ See the section “Hazard Mitigation Assistance for Permanent Work” of this report.

⁵¹ Section 322 of the Stafford Act (42 U.S.C. §5165) encourages grantees to submit a mitigation plan in order to receive additional amount of assistance through the hazard mitigation grant program (HMGP, Section 404 of the Stafford Act, 42 U.S.C. §5170c). In implementing regulations, 44 C.F.R. §201.4, FEMA has required that a grantee has an approved “standard” hazard mitigation in order to receive permanent work assistance through the PA Program. To receive the additional amount of HMGP assistance allowed by Section 322 of the Stafford Act, a grantee must have an approved “enhanced” mitigation plan, per 44 C.F.R. §201.5. This regulation is explained further in FEMA, *Restrictions on Grant Obligations to State, Tribal and Local Governments Without a FEMA-Approved Mitigation Plan*, FP 306-112-1, August 19, 2013, at <http://www.fema.gov/media-library/assets/documents/34437>.

⁵² FEMA, *Public Assistance Guide*, June 2007, p. 85, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

FY2000-FY2013 indicates that approximately 65% of all PA projects were for permanent work. This accounted for 59%, or \$30.2 billion, of the total federal obligations for assistance in the PA Program.

Hazard Mitigation Assistance for Permanent Work

Hazard mitigation, as defined in FEMA regulations, is “any cost effective measure which will reduce the potential for damage to a facility from a disaster event.”⁵³ Through its administration of the PA Program, FEMA has issued regulations stipulating that Regional Administrators have the authority to require certain hazard mitigation measures in addition to those required by local building codes and standards. The “hazard mitigation criteria required by the President” allowed by law is principally formulated by policy guidance issued by FEMA. This policy guidance explains the conditions by which FEMA will approve assistance for hazard mitigation measures (with examples provided).⁵⁴ The criteria do not establish any fixed set of requirements on facility design in the manner of a supplement to local or state building codes. FEMA’s criteria were updated in 2010 to reflect an increased emphasis by Administrator Craig Fugate to “maximize section 406 mitigation so as to reduce the risk of damage to the same facilities in future disasters.”⁵⁵ As shown later in **Figure 6**, FEMA-supplied data indicate that \$3.7 billion has been obligated for PA hazard mitigation assistance between FY2000-FY2013.

FEMA considers the authority to include hazard mitigation measures on projects to be discretionary, meaning in essence that “only FEMA has the authority to determine which hazard mitigation measures it will fund” and that “The Stafford Act and applicable regulations do not authorize State or local building officials or agencies to determine the amount of hazard mitigation funding FEMA will contribute to a project.”⁵⁶ With this discretion, FEMA has determined that additional hazard mitigation measures can only be applied to facilities that are being repaired (not replaced in full) and only to areas of the building that are damaged by the disaster.⁵⁷

In addition to the hazard mitigation measures required and allowed under FEMA’s criteria, there are other forms of assistance provided by the PA Program that may have the effect of mitigating future disaster risks. First, there are those costs that are eligible to comply with federal floodplain management standards, namely building code standards related to the National Flood Insurance Program (NFIP) and Executive Order 11988, *Floodplain Management*, as most recently amended by Executive Order 13690, *Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input*.⁵⁸ For example, all facilities in

⁵³ 44 C.F.R. §206.2(14).

⁵⁴ FEMA, *Hazard Mitigation Funding Under Section 406 (Stafford Act)*, 9526.1, March 30, 2010, at <http://www.fema.gov/hazard-mitigation-funding-under-section-406>.

⁵⁵ W. Craig Fugate, *Section 406 Mitigation*, FEMA, Memorandum to Regional Administrators, Acting Regional Administrators, and Federal Coordinating Officers, July 10, 2009.

⁵⁶ *Ibid.*, Section VI.A.4, p. 3.

⁵⁷ In the PA Guide, FEMA states that mitigation measures cannot be applied to replacement buildings because “new construction will be to current codes and standards, which are intended to ensure structural integrity for local conditions, mitigation funding applies only to building repairs, which generally are not covered by codes and standards.” See FEMA, *Public Assistance Guide*, June, 2007, p. 125, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

⁵⁸ Executive Order 11988, “Floodplain Management,” 42 *Federal Register* 26951, May 24, 1997, as amended; Executive Order 13960, “Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting (continued...)”

the special flood hazard area that are being replaced or substantially improved with federal assistance must be elevated to or above the base flood elevation level.⁵⁹ Second, there are those costs associated with bringing the *undamaged* parts of a facility into compliance with applicable codes and standards are generally referred to as “triggered costs” by FEMA. These triggered costs are eligible costs under the PA Program, so long as they are found reasonable, and could be considered as a hazard mitigation obligation through permanent work assistance as they may assist in improving the facility’s design in a manner that will “reduce the potential for damage to a facility.” Not all triggered costs may have this hazard mitigation benefit. For example, some triggered costs may be associated with increasing the accessibility of facility, which, though a potentially valuable improvement, may or may not reduce future risk.

Insurance Requirements for Permanent Work

Section 311 of the Stafford Act requires that applicants receiving assistance for permanent work projects obtain and maintain insurance on the facility to the extent that insurance is “reasonably available, adequate, and necessary to protect against future loss to such property,” as determined by the President.⁶⁰ This insurance requirement is implemented further through regulations and FEMA policy guidance.⁶¹ In order to determine whether insurance is “reasonably available,” FEMA is required to defer to the appropriate state insurance commissioner to certify the type and extent of insurance that is reasonable for the facility and region.⁶² At a minimum, FEMA requires that facility owners obtain and maintain insurance that provides coverage equal to the amount of assistance being provided by the PA Program (i.e., equal to the cost of eligible damage to the facility) for the hazard type responsible for the damage (e.g., earthquake insurance for damage caused by earthquakes).⁶³ Generally, a state insurance commissioner only becomes involved at the request of the applicant in certifying what is “reasonable” other than the standard set by FEMA. If facility owners fail to obtain and maintain insurance as required by FEMA, the facility is ineligible for permanent work assistance in a future disaster of the same hazard type (this restriction does not apply to emergency work assistance).⁶⁴

In all circumstances, the dollar amount of PA grant assistance provided by FEMA is reduced by the amount of eligible insurance coverage in force at the time of the disaster. This is required by legal restrictions against the duplication of benefits, where an applicant cannot receive assistance from the PA Program if an insurance policy will provide the same benefit.⁶⁵ Therefore, in theory,

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and Considering Stakeholder Input,” 80 *Federal Register* 6425, February 4, 2015; and 44 C.F.R. Part 9 (Floodplain Management and Protection of Wetlands).

⁵⁹ See, generally, conditions of 44 C.F.R. Part 60. It is beyond the scope of this report to discuss all of these requirements.

⁶⁰ 42 U.S.C. §5154. This insurance requirement of the Stafford Act also applies to a grant assistance from the Economic Development Administration issued as a result of a declared disaster, as codified at 42 U.S.C. §3149(c)(2).

⁶¹ See 44 C.F.R. Part 206, Subpart I (§§206.250-53). FEMA also has two fact sheets relating to the insurance requirement, one for applicants and one for FEMA field personnel. See FEMA, *Insurance Considerations for Applicants*, 9580.3, May 29, 2008, at https://www.fema.gov/pdf/government/grant/pa/9580_3.pdf; and FEMA, *Insurance Responsibilities for Field Personnel*, 9580.2, June, 4, 2007, at https://www.fema.gov/pdf/government/grant/pa/9580_2.pdf.

⁶² 42 U.S.C. §5154(a)(2), Section 311(a)(2) of the Stafford Act.

⁶³ See 44 C.F.R. §§206.252(d) and 206.253(b).

⁶⁴ 42 U.S.C. §5154(b), Section 311(b) of the Stafford Act.

⁶⁵ For more on the duplication of benefits restriction, see 42 U.S.C. §5155, Section 312 of the Stafford Act; and 44 (continued...)

proper implementation of the “obtain and maintain” insurance requirement reduces future PA Program costs by increasing the financial risk transfer to the insurance market (either public or private insurance). However, the DHS IG recently found past situations where this requirement has not been implemented adequately by FEMA and grantees.⁶⁶

The legal requirements related to insurance for facilities that are in an identified special flood hazard area⁶⁷ are further increased in Section 406(d) of the Stafford Act. For these facilities, the dollar amount of permanent work assistance provided by the PA Program may be reduced by the maximum amount of available flood insurance, regardless of whether the facility had previously obtained that insurance. Generally, the amount of flood insurance available is limited to the maximum coverage amounts of a policy through the National Flood Insurance Program (NFIP).⁶⁸ Thus, owners of facilities in these special flood hazard areas are strongly incentivized to obtain flood insurance pre-disaster, and essentially are penalized if they do not. Facility owners at risk of other types of disasters are not similarly incentivized to obtain their respective forms of insurance (e.g., facilities at risk of earthquake damage are not penalized for failing to carry earthquake insurance if not previously required to do so because of a past disaster).

FEMA has proposed a revision to existing policies on the insurance requirement. Among other changes, if implemented as proposed, the new policy would formally allow applicants (i.e., local governments, PNPs, etc.), to retain some or all of their risk through a self-insurance plan at the approval of FEMA, not just states.⁶⁹ As of the date of this report, the new policy had yet to be implemented, though FEMA had already solicited public comment on the policy.⁷⁰

Administrative Cost Assistance

The Disaster Mitigation Act of 2000 (DMA 2000) revised the Stafford Act to direct the President to establish regulations for providing grant assistance to cover the management expenses of grantees and applicants.⁷¹ Since this directive, FEMA has had two distinct processes for providing

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C.F.R. §206.191.

⁶⁶ The DHS IG found that in addition to upwards of \$177 million in assistance provided that could have been offset by insurance proceeds, FEMA may have also inappropriately waived the “obtain and maintain” insurance requirement. In the IG’s estimation, “as a result, FEMA potentially stands to lose up to a billion dollars in future Florida disasters because many Florida communities may not have adequate insurance coverage for future disasters such as those that occurred in 2004 and 2005.” See Department of Homeland Security, Office of Inspector General, *FEMA Insurance Reviews of Applicants Receiving Public Assistance Grant Funds for 2004 and 2005 Florida Hurricanes Were Not Adequate*, OIG-15-19-D, December 18, 2014, http://www.oig.dhs.gov/assets/GrantReports/2015/OIG_15-19-D_Dec14.pdf.

⁶⁷ As defined in regulations at 44 C.F.R. §206.250(e) and 44 C.F.R. §59.1. In general, this is the area at risk for flooding by the “1 in 100 year” standard (1% standard), often referred to as the “base flood.”

⁶⁸ The maximum amount of coverage for non-residential buildings under the NFIP is \$500,000 for the building, and \$500,000 for contents. See FEMA, *National Flood Insurance Program: Summary of Coverage for Commercial Property*, F-778, https://www.floodsmart.gov/floodsmart/pdfs/NFIP_Summary_of_Coverage.pdf.

⁶⁹ See the proposed policy, Section VII, Part 1, C (p. 3) of FEMA, *Public Assistance Policy on Insurance*, Draft, 9530.1, at <http://www.regulations.gov/#!documentDetail;D=FEMA-2014-0029-0002>. States are currently legally allowed to act as a self-insurer for their facilities, as prescribed at 42 U.S.C. 5154(c), Section 311(c) of the Stafford Act.

⁷⁰ See FEMA, “Public Assistance Policy on Insurance, RP9530.1,” 79 *Federal Register* 60861, October 8, 2014.

⁷¹ Section 202 of P.L. 106-390, 114 Stat. 1560, as codified at 42 U.S.C. §5165b. Prior to DMA 2000, grantees were afforded some administrative expenses as codified at 42 U.S.C. §5172(f) (1988 edition), the former Section 406(f) of (continued...)

this assistance for both the PA Program and the Hazard Mitigation Grant Program. For disasters declared before November 2007, grantees and applicants received a “sliding scale” reimbursement model, whereby they were given an extra amount of grant assistance for management costs based on a small percentage of the total assistance provided by FEMA.⁷²

After November 2007 (essentially starting in FY2008), FEMA established a new procedure.⁷³ The costs for applicants and grantees are grouped into two categories:

- Direct administrative costs (often referred to as DAC) are costs incurred by the grantee or applicant that “can be identified separately and assigned to a specific project.”⁷⁴
- Indirect, management costs that a grantee or applicant “reasonably incurs in administering and managing the PA grant that are not directly chargeable to a specific project.”⁷⁵

Eligible direct administrative costs are provided by FEMA directly on the grant award for activities such as travel expenses and preparing documentation related to the specific project. The amount provided is based on the actual cost of these activities, or an estimate of their cost. GAO recently audited the past and current process for providing assistance for these costs, and found that the change made in 2007 may have had several unintended consequences, including increasing the workload of grantees and applicants/subgrantees because of the complexity of DAC procedures.⁷⁶ In GAO’s recent analysis of FEMA data from FY2008 to FY2012, GAO found that direct administrative costs totaled approximately \$107 million, about 0.77% of the total spending for the PA Program.⁷⁷

Management costs (or indirect costs) are provided directly to the grantee (the state or tribal government with the disaster declaration), not to the individual applicants in the communities. For indirect management costs, FEMA has established that it will provided a maximum of 3.34% of the federal share of projected eligible PA Program costs for major disaster declarations and 3.9% of the federal share of projected eligible program costs for emergency declarations.⁷⁸ FEMA, through the Chief Financial Officer, works with the grantees to develop a “lock-in” amount of management costs within 12 months of the declaration, and that amount cannot exceed

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the Stafford Act.

⁷² See 44 C.F.R. §207.9 for a description of this process.

⁷³ The new process was established by regulation, see the interim final rule at FEMA, “Management Costs,” 72 *Federal Register* 57869, October 11, 2007. For the initial proposed rulemaking for this procedure, see FEMA, “Management Costs,” 67 *Federal Register* 56130, August 30, 2002.

⁷⁴ See 44 C.F.R. §207.2 for official definitions, and FEMA, *Section 324 Management Costs and Direct Administrative Costs*, March 12, 2008, p. 2, at <https://www.fema.gov/9500-series-policy-publications/95259-section-324-management-costs-direct-administrative-costs>.

⁷⁵ Ibid.

⁷⁶ In the same report, GAO audited both the administrative costs FEMA incurs to manage the federal government’s support to communities in response to disasters, and the administrative costs reimbursed to grantees and applicants for the PA Program. See U.S. Government Accountability Office, *Federal Emergency Management Agency: Opportunities Exist to Strengthen Oversight of Administrative Costs for Major Disasters*, GAO-15-65, December 2014, pp. 24-36, at <http://www.gao.gov/products/GAO-15-65>.

⁷⁷ Ibid., p. 27.

⁷⁸ 44 C.F.R. §207.5(b)(4). The projected amount excludes direct federal assistance.

\$20 million unless specifically exempted by FEMA. The amount “locked-in” may be less than the 3.34% or 3.9% cap for major disaster and emergencies, respectively.⁷⁹ FEMA has produced guidance to applicants on examples of activities that should be classified as direct versus management costs.⁸⁰

Grantee Cost-Shares

There are no legal or regulatory limits on the amount of money that can be awarded through PA grants for any one project, applicant, or disaster declaration. So long as the project is otherwise eligible, FEMA will award funding (subject to sufficient funds being available in the Disaster Relief Fund for the project).⁸¹ The PA Program has a minimum federal cost-share of 75%, meaning that the maximum a grantee is responsible for is 25% of the total eligible amount of grant assistance, for both emergency and permanent work.⁸² The President may decide to increase this cost-share, often on the recommendation of FEMA under a regulatory assessment.⁸³ The cost-share can also be adjusted by separate laws specifying the cost-share for specific disaster declarations.⁸⁴ Under regulatory procedures, FEMA may recommend that the President increase the federal share up to 90% of the eligible costs for emergency and permanent work if the assessed damage from the disaster exceeds certain per capita damage thresholds. In addition, FEMA may recommend that the federal cost-share be increased to 100% for emergency work for a limited period of time after an incident, regardless of any per capita damage assessment.⁸⁵ FEMA also has a specific policy for providing 100% cost-share on direct federal assistance.⁸⁶ Cost-shares for individual disasters are established in the FEMA/state agreement which is completed as early as possible following an incident (and amended thereafter).⁸⁷ A full discussion of cost-share adjustments for all Stafford Act assistance programs, including the PA Program, is provided in a separate CRS report.⁸⁸

In DMA 2000, the President was directed to establish regulations by which the federal cost-share for permanent work assistance (restoring facilities) could be reduced for facilities damaged on more than one occasion over a ten-year period by the same type of event (e.g., a flood, tornado, or

⁷⁹ This process is explained by FEMA in FEMA, *Section 324 Management Costs and Direct Administrative Costs*, March 12, 2008, at <https://www.fema.gov/9500-series-policy-publications/95259-section-324-management-costs-direct-administrative-costs>.

⁸⁰ See FEMA, *Section 324 Management Costs and Direct Administrative Costs*, Public Assistance Program Indirect and Direct Administrative Activity List, March 12, 2008, at http://www.fema.gov/pdf/government/grant/pa/9525_9_pa_indirect_direct_administrative_activity_list.pdf.

⁸¹ For more on the Disaster Relief Fund, see the “Appropriations for the Public Assistance Program” section of this report and CRS Report R43537, *FEMA's Disaster Relief Fund: Overview and Selected Issues*, by (name redacted).

⁸² This cost share is established in multiple sections of the Stafford Act under the authorities used by the PA Program, see 42 U.S.C. §§5170b(b), 5172(b), 5173(d); Sections 403(b), 406(b), and 407(d) of the Stafford Act respectively.

⁸³ 44 C.F.R. §206.47.

⁸⁴ For example, see Section 4501 of P.L. 110-28, 121 Stat. 156. This provision set the federal cost-share at 100% of all eligible costs under the Stafford Act assistance programs for the States of Louisiana, Mississippi, Florida, Alabama and Texas in connection with Hurricanes Katrina, Wilma, Dennis and Rita.

⁸⁵ 44 C.F.R. §206.47.

⁸⁶ See FEMA, *100% Funding for Direct Federal Assistance and Grant Assistance*, 9523.9, June 9, 2006, at <https://www.fema.gov/9500-series-policy-publications/100-funding-direct-federal-assistance-and-grant-assistance>.

⁸⁷ See 44 C.F.R. §206.44 for more on the FEMA/state agreement.

⁸⁸ See CRS Report R41101, *FEMA Disaster Cost-Shares: Evolution and Analysis*, by (name redacted).

earthquake) and only if the owner of the facility had failed to properly mitigate the facility to prevent repetitive damages.⁸⁹ By law, the federal cost-share could be reduced to not less than 25% (meaning the federal share would be a minimum of 25%, and the grantee share no more than 75%).⁹⁰ FEMA proposed a regulation for this reduction in 2009, but the regulation has yet to be finalized so the legal requirement is not in effect.⁹¹ In the proposed rulemaking, FEMA has interpreted the language of the statute as meaning that the cost share would be reduced on the third occasion that a facility is damaged by the same event within a ten-year window, not the second.⁹² FEMA has suggested that their current means of tracking projects and applicants across these multiple disasters and years does not allow the ready identification of these types of facilities, thereby preventing easy implementation of the cost-share reduction requirement.⁹³ There is no reliable estimate for how many facilities—if any at all—would ultimately have their cost-share reduced because of this unenforced requirement.

Appeal Rights

The Stafford Act specifically provides a “right of appeal” to all grantees and applicants regarding any decision on the “eligibility for, from, or amount of assistance under this title [the Stafford Act].”⁹⁴ The statute also establishes a timeline for the appeals process. Appeals must be filed within 60 days of being notified of the decision in question, and the federal official responsible for administering the appeal has 90 days to reach a decision after it is filed. This statute on an appeals process applies for every Stafford Act assistance program, and the PA Program in particular has expanded on it in regulations and administrative policies.⁹⁵ The traditional PA appeal process has two stages of appeal; the initial appeal goes to the FEMA Regional Administrator where the disaster occurred and the second appeal goes to FEMA’s Assistant Administrator for Recovery for a decision, which is final.⁹⁶

SRIA established a new alternative dispute resolution (ADR) procedure for PA Program assistance decisions related to a major disaster declaration.⁹⁷ The history of this provision and

⁸⁹ Section 205(b) of DMA 2000, 114 Stat. 1563, as codified at 42 U.S.C. §5172(b)(2), Section 406(b)(2) of the Stafford Act.

⁹⁰ Section 205 of P.L. 106-390, 114 Stat. 1563; as codified at 42 U.S.C. §5172(b)(2), Section 406(b)(2) of the Stafford Act.

⁹¹ FEMA, “Disaster Assistance; Public Assistance Repetitive Damage,” 74 *Federal Register* 40124, August 11, 2009.

⁹² For an explanation, see Section II.C, 74 *Federal Register* 40126.

⁹³ In-person meeting with FEMA staff, October 31, 2014. In the proposed rule, FEMA notes that it would need to track the history of the provision of disaster assistance following Presidentially-declared major disasters by applicant and facility through the use of its National Emergency Management Information System (NEMIS)/Emergency Management Mission Integrated Environment (EMMIE) computer program and database in which all PW’s are stored. FEMA would use the latitude and longitude documented on the PW and entered into NEMIS/EMMIE for the damaged facility to track repetitively damaged facilities. Tracking and recording this information in NEMIS/EMMIE would assist FEMA in correctly and consistently interpreting the requirements in this proposed rule, and if the Federal cost-share is reduced it would serve as essential documentation for resolving appeals that may follow. (Section II.G, 74 *Federal Register* 40127).

⁹⁴ 42 U.S.C. §5189a(a), Section 423(a) of the Stafford Act.

⁹⁵ See 44 C.F.R. §206.206 and FEMA, *Public Assistance Program Appeal Procedures*, Version 3, April 7, 2014, at <https://www.fema.gov/media-library/assets/documents/93610>.

⁹⁶ 44 C.F.R. §206.206(b).

⁹⁷ Section 1105 of SRIA, 127 Stat. 43-45. The ADR procedure applies to assistance provided by Sections 403, 406, and (continued...)

possible rationale are described in another CRS report.⁹⁸ Since SRIA, FEMA has implemented the ADR procedure in regulations, and created a new manual on the appeals process to explain the procedure.⁹⁹ FEMA also maintains a database of appeals online, and has created a new Public Assistance Appeals Branch to centrally manage the appeals process.¹⁰⁰

Methods for Awarding and Disbursing Grant Funding

There are two general methods FEMA currently uses to determine the amount of, and award, grant assistance for both emergency and permanent work under the PA Program. FEMA will either award grants based on the estimated federal share of the total eligible cost for the project, or it will award grants on the federal share of actual eligible costs evidenced through documentation by the applicant/grantee. Succinctly, when a grant is provided by estimate, the applicant receives the full amount of assistance at the time the project is approved. The actual cost basis method reimburses the applicant for eligible expenses only as actual costs are documented by the applicant. When and how these methods are applied is described briefly below.

Estimated Cost Basis

Under current practice, FEMA issues grants based on the estimated federal share of eligible costs for PA projects when:

- The project is eligible for simplified procedures as authorized in Section 422 of the Stafford Act (a “small project” in FEMA terminology);
- An applicant has decided to receive an in-lieu contribution through Section 406(c) of the Stafford Act (an “alternate project” in FEMA terminology);
- Certain projects that include significant improvements for the facility (an “improved project” in FEMA terminology); or
- An applicant chooses to use the alternative procedure for a permanent work, large project grant to be based on a fixed estimate.

These types of PA projects are described in greater detail below.

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407 of the Stafford Act.

⁹⁸ For more background on the SRIA ADR requirement, see CRS Report R42991, *Analysis of the Sandy Recovery Improvement Act of 2013*, by (name redacted), (name redacted), and (name redacted).

⁹⁹ See 44 C.F.R. §206.210 and FEMA, *Public Assistance Program Appeal Procedures*, Version 3, April 7, 2014, at <https://www.fema.gov/media-library/assets/documents/93610>.

¹⁰⁰ For the appeals database, see <https://www.fema.gov/appeals>; for more on the appeals branch, see <https://www.fema.gov/public-assistance-appeals-branch>.

Simplified Procedure “Small” Projects

Section 422 of the Stafford Act allows applicants to request that FEMA provide PA grants based on the federal share of the estimated total eligible cost of the project, as opposed to reimbursing on eligible actual costs.¹⁰¹ The statute establishes a cap on the size of projects allowed to use this method at \$35,000, adjusted annually for inflation.¹⁰² For the period FY2000 through FY2013 this threshold ranged between \$48,900 and \$68,500.¹⁰³ Providing this assistance via a federal estimate, as opposed to actual cost, is deemed a simplified procedure, though projects under this ceiling and using this method are often referred to by FEMA as small projects. The simplified procedure can be applied for any category of work assistance in the PA Program. In general, the simplified procedures are intended to reduce administrative expenses, for both FEMA and the applicant, and to speed up the delivery of assistance to the affected communities.¹⁰⁴

SRIA revised Section 422 to require the Administrator of FEMA to analyze and report whether it would be appropriate to raise the estimated cost ceiling on small projects, based on a number of considerations including how the threshold impacts “cost-effectiveness, speed of recovery, capacity of grantees, past performance, and accountability measures.”¹⁰⁵ FEMA produced a report analyzing this issue on January 29, 2014, one year after enactment of SRIA and in fulfillment of the legislative deadline.¹⁰⁶ In addition to reviewing the size of the maximum estimated cost threshold for simplified procedures, FEMA also reviewed its minimum estimated cost threshold to receive grant assistance—currently set at \$1,000.¹⁰⁷ Through an analysis of past legislative intent on the size of small projects and a benefit-cost analysis, among other factors, FEMA recommended raising the eligibility for simplified Procedures to \$120,000 for the maximum estimated cost threshold and \$3,000 for the minimum estimated cost threshold. Based on past data from the PA Program, FEMA believes that the new small project thresholds will capture approximately 93% of all PA projects, though only 20% of the total costs of assistance in the PA Program.¹⁰⁸ CRS analysis of project data from FY2000-FY2013 indicates that approximately 87% of all PA projects were small projects, and 9% of the total federal obligations for assistance in the PA Program. Therefore, the new thresholds may increase the number of small projects by roughly 6 percentage points, and the amount of assistance provided through simplified procedures by 11

¹⁰¹ 42 U.S.C. §5189. Specifically, eligible costs under Section 403, 406, 407, or 502 of the Stafford Act.

¹⁰² This \$35,000 figure was set in 1988 by Section 106(k) of P.L. 100-707, 102 Stat. 4705, and is adjusted annually according to the Consumer Price Index for All Urban Customers.

¹⁰³ FEMA, “Notice of Adjustment of Disaster Grant Amounts,” 64 *Federal Register* 215, November 8, 1999. FEMA, “Notice of Adjustment of Disaster Grant Amounts,” 78 *Federal Register* 208, October 28, 2013. This example, from FY2000, establishes the rate of \$48,900. The notice states that “the increase is based on a rise in the Consumer Price Index for All Urban Consumers of 2.3 percent for the prior 12-month period.”

¹⁰⁴ For a description of the legislative intent behind the simplified procedures, see Section B, *History of Simplified Procedures Threshold*, in FEMA, *Determination on the Public Assistance Simplified Procedures Thresholds*, Analysis Report for Sandy Recovery Improvement Act of 2013, January 29, 2014, at <https://www.fema.gov/media-library/assets/documents/90458>.

¹⁰⁵ Section 1107 of SRIA (127 Stat. 46) as codified at 42 U.S.C. §5189(b)(1), Section 422(b)(1) of the Stafford Act

¹⁰⁶ FEMA, *Determination on the Public Assistance Simplified Procedures Thresholds*, Analysis Report for Sandy Recovery Improvement Act of 2013, January 29, 2014, at <https://www.fema.gov/media-library/assets/documents/90458>.

¹⁰⁷ A minimum threshold for project size is not a requirement of the Stafford Act, but is established in FEMA’s implementing regulations, see 44 C.F.R. §206.202(d)(2).

¹⁰⁸ See FEMA, *Determination on the Public Assistance Simplified Procedures Thresholds*, Analysis Report for Sandy Recovery Improvement Act of 2013, January 29, 2014, p. 22, at <https://www.fema.gov/media-library/assets/documents/90458>.

percentage points.¹⁰⁹ As required by law, following their analysis of the cost thresholds, FEMA established the new floor for the minimum project amount and a ceiling for small project eligibility by regulation. Thus, these new thresholds of \$3,000 for a minimum project size, and \$120,000 for the simplified procedure maximum, are effective as of February 26, 2014.¹¹⁰ By law, FEMA is also required to adjust the thresholds annually by the Consumer Price Index and to review the thresholds no later than every three years.¹¹¹

Validation Process for Small Project Estimates

As explained above, small projects are based on the federal estimate for the cost of the project. However, applicants are encouraged to produce their own estimates on the cost of small projects and provide them on project worksheets to FEMA for validation. This process is established in FEMA policy, not law or regulation, and is designed to “confirm the eligibility, compliance, accuracy and reasonableness of small projects formulated by an applicant.”¹¹² FEMA will review a 20% sample size of all small projects submitted by the applicant under a particular disaster declaration, but will individually review any that have identified special considerations, such as residing in the floodplain or historical preservation issues. FEMA does not have an established process to review whether the estimated cost of small projects ultimately reflects the final cost for completing the project.

In-Lieu “Alternate” Projects

The Stafford Act authorizes the President to provide certain applicants, at their request, an “in-lieu” contribution based on the amount of estimated cost of the eligible damage for the eligible facility. Under current law, this authority only applies to permanent work projects, and the in-lieu contribution/grant can be used to repair or build an existing or new alternate facility. An applicant may also use the in-lieu contribution to fund mitigation measures on another facility.¹¹³ Thus, FEMA refers to grants using this authority as “alternate” projects (not to be confused with alternative procedures).¹¹⁴ For example, if an elementary school was substantially destroyed after a disaster, a local government may decide that instead of rebuilding that particular school (and having FEMA reimburse them for the federal share of the eligible cost of doing so), the community may be better served by using that money to build a new high school or to better protect a nearby police station (perhaps because of shifting demographic needs in their population). The decision by an applicant to receive an in-lieu contribution for a different project

¹⁰⁹ See **Table 5** of this report for more data.

¹¹⁰ See FEMA, “Amendment to the Public Assistance Program’s Simplified Procedures Project Thresholds,” 79 *Federal Register* 10685, February 26, 2014. FEMA has also sought public comment on the thresholds, see FEMA, “Simplified Procedures Project Thresholds for the Public Assistance Program,” 79 *Federal Register* 688899, November 19, 2014.

¹¹¹ Section 1107 of SRIA (127 Stat. 46) as codified at 42 U.S.C. §5189(b), Section 422(b) of the Stafford Act.

¹¹² FEMA, *Public Assistance Program, Validation of Small Projects*, 9570.6 Standard Operating Procedure, September 1999, p. 3, at http://www.fema.gov/media-library-data/20130726-1847-25045-1794/9570.6_validation_of_small_projects_sop.pdf.

¹¹³ 42 U.S.C. §5172(c), Section 406(c) of the Stafford Act. Regulations for in-lieu contributions are found at 44 C.F.R. §206.203(d)(2), and supplemental policy guidance at FEMA, *Alternate Projects Disaster Assistance Policy*, 9525.13, August 22, 2008, at <http://www.fema.gov/site-page/alternate-projects>.

¹¹⁴ The “alternate project” name of in-lieu contributions projects can now be easily confused with *alternative* procedure projects (not alternate), so CRS refers to them as *in-lieu projects* or *in-lieu contributions*.

needs to be in the interest of the public welfare, as determined by the applicant, and the new project should serve the “same general area that was being served by the originally funded project.”¹¹⁵

In order to estimate the size of the in-lieu contribution, FEMA uses a cost-estimating process called the Cost Estimating Format, or CEF, to estimate the eligible damages on the original project. In other words, for in-lieu contributions, the CEF helps identify the amount of assistance that would have been provided to the applicant had they elected to repair or replace the existing facility. The CEF tool was initially developed following the 1994 Northridge Earthquake in California, and was most recently revised in 2009.¹¹⁶ The CEF is *not* used to estimate the costs of small projects described previously.

Once the original project cost is estimated using the CEF, FEMA is obligated by law to reduce the amount of assistance contributed in-lieu to the applicant for the new project. For governmental applicants, the reduction is 10% of the federal share of eligible costs for repairing the existing facility (meaning FEMA provides 90% of the amount it would otherwise have provided), for private nonprofit applicants, the reduction is 25% of the federal share (meaning FEMA provides 75% of the amount it otherwise would have provided).¹¹⁷ The reduction of the federal share of assistance for public facility in-lieu projects was lowered from 25% of the eligible costs to the current 10% by P.L. 109-347.¹¹⁸ FEMA applies the reduction to the federal share of the estimated eligible cost of repairing the current facility, *not* the estimated costs of new project or mitigation activities.¹¹⁹ This penalty on the in-lieu contribution can be considered a deterrent to applicants from recovering facilities in innovative ways as opposed to rebuilding and repairing the facility back to the way it was prior to the disaster.

Under the alternative procedures for the PA Program established by SRIA, the in-lieu contributions for different projects are not reduced by 10% for public facilities or 25% for private nonprofit facilities.¹²⁰ In order to receive this benefit, FEMA requires that an applicant first accept and negotiate a grant based on fixed estimate of cost (this process is described later in the report).¹²¹

FEMA reported to CRS that the authority for in-lieu contributions is used very rarely by grantees as a percent of the number of total permanent work projects (fluctuating year to year, ranging

¹¹⁵ Section VII.E of FEMA, *Alternate Projects Disaster Assistance Policy*, 9525.13, August 22, 2008, at <http://www.fema.gov/site-page/alternate-projects>.

¹¹⁶ See FEMA, “Public Assistance Cost Estimating Format for Large Projects,” 78 *Federal Register* 61227, October 3, 2013. For more on how and when FEMA currently uses the CEF, see an explanation at FEMA, *Public Assistance: Cost Estimating Format Standard Operating Procedure*, at <http://www.fema.gov/public-assistance-cost-estimating-format-standard-operating-procedure>.

¹¹⁷ See 42 U.S.C. §5172(c)(1)(A) for public applicants, and (c)(2)(A) for private nonprofit applicants (§406(c)(1)(A) and (2)(A) of the Stafford Act).

¹¹⁸ See Section 609 of Security and Accountability For Every Port Act of 2006 (SAFE Port Act, P.L. 109-347, 120 Stat. 1942).

¹¹⁹ Returning to the example of the school, this means FEMA provides 90% of what they estimated to be the total eligible federal assistance for repairing the original damaged elementary school, *not* 90% of the new eligible costs of building a different high school or mitigating future damages to the police station.

¹²⁰ Section 1102 of SRIA (127 Stat. 40), as codified at 42 U.S.C. §5189f(d), Section 428(d) of the Stafford Act.

¹²¹ FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent Work*, Version 2, December 19, 2013, p. 12, at <https://www.fema.gov/media-library/assets/documents/89754>.

from 0.02% of permanent work projects in 2005 to 0.53% in 2008).¹²² FEMA also reports that certain types of facilities eligible for permanent work assistance are more likely to receive in-lieu contributions than others. For example, approximately 0.09% of roads and bridge projects (Category C) used in-lieu contribution authority versus 0.33% of building projects (Category E) from FY2000 to FY2014.¹²³

Improved Projects

Improved projects for permanent work assistance allow the applicant to significantly alter the pre-disaster design of the facility when repairing or replacing an eligible facility.¹²⁴ So long as the facility serves the same intended purpose and function (e.g., it was a police station and remains a police station afterwards), an improved project does not have a reduced federal cost share as is required with an in-lieu contribution. However, FEMA only provides the federal share of estimated eligible costs for repairing/replacing the facility as it was designed originally, not for the additional “improvements” of the project. An improved project uses an estimated cost basis if it is either a small project or the costs for the improvement cannot be distinguished from repairing or replacing the facility to pre-existing design. If the improved project is estimated, the estimate of the original project, minus improvements, is developed using the CEF. Thus, for example, if an applicant wishes to significantly expand the capacity of a fire station by building it with three truck bays instead of its original two bays, FEMA will not provide assistance for the additional cost of the third bay.¹²⁵ In this example, one assumes the costs for the third truck bay cannot be isolated from repairing the original two bays.

Alternative Procedure Fixed-Estimate Grants

As part of the new SRIA alternative procedures for the PA Program, FEMA is directed to issue grants to applicants for large, permanent work projects (facility repair and restoration) based on estimates of the eligible cost. By law,¹²⁶ SRIA required the estimation procedure to include methods for:

- Using a “fixed” estimate, meaning that after the estimate is agreed upon and set, the estimate will not change due to changes in the project or other factors. As implemented by FEMA, these estimated grants function much in the same way as an in-lieu contribution does, as once the amount is agreed upon, the grants “provide [applicants] with flexibility to repair or rebuild a facility as it deems necessary for its operations with no requirement to rebuild to pre-disaster design, capacity or function.”¹²⁷

¹²² Email correspondence from FEMA staff, received January 7, 2015.

¹²³ Ibid.

¹²⁴ Improved projects are not specifically authorized in the text of the Stafford Act, but rather are approved through FEMA’s interpretation of Section 406 authorities. In regulations, see 44 C.F.R. §206.203(d)(1), and supplemental policy guidance at FEMA’s website at <https://www.fema.gov/public-assistance-project-formulation-cost-estimating/improved-project>.

¹²⁵ See FEMA, *Public Assistance Guide*, June 2007, p. 110, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

¹²⁶ Section 1102 of SRIA (127 Stat. 40), as codified at 42 U.S.C. §5189f(e)(1), Section 428(e)(1) of the Stafford Act.

¹²⁷ FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent Work*, Version 2, December 19, 2013, p. 5, at <https://www.fema.gov/media-library/assets/documents/89754>.

- Accepting the estimates of professionally licensed engineers provided by the applicant, so long as the estimate complies with FEMA regulations, policy, and guidance. As implemented, FEMA uses the CEF whenever the applicant does *not* provide an estimate. It also requires the applicant's professional engineer to either use "the CEF or a methodology and format consistent in the CEF's level of detail."¹²⁸
- Using an independent expert panel, at the applicant's request, to review and validate the cost estimate where the estimated cost is over \$5 million. As implemented, FEMA has determined that it will pay for all expenses of the panel and the reviews.¹²⁹

SRIA also provided guidance on what happens if the estimated grant amount does not equal the final actual cost of the applicant's project.¹³⁰ In other words, SRIA dictates what happens if the grant approved by fixed estimate provides more or less assistance than was ultimately determined to be eligible costs—often many years later. In instances where the amount provided by grant is less than the actual cost of the project, the applicant will pay the overages. In instances where the estimated grant amount is more than the actual project cost, FEMA will allow the applicant to use the extra funds for PA hazard mitigation activities or other activities improving future PA operations.¹³¹

Actual Cost Basis

FEMA's policies state they currently use an actual cost basis for reimbursing grantees for large projects (currently over the \$120,000 threshold) that are either emergency or permanent work.¹³² As with in-lieu contributions, the CEF tool is used by FEMA for actual cost projects to help anticipate the end expenditure for the project. This enables FEMA to anticipate future costs and outlays for PA projects, and obligate in advance the expected cost of the project. Though funds are obligated by FEMA at project approval, the funds are only incrementally disbursed as actual costs are documented by the applicant.¹³³ Therefore, FEMA provides the full assistance amount to the applicant only after all eligible work on a PA project has been completed in its entirety. The process for reimbursing by actual costs is governed by regulations,¹³⁴ and allows for the scope of the project to evolve as the project is commenced, so long as these changes are approved by FEMA.¹³⁵ Changes to the scope of work are generally *not* allowed when FEMA issues a grant based on estimates of eligible costs.

¹²⁸ *Ibid.*, p. 7.

¹²⁹ *Ibid.*, p. 8.

¹³⁰ Section 1102 of SRIA (127 Stat. 40), as codified at 42 U.S.C. §5189f(e)(1)(D), Section 428(e)(1)(D) of the Stafford Act.

¹³¹ A list of unacceptable uses is also provided at FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent Work*, Version 2, December 19, 2013, p. 12, at <https://www.fema.gov/media-library/assets/documents/89754>.

¹³² For more on the large versus small project distinction, see the "Simplified Procedure "Small" Projects" section of this report.

¹³³ FEMA will, under some circumstances, provide advances on assistance funds (see 44 C.F.R. §13.21).

¹³⁴ Namely, 44 C.F.R. §§13.21, 206.204, and 206.205(b).

¹³⁵ See 44 C.F.R. §206.204(e).

Possible DMA 2000 Grant Estimating Procedure

As described above, large, permanent work project grants are currently awarded on an actual cost basis. Section 205(d) of DMA 2000 required the President to develop and implement a procedure for awarding these grants based on the estimates of the eligible cost.¹³⁶ The President was directed to convene an expert panel on how costs should be estimated by FEMA, and to issue regulations implementing these cost estimation procedures. Although the expert panel convened twice and issued a report with recommendations for how the estimating procedure should be developed,¹³⁷ final regulations implementing the statute have not been issued. However, in October 2013, FEMA proposed a final rule to implement the grant estimating procedure required by DMA 2000.¹³⁸ As shown later in **Table 5**, the impact on the PA Program of this proposed change in procedure is significant. CRS analysis of project data from FY2000 to FY2013 indicates that large, permanent work projects accounted for approximately 7% of all PA projects between FY2000-FY2013, but 53%, or \$27.2 billion, of total federal obligations for assistance.

If and when this regulation becomes final, the only remaining category of PA projects that would be reimbursed on an actual cost basis is large, emergency work projects. CRS analysis of project data from FY2000-FY2013 indicates that large, emergency work projects accounted for approximately 6% of all PA projects, but 38%, or \$19.6 billion, of total federal obligations for assistance. In addition, any large, permanent work project that is more than 90% complete at the time of estimation would still be reimbursed on an actual cost basis.¹³⁹

See the **text box** on how the status of the statutory changes made by DMA 2000 only become effective after these regulations are finalized.

Explanation of the Effective Status of Section 406(e) of the Stafford Act

DMA 2000 revised, among other provisions, the text of Section 406(e) of the Stafford Act (42 U.S.C. §5172(e)) to require the creation of the large, permanent work grant estimation procedure. This change is not yet effective, however, because FEMA has yet to finalize the rulemaking implementing the grant estimation procedure. Therefore, the Section 406(e) statutory text that is effective is the same as it was *before* passage of DMA 2000, until such a point that the proposed rulemaking is finalized and the DMA 2000 revision becomes effective. Lay observers can find this change confusing, as Section 406(e) of the Stafford Act in the official version of U.S. Code (namely, as published by the Government Publication Office) reflects the DMA 2000 revised language, not what is in effect until the implementation of the rulemaking. The active, pre-DMA 2000 text, is provided in the annotated code as a note to Section 406 and should be referenced as the “true” code until the proposed rulemaking is finalized.¹⁴⁰

If and when the DMA 2000 grant estimation regulation is finalized by FEMA, the possibility exists that there may be two different options available to applicants to receive grants based on estimates for large, permanent work projects. There could be the new, DMA 2000 method, and the alternative procedure method. The two options would only be available *if* FEMA were

¹³⁶ P.L. 106-390, 114 Stat. 1564.

¹³⁷ FEMA, *Public Assistance: Expert Panel on Cost Estimating*, Recommendation Report of Federal Advisory Committee 10733, October 2002, at <http://www.fema.gov/media-library-data/20130726-1836-25045-8450/cefre.pdf>.

¹³⁸ FEMA, “Public Assistance Cost Estimating Format for Large Projects,” 78 *Federal Register* 61227, October 3, 2013.

¹³⁹ FEMA believes that since a project is almost complete at 90% status, there is no need to estimate the remaining portion of the project and it should just be reimbursed on an actual cost basis. See Section V. A. of FEMA, “Public Assistance Cost Estimating Format for Large Projects,” 78 *Federal Register* 61238, October 3, 2013.

¹⁴⁰ See p. 5534 of the Title 42 of the U.S. Code, 2013 edition.

continuing the alternative procedures pilot, or had implemented the alternative procedure permanently, after the DMA 2000 grant estimation rulemaking is finalized. Likewise, FEMA may decide to incorporate some of the processes of the alternative procedures into the DMA 2000 grant estimation final regulation (or vice versa), eliminating some of the possible differences between the two methods.¹⁴¹ **Table 2** provides a summary comparison of the two methods as they are currently designed.

Table 2. Summary Comparison of Large, Permanent Work Grant Estimation Procedures

	DMA 2000 Procedure^a	SRIA Alternative Procedure^b
Estimate is developed using the...	Cost Estimating Format (CEF), as approved by the expert panel established to create the CEF.	CEF if produced by FEMA, or by using the applicant's estimate from a licensed engineer that using the CEF or similar estimating format.
If applicant and FEMA disagree on estimate...	Applicant may appeal using standard PA appeal procedures.	Applicant may request an independent expert panel review and validate the estimate amount only for eligible projects over \$5 million. If applicant is unsatisfied by expert panel, it may elect to use an actual cost basis for the grant. For eligible projects estimated under \$5 million, applicant may appeal using standard PA appeal procedures.
If final actual costs differ from estimate...	There are ceiling and floor thresholds of 10% for cost underruns and overruns. If costs underrun (the actual cost of the project is less than estimate) by less than 10%, the applicant may use extra funds for hazard mitigation measures, similar to those authorized by the Hazard Mitigation Grant Program (Section 404 of the Stafford Act). If the underrun is greater than 10%, the applicant must reimburse the federal share of the difference. If the actual costs exceed the 10% thresholds, applicant can receive additional funding, or must repay funding, in the excess amount of the federal cost share.	As a fixed estimate grant, any actual cost overruns are borne by applicant. Actual cost underruns are kept by the applicant and may be used for PA Program-related purposes such as hazard mitigation activities or activities to improve future PA permanent work operations.

Source: CRS analysis of PA Program documents cited in notations.

Notes:

- a. For a full explanation of the proposed DMA 2000 procedure for grant estimation, see Federal Emergency Management Agency, "Public Assistance Cost Estimating Format for Large Projects," *78 Federal Register* 61227, October 3, 2013.
- b. For full explanation of the SRIA Alternative Procedure for grant estimation, see Federal Emergency Management Agency, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent Work*, Version 2, December 19, 2013, at <https://www.fema.gov/media-library/assets/documents/89754>.

¹⁴¹ The statutes authorizing both the alternative procedure and the DMA 2000 grant estimation procedure contain different base requirements. However, there is enough flexibility within the statutes that the President, via FEMA's administrative discretion, could develop similar methods for the DMA 2000 grant estimation procedure and the alternative procedure for PA grants.

Public Assistance Alternative Procedures Created by the Sandy Recovery Improvement Act

The Sandy Recovery Improvement Act (SRIA) reformed numerous Stafford Act assistance authorities, including the PA Program.¹⁴² The foremost change of SRIA to the PA Program was to create a new section of the Stafford Act, Section 428, establishing “alternative procedures” for the PA Program.¹⁴³ Many of the changes made by SRIA were initially piloted under Section 689j of P.L. 109-295, the Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA).¹⁴⁴

This section describes how FEMA chose to implement the SRIA alternative procedures and discusses some of the decisions made in this implementation process that may be of interest to Congress. The changes made by SRIA to the PA Program are discussed in detail in the prior sections of this report and in a separate report by CRS.¹⁴⁵

Pilot Program Guidance

In SRIA, Congress specifically granted FEMA the authority to carry out the alternative procedures as a pilot program, and allowed FEMA to waive having to go through the normal rulemaking process so that it could expeditiously implement the procedures.¹⁴⁶ Consequently, FEMA has established the Public Assistance Alternative Procedures (PAAP) Pilot Program, and provided the policies it uses to administer the PAAP Pilot Program through a series of guides and supplementary documents made available on its website.¹⁴⁷ FEMA has generally split the PAAP Pilot Program into those new rules it is applying for alternative procedures on debris removal projects in emergency work (Category A projects) and large, permanent work projects (Categories C-G).¹⁴⁸ It is unclear when, or if, FEMA intends to revise regulations on the PA Program, namely 44 C.F.R. §206, to formally adopt the alternative procedures pilot program. SRIA suggests, but does not require, that FEMA ultimately adopt these policies in regulation.¹⁴⁹

It is beyond the scope of this report to analyze the PAAP Pilot Program guidance provided by FEMA in full. However, a few issues that may be of interest to Congress are discussed below.

¹⁴² Division B of P.L. 113-2, the Disaster Relief Appropriations Act, 2013

¹⁴³ 42 U.S.C. §5189f.

¹⁴⁴ 120 Stat. 1455. For more on the PKEMRA PA Pilot program, see FEMA, *Public Assistance Pilot Program: Fiscal Year 2009 Report to Congress*, May 20, 2009, at <http://www.fema.gov/library/viewRecord.do?id=3683>.

¹⁴⁵ See CRS Report R42991, *Analysis of the Sandy Recovery Improvement Act of 2013*, by (name redacted), (name redacted), and (name redacted).

¹⁴⁶ Section 1102 of SRIA (127 Stat. 41), as codified at 42 U.S.C. §5189f(f), Section 428(f) of the Stafford Act.

¹⁴⁷ See FEMA's PAAP website for all supporting documentation, at <https://www.fema.gov/alternative-procedures>.

¹⁴⁸ See the “Eligible Types of Assistance (Categories of Work)” section of this report for more on these categories. SRIA also permanently amended Section 403 of the Stafford Act the eligibility of certain types of salaries and benefits of local government employees for emergency protective measure grants (Category B). For a description of this revision, see CRS Report R42991, *Analysis of the Sandy Recovery Improvement Act of 2013*, by (name redacted), (name redacted), and (name redacted).

¹⁴⁹ The law states that “Until such time as the Administrator promulgates regulations to implement this section....” The law does not specify if the Administrator is *required* to issue regulations, and if so, when they are required to do so. See Section 1102 of SRIA (127 Stat. 41), as codified at 42 U.S.C. §5189f(f), Section 428(f) of the Stafford Act.

Fixed Estimate Grants for Debris Removal

FEMA is not yet issuing grants by fixed-estimate for debris removal emergency work projects, as noted in PAAP guidance.¹⁵⁰ This fixed-estimate procedure is being provided for large, permanent work projects. Though SRIA requires the Administrator to provide such a method as a condition of the alternative procedures,¹⁵¹ FEMA indicated to CRS that there is not currently an accurate enough method available to estimate the amount of debris following a disaster, and therefore the cost of removing the debris. FEMA also suggested that they have not received sufficient interest from grantees or applicants in using this alternative procedure.¹⁵² However, FEMA does currently use methods to estimate the amount of debris following a disaster in order to provide eligible grantees expedited payments of 50% of the initial estimate for full anticipated debris removal costs, as required by current law.¹⁵³ Presumably, these estimation methods are considered insufficient for the purposes of making grants based on fixed estimates. In addition, in a past pilot program for debris removal procedures authorized by PKEMRA, FEMA did pilot a fixed grant estimating procedure for debris removal projects under \$500,000. However, FEMA indicated that too few applicants used the grant estimating procedure to determine what impact, if any, it would have had on the efficacy of the assistance.¹⁵⁴

Selective Availability of Alternative Procedures for Applicants

SRIA did not directly specify how an applicant may choose to participate in the alternative procedures, only that it was at their discretion.¹⁵⁵ Generally, FEMA has determined that an applicant may choose among some or all of the alternative procedures on a project-by-project basis, with certain limitations.¹⁵⁶ This approach is more flexible than other methods FEMA could have used. FEMA could have, for example, decided that if an applicant wished to use alternative procedures on one of their projects, the applicant would need to use the same procedure on all of their projects, or decided that an applicant must use all features of the alternative procedures for a project instead of just some of them. Not unexpectedly, early statistics provided to CRS by FEMA on the usage of alternative procedures by December 2014 indicate that some alternative procedures are considerably more popular with applicants than others (e.g., relatively few

¹⁵⁰ See FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Debris Removal*, Version 2, June 27, 2014, p. 4, <https://www.fema.gov/media-library/assets/documents/33376?id=7776>.

¹⁵¹ Section 1102 of SRIA (127 Stat. 41), as codified at 42 U.S.C. §5189f(e)(2)(A), Section 428(e)(2)(A) of the Stafford Act.

¹⁵² In-person meeting with FEMA staff, October 31, 2014.

¹⁵³ 42 U.S.C. §5173(e), Section 407(e) of the Stafford Act. For an explanation of these methods, see FEMA, *Debris Estimating Field Guide*, FEMA 329, September, 2010, at http://www.fema.gov/pdf/government/grant/pa/fema_329_debris_estimating.pdf

¹⁵⁴ FEMA, *Public Assistance Pilot Program: Fiscal Year 2009 Report to Congress*, May 20, 2009, at <http://www.fema.gov/library/viewRecord.do?id=3683>.

¹⁵⁵ Section 1102 of SRIA (127 Stat. 40), as codified at 42 U.S.C. §5189f(d), Section 428(d) of the Stafford Act.

¹⁵⁶ Limitations are explained in the PAAP Pilot Program guides. See both FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Debris Removal*, Version 2, June 27, 2014, at <https://www.fema.gov/media-library/assets/documents/33376?id=7776>; and

FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent*, Version 2, December 19, 2013, at <https://www.fema.gov/media-library/assets/documents/89754>.

applicants are recycling debris while many more are using the sliding scale for accelerated debris removal).¹⁵⁷

Applicability of Alternative Procedures to Past Disasters

SRIA explicitly provided that FEMA *may* approve alternative procedures for PA projects for disasters declared after date of enactment, and that it *may* apply alternative procedures for PA projects “for which construction ha[d] not yet begun on the date of enactment.”¹⁵⁸ In its PAAP Pilot Program guidance for permanent work projects, FEMA makes available alternative procedures for any major disaster declared on or after May 20, 2013, and states it may also approve subgrants before then if construction has not begun.¹⁵⁹ FEMA does not specify further how one defines when construction begins (e.g., before or after any demolition occurs, before or after the metaphorical first shovel of dirt, etc.). However, FEMA has approved alternative procedures for permanent work projects in Louisiana for major disaster declarations issued for Hurricanes Katrina and Gustav (in August 2005 and September 2008, respectively).¹⁶⁰ More recently, many more projects have been approved or are under review with alternative procedures stemming from Hurricane Sandy, especially in New York, all of which pre-date the start of the pilot on May 20, 2013.

In its PAAP Pilot Program guidance for emergency work debris removal projects, FEMA has established a pilot “performance period” for disaster declarations between June 28, 2013, and June 27, 2015, when the pilot would end.¹⁶¹ Notably, this period does not include disaster declarations for Hurricane Sandy (made around the end of October, 2012), and began approximately six months following enactment of SRIA.¹⁶² FEMA states that it will conduct an analysis of the effectiveness of the alternative procedures after the end of the pilot and determine whether to discontinue the pilot, extend it, or issue regulations making it more permanent.¹⁶³ The

¹⁵⁷ Email correspondence from FEMA staff, received January 7, 2015. Early statistics from FEMA indicate that 11 applicants have used the recycling debris alternative procedure, and by comparison 436 have used the sliding scale accelerated debris removal procedure.

¹⁵⁸ Date of enactment was January 29, 2013. Section 1102 of SRIA (127 Stat. 42), as codified at 42 U.S.C. §5189f(a), Section 428(a) of the Stafford Act.

¹⁵⁹ FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent*, Version 2, December 19, 2013, p. 2, at <https://www.fema.gov/media-library/assets/documents/89754>.

¹⁶⁰ Disaster declarations 1603 and 1786, respectively. Early statistics provided by email from FEMA staff, received January 7, 2015.

¹⁶¹ However, between June 28, 2013, and June 27, 2014, of this period, only large projects for debris removal were eligible for alternative procedures beyond reimbursement of straight-time labor costs. After June 27, 2014, all debris removal alternative procedures except for fixed grant estimates are available to both small and large projects. See FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Debris Removal*, Version 2, June 27, 2014, p. 2, at <https://www.fema.gov/media-library/assets/documents/33376?id=7776>.

¹⁶² However, in an immediate final rule issued on November 9, 2012, FEMA implemented a policy for reimbursing state, tribal, and local governments or owner/operators of private nonprofits for the base and overtime wages of employees that are performing or administering debris removal projects. This rule implemented a similar policy as is found in the alternative procedures, but only for disasters related to Hurricane Sandy. See Department of Homeland Security, “Debris Removal: Eligibility of Force Account Labor Straight-Time Costs under the Public Assistance Program for Hurricane Sandy,” *77 Federal Register* 67285, November 9, 2012.

¹⁶³ *Ibid.* It is unclear from current guidance what the “end” of the program period means for project eligibility for alternative procedures. For instance, one interpretation could be that debris removal projects for all disasters declared before that date are eligible, or that all debris removal projects approved before that date, or other interpretations. FEMA is currently addressing how it will implement the performance period, and whether there will be an immediate (continued...)

PAAP Pilot Program guidance for permanent work does not contain an explicit end date for the pilot.

Summary Analysis of Obligations for the Public Assistance Program

The following section provides analysis of PA Program spending for major disasters in the period FY2000 through FY2013. FY2014, and early data from FY2015, were excluded from this analysis because these more recent data are subject to considerable modification as the recovery from major disasters advances and more PA projects are approved or have their obligations revised. This could also affect actual obligation levels for early fiscal years to a lesser degree. The data for this analysis were derived from FEMA datasets, including publicly available data that can be accessed through the OpenFEMA website.¹⁶⁴ Additional information on these data, as well as important considerations regarding their reliability, is available in **Appendix B**.

Appropriations for the Public Assistance Program

The PA Program is financed from the Disaster Relief Fund (DRF), which typically receives no-year appropriations and is the primary funding source for Stafford Act disaster assistance authorities.¹⁶⁵ Appropriations to the DRF do not separately identify funding amounts for the varied programs authorized by the Stafford Act, thus the PA Program has not historically received a distinct appropriation. Appropriations to the DRF as a whole, from FY2000 through FY2013, are shown in **Table 3**.

Table 3. Appropriations to the Disaster Relief Fund, FY2000 through FY2013

Enacted Annual Appropriations and Supplemental Appropriations

Fiscal Year	Annual Appropriation	Supplemental Appropriation	Total Appropriation
2000	\$2,780	\$0	\$2,780
2001	\$1,600	\$2,000	\$3,600
2002	\$2,164	\$7,008	\$9,172
2003	\$800	\$1,426	\$2,226
2004	\$1,789	\$2,500	\$4,289
2005	\$2,042	\$43,091	\$45,133

(...continued)

extension.

¹⁶⁴As stated by FEMA, “the OpenFEMA initiative provides approved mission relevant data for stakeholders to leverage in value-added ways such as research, analysis, app development, and other purposes.” Information can be accessed at <https://www.fema.gov/openfema>.

¹⁶⁵ The funds for no-year accounts are available until expended—any remaining funds at the end of the fiscal year are carried over to the next fiscal year. One benefit of a no-year account is that the unobligated balance in the account can be used to pay for future disasters the next fiscal year. For more on the DRF, see CRS Report R43537, *FEMA's Disaster Relief Fund: Overview and Selected Issues*, by (name redacted).

Fiscal Year	Annual Appropriation	Supplemental Appropriation	Total Appropriation
2006	\$1,770	\$6,000	\$7,770
2007	\$1,487	\$4,256	\$5,743
2008	\$1,324	\$10,960	\$12,284
2009	\$1,278	\$0	\$1,278
2010	\$1,600	\$5,100	\$6,700
2011	\$2,645	\$0	\$2,645
2012	\$7,100	\$6,400	\$13,500
2013	\$7,007	\$11,485	\$18,492
Total	\$35,386	\$100,226	\$135,612

Source: CRS analysis of appropriations statutes, as reported in CRS Report R43537, *FEMA's Disaster Relief Fund: Overview and Selected Issues*.

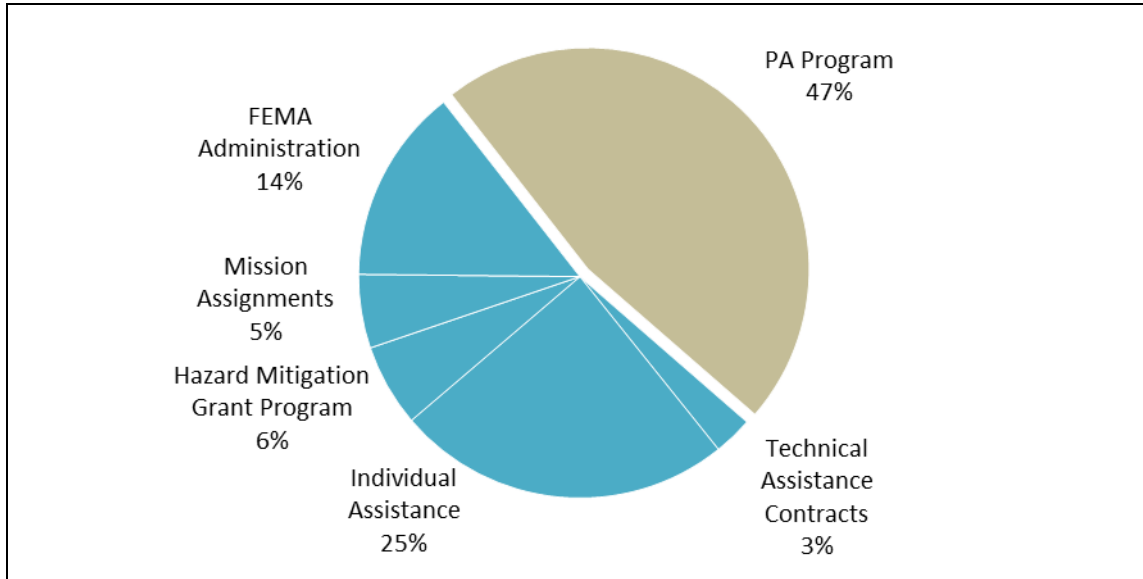
Notes: Does not include rescissions or transfers unless they have been incorporated in appropriations acts. The Budget Control Act of 2011 (BCA) created an allowable adjustment specifically to cover disaster relief (defined as the costs of major disasters under the Stafford Act), separate from emergency appropriations. Under the BCA, which was in place for both FY2012 and FY2013 in the table above, the President's budget request and enacted appropriation levels were higher than in prior years. A discussion of this change can be found in CRS Report R42352, *An Examination of Federal Disaster Relief Under the Budget Control Act*, by (name redacted), (name redacted), and (name redacted).

Aggregate Spending on Public Assistance

The PA Program has consistently been the largest source of federal obligations from the DRF.¹⁶⁶ For the period FY2000 through FY2013, more than 90% of all major disaster declarations made through the Stafford Act included provision of assistance through the PA Program. In addition, obligations for PA grants accounted for 47% of total DRF obligations for major disaster declarations. As shown in **Figure 1**, this is the largest activity funded from the DRF during that time.

¹⁶⁶ Analysis of DRF obligations was conducted using obligation data provided by FEMA. These figures do not include projected future obligations.

Figure I. Share of DRF Funding by Activity
FY2000-FY2013



Source: CRS analysis of DRF obligation data for major disaster declarations provided by FEMA.

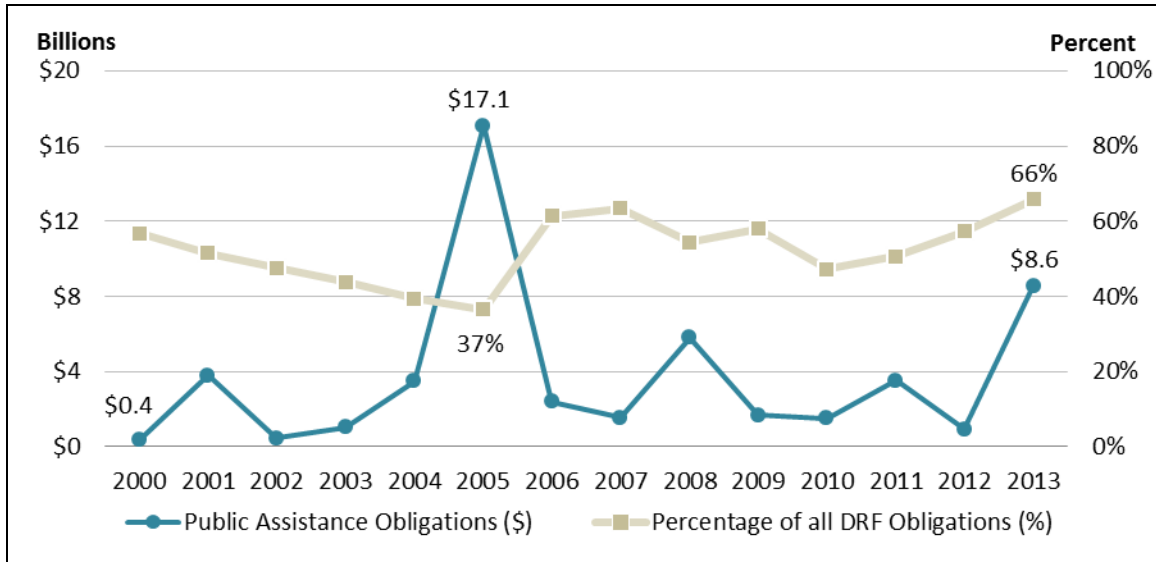
Notes: FEMA data groups obligations for Technical Assistance Contracts (TAC) with obligations for the PA Program under the broad category of “Infrastructure.” As a result, other analysis of DRF obligations, including previous research done by Government Accountability Office, will group these obligations together.

During this time period, the percent of overall DRF obligations attributable to PA grants ranged from a low of 36% in FY2005 to a high of 66% in FY2013. **Figure 2** displays both total federal obligations for PA grants during this period, as well as the percentage of all DRF obligations spent on these grants. Federal obligations for PA grants for major disaster declarations ranged between \$0.37 billion and \$17.1 billion per fiscal year, for an average annual obligation of \$3.9 billion.¹⁶⁷ This obligation total does not include the funding provided by state and local governments as part of their cost-share requirement. For most of the declarations during this period, the federal government funded 75% of PA costs; however, for certain declarations the cost-share was increased through either FEMA’s administrative discretion or through statute.¹⁶⁸ During this period, FY2005 had the largest amount of PA obligations in a single FY. This is largely the result of Hurricane Katrina, which accounted for more than \$14.8 billion in PA grants for Louisiana and Mississippi alone. In addition, current figures for FY2013 are projected to increase as additional projects are processed for disaster declarations, especially for the declarations for Hurricane Sandy. While major incidents like Hurricanes Katrina or Sandy can lead to PA obligations in the billions, the average amount of assistance provided per major disaster declaration for PA grants is roughly \$69.8 million. For more than half of the major disasters declarations in this time period, the federal obligation for PA grants was less than \$10 million.

¹⁶⁷ Total obligations over time have not been adjusted for inflation.

¹⁶⁸ For more on cost-share adjustments, see CRS Report R41101, *FEMA Disaster Cost-Shares: Evolution and Analysis*, by (name redacted).

Figure 2. Public Assistance Federal Obligations, FY2000-FY2013



Source: Obligation totals and percentages are derived from CRS analysis of DRF obligation data for major disaster declarations provided by FEMA that is not publically available. Total federal obligations for recent years are likely to increase as outstanding work is processed.

Notes: Figure only includes federal obligations for public assistance as a result of a major disaster declaration. Many of the Category Z (grantee management cost) obligations for a major disaster declared following the September 11, 2001, terrorist attacks for New York State (DR-1391), included expenses that would not normally be considered grantee management or would not normally fall within the PA Program. For the analysis above, these expenses, totaling more than \$2.3 billion, have been removed.

Public Assistance Spending by Type of Work, Category, and Project Size

Individual project worksheets for the PA Program are made publically available by FEMA, with data beginning in FY1998.¹⁶⁹ These worksheets provide information related to both the total project amount, which is an estimate developed early in the process, and the amount that was ultimately obligated from the DRF. In addition, these worksheets identify the category of the projects (e.g., Category A: Debris Removal) and whether the project is classified as large or small, which has implications for administering the grant. Due to the data entry process used by FEMA and the increasingly prevalent practice of grouping many projects on one worksheet, each worksheet in this dataset does not necessarily equate to a discrete project in a lay sense of the word. Nonetheless, these data can be used to measure obligations within the program along key variables of interest.

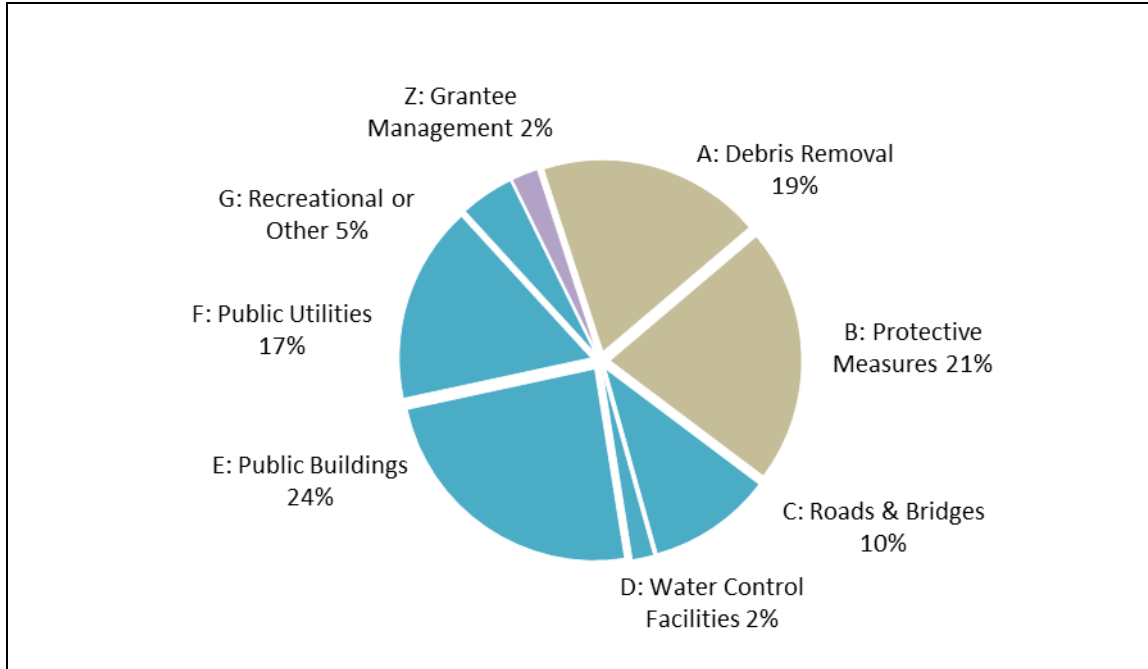
Total spending in the PA Program for major disaster declarations can be divided into three broad groups: emergency work, permanent work, and grantee management costs. For the period FY2000-FY2013, permanent work accounted for more than 57% of all federal obligations for the PA Program. Emergency work was 40% of the total and grantee management costs were 2%.

Figure 3 displays these three groups, as well as the subcategories identified by FEMA.

¹⁶⁹ Data on project worksheets are available at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>. For more on the project worksheet data, see **Appendix B** of this report.

Figure 3. Type of Work and Category as a Percent of Total Public Assistance Federal Obligations, FY2000-FY2013

(Emergency work categories are shaded beige, permanent work categories are shaded blue, and grantee administrative costs [state management] are shaded purple)

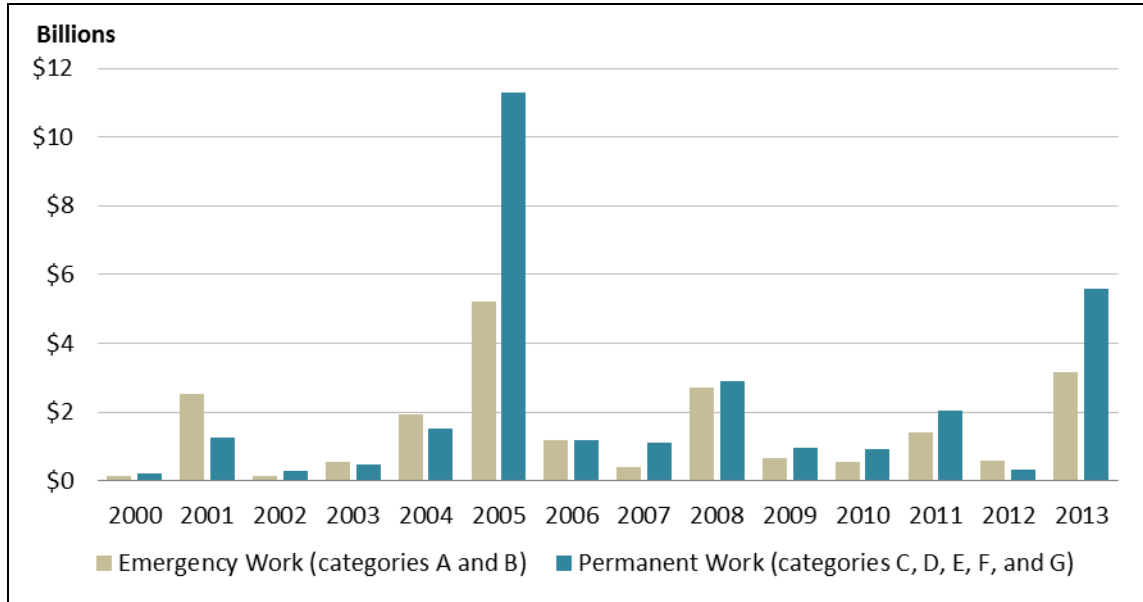


Source: CRS analysis of project worksheet data made available by FEMA at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>. See **Appendix B** for a description of this data and its limitations.

Notes: Figure only includes federal obligations for PA grants as a result of a major disaster declaration. Many of the Category Z (grantee management) obligations for a major disaster declared following the September 11, 2001, terrorist attacks for New York State (DR-1391), included expenses that would not normally be considered grantee management or would not normally fall within the PA Program. For the analysis above, these expenses, totaling more than \$2.3 billion, have been removed.

Federal obligations for permanent work have varied greatly over time. In FY2005, obligations for subcategories C through G exceeded \$11 billion, while for 10 of the 14 fiscal years during this period obligations were below \$2 billion each year. Within this group, obligations for public buildings were the largest. In FY2005, FY2008, and FY2013, obligations for public buildings (Category E) alone were in excess of \$1 billion each year. Obligations for emergency work were closely divided between debris removal (Category A) and emergency protective measures (Category B). Category A accounted for \$9.8 billion between FY2000 and FY2013, while Category B accounted for 11.3 billion. The annual federal obligation for permanent work and emergency work projects is presented in **Figure 4**. The data in this figure are derived entirely from the publically available project worksheet data and have not been adjusted for inflation.

Figure 4. Federal Obligations for Permanent Work and Emergency Work, FY2000-FY2013



Source: CRS analysis of project worksheet data made available by FEMA at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>. See **Appendix B** for a description of this data and its limitations.

Notes: Figure only includes federal obligations for PA grants as a result of a major disaster declaration.

As discussed previously, PA Program obligations vary considerably from one declaration to the next. Many of the most well-known disasters, such as Hurricanes Katrina and Sandy, have federal PA Program obligations in the billions of dollars. Conversely, more than half of all major declarations had obligations less than \$10 million per disaster. **Table 4** below demonstrates this difference for each category of work. In this table, all declarations have been divided into quartiles based upon the total amount of PA Program obligations for emergency and permanent work (costs for grantee management were excluded). As the table shows, there is a significant decline in obligation amounts for every category between the most costly disasters and the next quartile. Therefore, the largest 25% of disasters account for 91.3% of the federal obligations for the PA Program.

Table 4. Average PA Obligations per Major Disaster by Quartile, FY2000-FY2013
 (Quartiles based on total amount of federal PA obligations for emergency and permanent work)

	Most Costly 25%	51%-75%	26%-50%	Least Costly 25%
A: Debris Removal	\$47,201,208	\$2,535,039	\$734,209	\$299,331
B: Emergency Protective Measures	\$53,158,214	\$2,754,282	\$ 947,290	\$352,796
All Emergency Work	\$100,359,422	\$5,289,322	\$1,681,499	\$652,127
C: Roads and Bridges	\$21,823,603	\$4,379,988	\$2,260,662	\$774,601
D: Water Control Facilities	\$5,642,148	\$804,533	\$371,664	\$139,514
E: Buildings and Equipment	\$64,931,742	\$886,323	\$329,085	\$182,149
F: Utilities	\$40,915,373	\$2,214,755	\$1,173,534	\$542,977
G: Parks, Recreational Facilities, and Other Items	\$11,040,792	\$966,289	\$419,526	\$108,366
All Permanent Work	\$144,353,659	\$9,251,888	\$4,554,471	\$1,747,607
Total	\$244,713,080	\$14,541,210	\$6,235,970	\$2,399,734
Percent of Total	91.3%	5.4%	2.3%	0.9%

Source: CRS analysis of project worksheet data made available by FEMA at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>. See **Appendix B** for a description of these data and its limitations.

Notes: Quartiles were developed using total obligations in categories A through G. Each quartile has 196 or 197 major disaster declarations, for a total of 786 major disaster declarations.

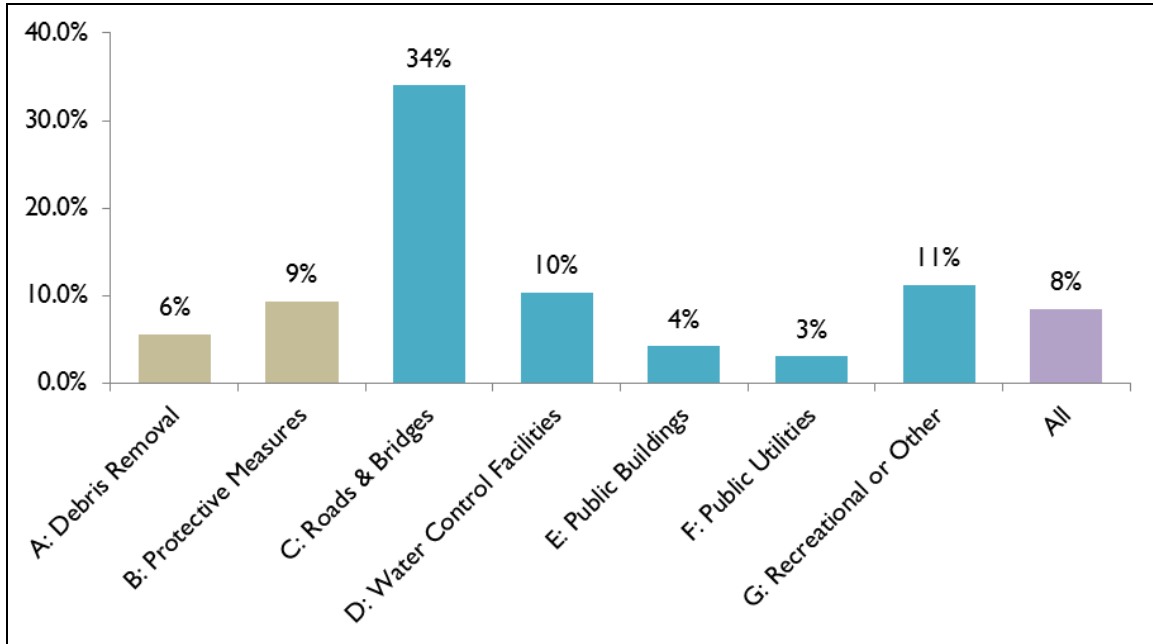
Figure 5 displays the distribution of obligations between large and small project worksheets across the PA Program. Within the PA Program, the vast majority of federal obligations are for large projects, which are currently those projects above \$120,000.¹⁷⁰ For the period FY2000 through FY2013 the small project threshold ranged between \$48,900 and \$68,500.¹⁷¹ During this time, more than 91% of all federal obligations for PA projects were for large projects. Within each category, small projects accounted for no more than 10% of all federal PA obligations, with the

¹⁷⁰ Department of Homeland Security, FEMA, “Amendment to the Public Assistance Program’s Simplified Procedures Project Thresholds,” 79 *Federal Register* 38, February 26, 2014. The current threshold of \$120,000 was determined by FEMA following an analysis required by §1107 of P.L. 113-2, The Sandy Recovery and Improvement Act of 2013.

¹⁷¹ FEMA, “Notice of Adjustment of Disaster Grant Amounts,” 64 *Federal Register* 215, November 8, 1999. FEMA, “Notice of Adjustment of Disaster Grant Amounts,” 78 *Federal Register* 208, October 28, 2013. This example, from FY2000, establishes the rate of \$48,900. The notice states that “the increase is based on a rise in the Consumer Price Index for All Urban Consumers of 2.3 percent for the prior 12-month period.”

exception of Category C. For this category, which includes repairs to non-federally owned roads and bridges, 34% of all federal obligations were for small projects.

Figure 5. Small Projects by PA Work Category, as a Percentage of Total PA Obligations, FY2000-FY2013



Source: CRS analysis of project worksheet data made available by FEMA at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>. See the **Appendix B** for a description of this data and its limitations.

Notes: Figure only includes obligations for PA grants as a result of a major disaster declaration. Category Z was excluded because management cost assistance is not subject to small or large project distinctions.

While federal obligations for the PA Program are primarily for large projects, small projects account for a much higher number of individual project worksheets. The FEMA dataset includes more than 450,000 individual project worksheets for small projects from FY2000 to FY2013. As shown in **Table 5**, small projects account for 87% of the total number of project worksheets. Further, there are more individual projects for permanent work than for emergency work during this period.

Table 5. Number of PA Projects and Federal Obligations by Size and Type of Work

		Small Projects	Large Projects	Total
Emergency Work	Number of Project Worksheets	151,209 (29% of total project worksheets)	31,829 (6%)	183,038 (35%)
	Obligations	\$1.6 billion (3% of total obligations)	\$19.6 billion (38%)	\$21.2 billion (41%)
Permanent Work	Number of Project Worksheets	303,533 (58%)	38,973 (7%)	342,506 (65%)
	Obligations	\$3.0 billion (6%)	\$27.2 billion (53%)	\$30.2 billion (59%)
Total	Number of Project Worksheets	454,742 (87%)	70,802 (13%)	525,544 (100%)
	Obligations	\$4.6 billion (9%)	\$46.8 billion (91%)	\$51.4 billion (100%)

Source: CRS analysis of project worksheet data made available by FEMA at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>. See **Appendix B** for a description of this data and its limitations.

Notes: Both the percentages for the number of project worksheets and percentages of the obligations total across rows (types of work) and columns (size of project). Obligations for grantee management costs are not included. Table only includes federal obligations for PA grants as a result of a major disaster declaration. Project worksheets have been excluded from this analysis if the total federal obligation was between -\$1 and \$1. Based on conversations with FEMA, it is likely that these entries were for data entry purposes and did not indicate new projects. For a discussion of other potential issues in counting project worksheets, see **Appendix B**.

Obligations for Private Nonprofit Facilities

As discussed previously, many different types of private nonprofit (PNP) facilities are eligible for assistance within the PA Program.¹⁷² For the period FY2000-FY2013, \$6.6 billion was obligated by FEMA to PNPs, with the highest spending in FY2005 (\$2.0 billion) and FY2013 (\$1.4 billion). During this time, more than 77% of all PA obligations for PNPs were for public buildings and public utilities (Categories E and F).

More than 8,400 different PNPs received PA grant assistance between FY2000 and FY2013.¹⁷³ Many of the largest individual projects for PNPs involved universities, hospitals, and electrical cooperatives. For example, Midwest Energy, Inc. received close to \$60 million in federal PA Program funding following severe winter storms in Kansas in 2007 and the Memorial Hermann hospital system in Texas received more than \$100 million following Tropical Storm Allison in 2001. In addition, many volunteer fire departments receive federal grants under the PA Program to carry out emergency protective measures (Category B) after an incident. These grants are often less than \$10,000. Overall, the average obligation per PNP, per disaster, was \$566,000. Many applicants received grant assistance under multiple declarations during this period and many of the PNPs received assistance for more than one project worksheet within a disaster declaration.

¹⁷² For more information, see the “Eligible Applicants” section of this report.

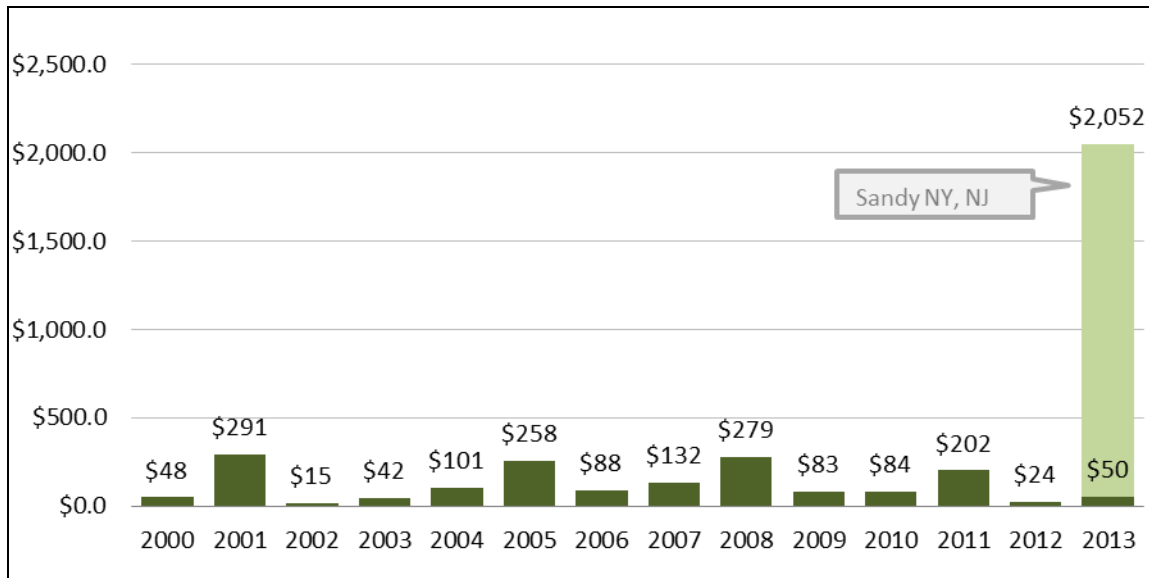
¹⁷³ Number of PNPs in the dataset is based on a count of discrete applicant IDs developed by FEMA.

Obligations for Hazard Mitigation within the PA Program

Section 406(e) of the Stafford Act provides FEMA with the discretionary authority to fund hazard mitigation activities on permanent work projects as part of the PA Program.¹⁷⁴ For every year between FY2000 and FY2012, the amount of mitigation funding provided with this authority was less than \$300 million, often much lower. However, spending increased greatly in FY2013 as the result of two major disaster declarations following Hurricane Sandy: DR-4085 (New York) and DR-4086 (New Jersey). These two disasters alone account for more than \$2 billion in PA mitigation expenses. The vast majority of this funding was used for public building and public utility projects (Categories E and F, respectively). Excluding the Hurricane Sandy declarations for New York and New Jersey, federal obligations for PA mitigation assistance between FY2000 and FY2013 was \$1.7 billion. **Figure 6** below displays total PA mitigation expenses over time, with the two largest declarations for Hurricane Sandy in light blue.

Figure 6. Hazard Mitigation Obligations in the PA Program, FY2000-FY2013

(\$ millions; lighter green in FY2013 represents obligations for DR-4085 and DR-4086, which were declared for NY and NJ, respectively, following Hurricane Sandy)



Source: CRS analysis of data provided by FEMA on hazard mitigation obligations for the PA Program.

Notes: Figure only includes obligations for PA grants as a result of a major disaster declaration. Analysis of hazard mitigation spending by project category is skewed by large obligations for projects following Hurricane Sandy.

For projects that included funding for PA mitigation, these expenses accounted for nearly 38% of the total costs of the PA project on average. However, this figure was largely driven by PA mitigation expenses in New York and New Jersey following Hurricane Sandy. For these projects, PA mitigation expenses accounted for approximately 50% of total project cost. When these two declarations are excluded, the overall project cost attributable to PA mitigation falls to 29% of the total. Due to limitations with the data provided, the above analysis does not include

¹⁷⁴ For more information, see the “Hazard Mitigation Assistance for Permanent Work” section of this report.

- costs associated with bringing facilities into compliance with existing standards;
- “triggered” costs bringing undamaged portions of the facility into compliance with standards; or
- costs associated with complying with floodplain management standards.

Inclusion of these costs may increase the amount of general hazard mitigation assistance provided by the PA Program considerably if accounted for in other analysis.

Considerations for Congress

There are numerous policy issues that Congress may consider when evaluating the PA Program. The following sections of this report discuss select issues that may arise in congressional oversight of the PA Program.

Balancing the Level of Statutory Versus Executive Branch Guidance for the PA Program

The provisions of the Stafford Act that grant the PA Program’s authorities are, in many respects, broadly worded statutes that allow the President, and FEMA as the delegated agency, to define the conditions of disaster assistance. It is reasonable for FEMA to develop complex policies and procedures for implementing the program when the law is silent on key definitions (such as what constitutes a *repair* or *replacement* project) or has left it to the administration’s discretion when to provide assistance (such as when debris removal assistance can be provided on private properties). For more on these examples of how FEMA has interpreted Stafford Act provisions through regulation and policy, see the **Text Box**.

That Congress has granted this responsibility is not unique to the Stafford Act or FEMA, but such administrative discretion to implement the statute has resulted in policies and regulations that were revised or reversed by Congress. Most recently, for example, Congress enacted in SRIA a change to the treatment of eligible labor costs for emergency protective measures, revising previous policies established by FEMA.¹⁷⁵ Also in SRIA, Congress directed that FEMA review, update, and revise its regulations in totality for when FEMA recommends to the President that assistance is provided to individuals and households through Section 408 authority of the Stafford Act.¹⁷⁶ Congress has also passed laws, such as P.L. 109-308, the Pets Evacuation and Transportation Standards Act (PETS Act) of 2006, that further specified the scope of Stafford Act authorities when FEMA’s existing interpretation of its authorities limited the possibility of providing that assistance.¹⁷⁷

¹⁷⁵ Section 1108(b) of SRIA (127 Stat. 47), as codified at 42 U.S.C. §5170b(d), Section 403(d) of the Stafford Act.

¹⁷⁶ Section 1109 of SRIA (127 Stat. 47). The law directed the revision of 44 C.F.R. §206.48.

¹⁷⁷ P.L. 109-308, the Pets Evacuation and Transportation Standards Act (PETS Act) of 2006, among other changes, added clause (J) to 42 U.S.C. §§5170b(a)(3), Section 403 of the Stafford Act, thereby making it explicit that provision of rescue, care, and shelter to individuals with pets and service animals should be considered an emergency protective measure.

Examples of FEMA Interpretations of Stafford Act Authorities

Debris Removal on Private Property in the *public interest*:

In Section 403 of the Stafford Act, the President is authorized to provide debris removal assistance on private property when it is “essential to saving lives and protecting and preserving property or public health and safety” and in Section 407 when it is in the broader “public interest.”¹⁷⁸ In implementing the statute, FEMA has therefore defined when debris removal is in the *public interest*. By regulation, it is in the *public interest* if it meets the conditions of Section 403 of the Stafford Act (eliminating threats to life, health, safety, and significant damage to public and private property) as well as if it “ensures economic recovery of the affected community to the benefit of the community-at-large.”¹⁷⁹

As further developed in policy, FEMA relies on determinations made by the relevant state, county, public health, or municipal government officials to decide if the debris is necessary to be removed in the public interest, though FEMA must receive and approve each request in writing. As a general policy, FEMA does not approve debris removal from commercial properties, such as cemeteries, industrial parks, and apartment complexes.¹⁸⁰

50% Rule for *Repairing Versus Replacing Facilities*:

Permanent work assistance under the Stafford Act is for the “repair, restoration, reconstruction, or replacement” of damaged facilities, but the law does not explain when a facility should be *repaired* or *replaced*.¹⁸¹ In regulations, FEMA stipulates that a facility is “repairable” when damages do not “exceed 50 percent of the cost of replacing a facility to its predisaster condition” and is replaceable if it exceeds that threshold.¹⁸² This is generally called the 50% rule. In policy, FEMA has elaborated by developing a full equation for the 50% rule, with eligible costs that may be included in the numerator of the 50% fraction but not in the denominator of the fraction, and vice versa.¹⁸³ As highlighted by the DHS IG, the 50% rule “can be very difficult [to apply] and [is] susceptible to error, misinterpretation, and manipulation” and now “represent[s] a ratio that has little to do with whether it will cost the taxpayer more or less to replace rather than repair the facility.”¹⁸⁴ Thus, DHS IG has questioned the complexity of this formula and whether FEMA has properly implemented it in past disasters, and the IG recommended its revision.¹⁸⁵

Consistent with past precedents, Congress may review current FEMA policies and procedures for the PA Program, and, when desired, override the policies through further clarification in law or submit formal legislative recommendations on policies in committee or conference report language. Likewise, Congress may also decide to codify existing policies without revising them, thereby assuring that they cannot be changed without legislative action.

Evaluating Key Prospective Changes to the PA Program

The PA Program is constantly evolving through revisions to administrative policies for the program. These policy documents, generally referred to as the 9500 Policy Series by FEMA, supplement interpretations of the Stafford Act made in PA Program regulations.¹⁸⁶ As established

¹⁷⁸ 42 U.S.C. §§5170b(a)(3)(A) and 5173(a), respectively.

¹⁷⁹ 44 C.F.R. §206.224(a).

¹⁸⁰ See FEMA, *Debris Removal from Private Property*, 9523.13, July 18, 2007, at http://www.fema.gov/pdf/government/grant/pa/9523_13.pdf.

¹⁸¹ 42 U.S.C. §5172(a)(1)(A), Section 406(a)(1)(A) of the Stafford Act.

¹⁸² 44 C.F.R. §206.226(f)(1).

¹⁸³ See FEMA, *Repair vs. Replacement of a Facility under 44 CFR §206.226(f) (The 50 Percent Rule)*, 9524.4, March, 25, 2009, at http://www.fema.gov/pdf/government/grant/pa/9524_4.pdf.

¹⁸⁴ For a summary, see Department of Homeland Security, Office of Inspector General, *FEMA's Progress in Clarifying its "50 Percent Rule" for the Public Assistance Grant Program*, OIG-14-123-D, August 7, 2014, pp.3-4, at http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-123-D_Jul14.pdf.

¹⁸⁵ *Ibid.*

¹⁸⁶ Generally, 44 C.F.R. Subparts H, I, and G. The 9500 Policy Series is found on FEMA's website at (continued...)

by Section 325 of the Stafford Act, these policies are required to be shared for public comment.¹⁸⁷ In practice, FEMA provides the policies on their website and posts a notice in the *Federal Register* identifying that they are considering creating a new PA policy, or revising an existing policy, that clarifies its regulations.¹⁸⁸ FEMA will also solicit feedback through outreach mechanisms such as weekly external affairs newsletters and through various emergency management associations. FEMA's review of these policies does not always include certain characteristics, such as cost-benefit analysis and paperwork reduction reviews, that is common for federal agencies, as outlined in the Administrative Procedure Act (APA).¹⁸⁹

Within FEMA's existing policy revision process, Congress may wish to comment on and evaluate the proposed policy changes, hold oversight hearings and briefings on the changes, or provide input directly through other communications. Congress may also consider changing the policy revision process itself, possibly by amending Section 325 of the Stafford Act, to (among other options):

- Create a formal reporting requirement to Congress prior to the finalization of PA policies, possibly to include requirements for explanatory briefings regarding the nature and intent of the planned policy;
- Revise the existing requirements in law to expand the types of interim policies FEMA is required to seek consultation from stakeholders;¹⁹⁰
- Establish conditions for whether a policy should undergo a more extensive APA or APA-like procedure.

Conversely, Congress may determine the existing PA Program policy revision process is unnecessarily cumbersome and inhibits rapid and necessary changes to the administrative practices of FEMA. If so, Congress may consider eliminating some or all of the existing requirements.

In addition to the generally constant evolution of FEMA PA Program policies described above, there are two major potential changes currently underway for the PA Program. These are discussed below.

(...continued)

<http://www.fema.gov/9500-series-policy-publications>.

¹⁸⁷ 42 U.S.C. §5165c.

¹⁸⁸ For example, see a recent notice on a change to the insurance requirement at FEMA, "Public Assistance Policy on Insurance, RP9530.1," 79 *Federal Register* 60861, October 8, 2014.

¹⁸⁹ For more on the Administrative Procedure Act process (5 U.S.C. §551 *et seq.*), see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by (name redacted).

¹⁹⁰ See existing conditions at 42 U.S.C. §5165c(b)(1)), Section 325(b)(1) of the Stafford Act. FEMA is currently required to consult on any interim policy that is likely to "(A) result in a significant reduction of assistance to applicants for the assistance with respect to the major disaster or emergency; or (B) to change the terms of a written agreement to which the Federal Government is a party concerning the declaration of the major disaster or emergency."

SRIA Alternative Procedures Pilot Program

SRIA reformed the PA Program primarily through the creation a new section of the Stafford Act establishing alternative procedures for the PA Program.¹⁹¹ As described earlier in this report, FEMA created the Public Assistance Alternative Procedures (PAAP) Pilot Program to implement these alternative procedures.¹⁹² As described in law, the purpose of the PA alternative procedures is to:

- (1) reduc[e] the costs to the Federal Government of providing such assistance;
- (2) increas[e] flexibility in the administration of such assistance;
- (3) expedit[e] the provision of such assistance to a State, tribal or local government, or owner or operator of a private nonprofit facility; and
- (4) provid[e] financial incentives and disincentives for a State, tribal or local government, or owner or operator of a private nonprofit facility for the timely and cost-effective completion of projects with such assistance reducing federal costs for providing assistance.¹⁹³

SRIA also requires the DHS IG to assess the effectiveness of the alternative procedures for permanent work projects.¹⁹⁴ Of note, the IG's report is *not* specifically required to assess the portion of the alternative procedures for debris removal assistance, though the IG retains the standing authority to review and audit these grants.¹⁹⁵ By law, among other elements, the IG's report is required to contain assessments of whether the alternative procedures:

- Increased the speed of disaster recovery for the community;
- Used estimates that were accurate (presumably to mean accurate to actual costs); and
- Should be continued, with any recommendations for changes to them in future legislation.¹⁹⁶

The report is to be issued three to five years following enactment of SRIA (so between January 2016 and January 2018) and is to be provided to the committees of jurisdiction for the Stafford Act (the Committee on Transportation and Infrastructure in the House, and the Committee on Homeland Security and Governmental Affairs in the Senate).

¹⁹¹ Section 1102 of SRIA (127 Stat. 39), as codified at 42 U.S.C. §5189f, Section 428 of the Stafford Act.

¹⁹² See the "Public Assistance Alternative Procedures Created by the Sandy Recovery Improvement Act" section of this report for more.

¹⁹³ Section 1102 of SRIA (127 Stat. 40), as codified at 42 U.S.C. §5189f(c), Section 428(c) of the Stafford Act.

¹⁹⁴ Section 1102 of SRIA (127 Stat. 42), as codified at 42 U.S.C. §5189f(h), Section 428(h) of the Stafford Act. The alternative procedures are discussed throughout this report, but for a summary, see FEMA's website at <https://www.fema.gov/alternative-procedures>.

¹⁹⁵ For example, the DHS IG conducted a review of debris removal assistance holistically in the past, see Department of Homeland Security, Office of Inspector General, *FEMA's Oversight and Management of Debris Removal Operations*, OIG-11-40, February 2011, http://www.oig.dhs.gov/assets/Mgmt/OIG_11-40_Feb11.pdf.

¹⁹⁶ Section 1102 of SRIA (127 Stat. 42), as codified at 42 U.S.C. §5189f(h)(2), Section 428(h)(2) of the Stafford Act.

In a committee report requirement accompanying the Department of Homeland Security Appropriations Act, 2015 (P.L. 114-4), Congress has also directed FEMA to produce quarterly reports on implementation of the PAAP Pilot Program, especially for permanent work.¹⁹⁷ These quarterly reports are instructed to include FEMA's assessment of "challenges and recommendations, including proposed authority modifications" to help the Pilot Program achieve its legislative objectives.¹⁹⁸ In addition, the quarterly reports are to contain, among other items, a financial summary of all permanent work projects in the PAAP Pilot Program and descriptions of projects over \$50 million.

The issuances of the IG's report and FEMA's quarterly reports on the PAAP Pilot Program may provide Congress with direction on how it could further revise the Stafford Act to improve the PA Program. Prior to or after the issuances of these reports, congressional oversight of the implementation of the alternative procedures may focus on a number of factors, including whether

- The PAAP Pilot Program has accomplished the four goals of the procedures as intended in law;
- The Pilot Program guidance produced by FEMA has properly construed the policy intentions of Congress in the enacting legislation, or any new intentions of the current Congress;
- Communities are receiving enough information and assistance from FEMA to participate fully in the Pilot Program, and if the participation period for the Pilot is long enough; and
- Both the federal government and applicants have similar initial opinions on the benefits/costs of the alternative procedures. For example, parties may disagree on the quality of fixed-estimates for large, permanent work grants, or the effectiveness of incentives for increasing the speed of debris removal.

Grants Based on Estimates for Large, Permanent Work Projects

FEMA is in the process of finalizing a rulemaking that would *require* grants based on estimates for large, permanent work projects, in fulfillment of a legal requirement of DMA 2000.¹⁹⁹ The DMA 2000 grant estimation procedures were originally developed and approved by an expert panel in 2002. Conservatively, if FEMA had adopted a final rule by October 2006 implementing the estimating procedure, a full four years after the expert panel released its final recommendations (and six since passage of the law), the President would have been required to submit a review of the estimating procedures and the CEF in October 2008, and the expert panel

¹⁹⁷ See U.S. Congress, House Committee on Appropriations, Department of Homeland Security Appropriations Bill, 2015, To accompany H.R. 4903, 113th Cong., 2nd sess., June 19, 2014, H.Rept. 113-481, p. 106. Appropriations conference reports and explanatory statements typically refer to the committee reports of their antecedent bills as a source of further direction to the funded agencies, in cases where that direction is not contradicted by the enacted bill, or its conference report or explanatory statement. See Rep. Harold Rogers, "Explanatory Statement Submitted by Mr. Rogers of Kentucky, Chairman of the House Committee on Appropriations, Regarding H.R. 240," Congressional Record, daily edition, vol. 161 (Tuesday, January 13, 2015), p. H275.

¹⁹⁸ Ibid.

¹⁹⁹ Section 205(d) of P.L. 106-390, 114 Stat. 1564. See the "Possible DMA 2000 Grant Estimating Procedure" section of this report for more information on this requirement.

would have submitted a review of the “appropriateness” of the cost estimating procedures in October 2007, 2009, 2011, and 2013.²⁰⁰ In short, had the rule been implemented in a timelier manner, the DMA 2000 grant estimation procedures may have evolved through the legally required reviews in ways that are currently unaccounted for by FEMA. FEMA notes this possible issue in their proposed rulemaking, stating that they “contacted individual panel members to re-validate the 10 percent threshold recommendation” but did not “request that the Panel validate any other portion of its recommendation, as the other portions of the recommendation are not meaningfully effected [sic] by the time that has elapsed.”²⁰¹ However, given the length of time since the passage of the initial DMA 2000 legal requirement and the expert panel’s recommendations, Congress may consider whether to request or require the President to reengage with the expert panel before finalizing the CEF rulemaking.

In addition, Congress may broadly consider whether it still agrees with the development of the DMA 2000 grant estimation procedure. Since passage of DMA 2000, Congress enacted SRIA which also established alternative procedures for the issuance of fixed-estimate grants for large, permanent work projects. **Table 2** highlights the some of the major differences between the SRIA alternative procedure methods and the DMA 2000 methods. Congress may consider if some of the differences applied in law for SRIA’s grant estimating alternative procedures should apply to the DMA 2000 grant estimating procedures, and vice versa, and whether either estimation method remains necessary to be authorized in the presence of the other. For example, Congress may evaluate whether large, permanent work grants should be issued as fixed estimates, as with the alternative procedure, or with a floor and ceiling threshold, as with the DMA 2000 procedure.

As a reminder, the DMA 2000 procedure is *not* currently active or available to applicants, and would not be available until after FEMA implements a final rulemaking. Thus, if Congress wishes to do so, Congress could prevent, delay, reform, or endorse the implementation of the DMA 2000 grant estimating procedure before it is implemented.

Improper Payments, Fraud, Waste, and Abuse in PA Program

As with any grant program, the PA Program is at risk for making improper payments, and experiencing fraud, waste, and abuse. The DHS IG has a dedicated component office called the Office of Emergency Management Oversight (EMO) that frequently produces, among other products, audits with recommendations for recouping improperly provided funds for the PA Program. The IG’s audits also make recommendations for improving PA Program management, and generally help ensure funds are appropriately provided and spent.²⁰² These audits are summarized annually in “capping reports” on the PA Program and HMGP assistance.²⁰³ The IG reported to CRS that for FY2009 to FY2013 they questioned the expenditure of over \$1.9 billion in PA assistance, and recommended that over \$387 million of these funds be put to better use.

²⁰⁰ These review requirements are required by statute, see 42 U.S.C. §5172(e)(3)(D) and (E); Section 406(e)(3)(D) and (E).

²⁰¹ See Section V.C.1 of FEMA, “Public Assistance Cost Estimating Format for Large Projects,” 78 *Federal Register* 61239, October 3, 2013.

²⁰² For more on this office, see EMO’s website at http://www.oig.dhs.gov/index.php?option=com_content&view=article&id=38&Itemid=12

²⁰³ See, for example, Department of Homeland Security, Office of Inspector General, *Capping Report: FY 2013 FEMA Public Assistance and Hazard Mitigation Grant and Subgrant Audits*, OIG-14-102-D, June 2014, at http://www.oig.dhs.gov/assets/GrantReports/2014/OIG_14-102-D_Jun14.pdf.

However, of those amounts, FEMA recovered only 13% of questioned costs (about \$245 million), and 64% of the funds that could be put to better use (about \$249 million).²⁰⁴

FEMA has recently established a new “Recovery Audits Unit” within its Recovery Directorate (the element responsible for managing the PA Program) that may improve future performance. This new unit was established as a result of an internal FEMA review of all IG and GAO audits issued between 2011 and 2014. According to FEMA’s internal review, “an overwhelming majority of the audits and recommendations applied to the PA Program. Of the 202 audits analyzed, 188 (93.1%) applied to PA, and 659 recommendations out of 680 (96.9%) also applied to PA.”²⁰⁵ In addition, DHS IG has recently begun conducting more “proactive” audits of the PA Program by deploying in the initial phase of a disaster to prevent misuse of funds.²⁰⁶ This approach has already resulted in several published audits that help applicants by giving them “the opportunity to correct noncompliance with Federal regulations before they spend the majority of their funding.”²⁰⁷ Congress may evaluate both FEMA’s new Recovery Audits Unit and DHS IG’s more proactive approach to determine if these changes will have an appreciable effect on the management of the PA Program. In addition to other recommendations produced by the IG, GAO, and other entities, Congress may also consider the following issues for improving PA Program assistance.

Management Cost Assistance

As discussed previously, the Stafford Act authorizes assistance to help pay for expenses a grantee “reasonably incurs in administering and managing the PA grant that are not directly chargeable to a specific project.”²⁰⁸ The amount of assistance provided is set by FEMA regulations and policies. Under policy guidance, FEMA has not “established any minimum or maximum for what constitutes a reasonable amount” that a grantee should pass through of the management award to subgrantees/applicants (i.e., how much should be shared by the state/tribe to a local government/PNP).²⁰⁹ In an audit, GAO found that few, if any, grantees passed through any amount of the management assistance to subgrantees,²¹⁰ a finding confirmed by FEMA to CRS.²¹¹ In theory, funds for administrative expenses can be used to improve the overall management of PA projects, eliminating some improper usage of the overall assistance. Congress may consider whether

²⁰⁴ Email correspondence from DHS IG staff, received October 15, 2014.

²⁰⁵ Recovery Directorate, FEMA, *Analysis of GAO/OIG Audits 2011-2014*, June 12, 2014, p. 2, at <http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/GAO-OIG%20Full%20Analysis%20FINAL%20%286%2012%2014%29.pdf>.

²⁰⁶ In-person meeting with DHS IG staff, October 5, 2014.

²⁰⁷ See, for example, Department of Homeland Security, Office of Inspector General, *New York City’s Department of Design and Construction Needs Assistance To Ensure Compliance with Federal Regulations*, OIG-14-115-D, July 2014, at http://www.oig.dhs.gov/assets/GrantReports/2014/OIG_14-115-D_Jul14.pdf.

²⁰⁸ 44 C.F.R. §207.2. See the “Administrative Cost Assistance” section of this report for more information.

²⁰⁹ FEMA, *Section 324 Management Costs and Direct Administrative Costs*, March 12, 2008, p. 2, at <https://www.fema.gov/9500-series-policy-publications/95259-section-324-management-costs-direct-administrative-costs>.

²¹⁰ U.S. Government Accountability Office, *Federal Emergency Management Agency: Opportunities Exist to Strengthen Oversight of Administrative Costs for Major Disasters*, GAO-15-65, December 2014, p. 28, at <http://www.gao.gov/products/GAO-15-65>.

²¹¹ In-person meeting with FEMA staff, December 12, 2014.

- Existing or additional assistance for administrative costs could be provided to grantees with the specific requirement that the assistance be used to prevent misuse of PA Program funds;
- Existing or additional management assistance should be given directly to subgrantees, regardless of grantee decisions as to whether or not assistance should be passed through to applicants;
- FEMA should reestablish its earlier, pre-2009 method of providing management cost assistance, or if FEMA should be directed to develop a new method irrespective the current and past models.²¹²

Limitations of Current PA Program Data for Congressional Oversight

One of the challenges revealed during CRS's research on the PA Program was the limitations of existing data on PA projects. Some of these limitations are described in **Appendix B**. For example, as noted earlier in the report, FEMA does not have a ready method of implementing legal requirements to reduce cost-shares on repetitively damaged facilities, as established by DMA 2000, due to the quality of data retained and tracked from disaster to disaster, project to project.²¹³ In addition, GAO noted that the emergency protective measures Sheltering and Temporary Essential Power (STEP) Pilot Program implemented after Hurricane Sandy may have inadequately collected data on recipients to prevent duplication of benefits.²¹⁴ More holistically, CRS research into the program indicates that certain policy issues may be difficult, if not impossible, to evaluate properly because of project data limitations. For example, FEMA is unable to readily identify or determine how many PNPs first apply to the SBA loan program before applying for grant assistance from the PA Program, and the amount of assistance they receive from SBA. This information would be useful, for instance, in determining the financial assistance needs of PNPs following disasters and whether both (or either) assistance programs are required. As another example, it would be difficult, if not impossible, to identify if facilities that had received PA mitigation assistance in the past had their damage reduced in a future disaster per the intended purpose.²¹⁵

Congress may consider overseeing current and future initiatives of FEMA to improve the quality and use of program data collected and maintained by FEMA. For example, in 2011, FEMA established a program called "FEMASat" to provide empirical, data-based reviews of FEMA's performance. FEMASat, and other data-based initiatives, may lead to improvements in the quality of data collected by the PA Program, and in turn the effective use of that data in policy analysis. Congress may wish to oversee the extent to which initiatives such as FEMASat are

²¹² See the "Administrative Cost Assistance" section of this report for summary of this change, and U.S. Government Accountability Office, *Federal Emergency Management Agency: Opportunities Exist to Strengthen Oversight of Administrative Costs for Major Disasters*, GAO-15-65, December 2014, at <http://www.gao.gov/products/GAO-15-65>.

²¹³ See Section 205(b) of DMA 2000, 114 Stat. 1563, as codified at 42 U.S.C. §5172(b)(2), Section 406(b)(2) of the Stafford Act, and the "Grantee Cost-Shares" section of this report for more on this DMA 2000 requirement.

²¹⁴ See the "Emergency Protective Measures" section of this report for more on the STEP Pilot Program, and U.S. Government Accountability Office, *FEMA Has Improved Disaster Aid Verification but Could Act to Further Limit Improper Assistance*, GAO-15-15, December 2014, pp. 32-34, at <http://www.gao.gov/assets/670/667469.pdf>.

²¹⁵ In addition to requiring better project data, this would require retrospective engineering analysis of the benefit provided by the mitigation measure in reducing the consequences of the subsequent disaster.

being implemented, their effectiveness, and whether they are improving, or perhaps worsening, the PA Program.

Congress may also wish to evaluate the quality of FEMA's database systems for PA Program and other grant program information. Congressional oversight could involve, for instance, a review of the funding for these databases, and whether additional funding is required to improve or develop new database systems. As a cautionary note, FEMA has a number of legacy database systems in addition to its current system, called the Emergency Management Mission Integrated Environment (EMMIE) which was deployed full-time in 2008. As highlighted by the IG, the existence of multiple database systems can inhibit the tracking of information, such as insurance requirements, across disasters.²¹⁶ Therefore, a new database system may not necessarily be beneficial if not properly designed. The existing system may be able to be improved (or used more effectively by field staff) to account for issues Congress may reveal in oversight of FEMA's database systems.

Expanding or Restricting Permanent Work Program Eligibility

As has been done in past legislation, Congress may wish to evaluate the types of applicants that are currently eligible for the PA Program. In doing so, it may consider expanding or restricting the scope of eligibility in a number of ways, possibly through the expansion/restriction of eligibility for certain nonprofit facility types, or the expansion of the PA Program to include private sector facilities.

Private Nonprofit Eligibility

As authorized in the Disaster Relief Act of 1970, the PA Program was only allowed to provide permanent work assistance to public facilities.²¹⁷ P.L. 92-209 was passed quickly thereafter, in 1971, to provide limited assistance beyond public facilities, allowing for assistance to be provided for private nonprofit medical facilities.²¹⁸ When considering P.L. 92-209, Congress recognized that

the need to protect our national medical care delivery systems requires that the same assistance should be authorized for privately owned, nonprofit medical care facilities—and their related administrative and support facilities—as present law provides for those which are publically owned.²¹⁹

Since then, namely in the Disaster Relief Act of 1974²²⁰ and in the Disaster Relief and Emergency Assistance Amendments of 1988,²²¹ permanent work assistance has expanded to include certain

²¹⁶ See Department of Homeland Security, Office of Inspector General, *FEMA's Process for Tracking Public Assistance Insurance Requirements*, OIG-12-18, December 2011, at http://www.oig.dhs.gov/assets/Mgmt/OIG_12-18_Decl1.pdf.

²¹⁷ See Section 252 of P.L. 91-606, 84 Stat. 1757.

²¹⁸ 85 Stat. 743.

²¹⁹ U.S. Congress, Senate Committee on Public Works, *Disaster Relief Amendments*, 92nd Cong., 1st sess., October 28, 1971, S.Rept. 92-411, p. 2.

²²⁰ This law expanded permanent work assistance to “private nonprofit educational, utility, emergency, medical, and custodial care facilities, including those for the aged or disabled....” See P.L. 93-288, 88 Stat. 153, as *then* codified at 42 U.S.C. §5172(b) (1976 edition), Section 402(b) of the Stafford Act.

PNPs with similar reasoning. DMA 2000 restricted this eligibility somewhat by establishing that a subset of eligible PNPs must first apply to the SBA for assistance before getting assistance from the PA Program.²²²

As described earlier in the report, the PA Program currently provides assistance only to governmental entities and certain PNPs.²²³ Congress may consider whether the eligibility of PNPs is appropriately scoped, or if it could be more restricted/expanded. For example, Congress may evaluate whether the current standards are too inclusive/exclusive for the types of PNPs that

- Provide an “essential service of a governmental nature to the general public,”²²⁴ and therefore meet minimum requirements of eligibility. For example, entities such as cemeteries may be excluded by this definition, while community arts centers are included;²²⁵
- Are allowed to apply directly to the PA Program for immediate grant assistance instead of first applying to the SBA loan program; and
- Can receive assistance if their facilities are “dedicated to or primarily used for religious, political, athletic, recreational, or vocational purposes ...”²²⁶ such as houses of worship.²²⁷

Privately Owned Facilities

Under past and current law, private entities, such as owners of private infrastructure facilities and individual homeowners, are excluded from PA Program assistance for both emergency work and permanent work. For emergency work, some assistance is granted indirectly to private entities, via eligible public sector or PNP applicants, namely for debris removal that is in the public interest and for emergency protective measures for the immediate preservation of life and property. For permanent work, there is a restriction against repairing and restoring private facilities, though private homeowners may receive grant assistance through separate provisions of the Stafford Act.²²⁸

(...continued)

²²¹ This law provided a formal definition for PNPs to include those “facilities which provide essential services of a governmental nature to the general public ...” which remains a defining characteristic of an eligible PNP under current law. See Section 103(f) of P.L. 100-707, 102 Stat. 4690.

²²² Section 205(a) of P.L. 106-390, 114 Stat. 1562; as codified at 42 U.S.C. §5172(a)(3), Section 406(a)(3) of the Stafford Act.

²²³ See the “Eligible Applicants” section of this report for more.

²²⁴ As defined at 42 U.S.C. §5122(11)(B), Section 102(11)(B) of the Stafford Act.

²²⁵ For more examples, see Section VII.B of FEMA, *Private Nonprofit (PNP) Facility Eligibility*, DAP 9521.3, July 8, 2007, pp. 3-4, at <http://www.fema.gov/media-library/assets/documents/89685>.

²²⁶ Section VII.D.3 of FEMA, *Private Nonprofit (PNP) Facility Eligibility*, DAP 9521.3, July 8, 2007, at <http://www.fema.gov/media-library/assets/documents/89685>.

²²⁷ For a legal analysis and discussion of recent legislative efforts to expand the PNP eligibility to include houses of worship, see CRS Report R42974, *Federal Aid for Reconstruction of Houses of Worship: A Legal Analysis*, by (name redacted).

²²⁸ 42 U.S.C. §5174, Section 408 of the Stafford Act, authorizes assistance for individuals and households. For more, see FEMA’s website for the Individual and Households Program (IHP), at <https://www.fema.gov/recovery-directorate/assistance-individuals-and-households-fact-sheet>.

Congress may wish to evaluate whether it is appropriate to continue the exclusion of private infrastructure facilities for permanent work assistance. Following completion of this potential evaluation, revisions to the PA Program may *not* be necessary if Congress determines that

- It is appropriate to continue to exclude private facilities from PA Program assistance for a variety of policy reasons (e.g., concerns over the moral hazards produced by the assistance, concerns that it would unduly influence capital markets, concerns that it assistance is too costly, etc.); or
- Any unique needs of private infrastructure can be provided by other governmental assistance programs (e.g., SBA disaster loans or assistance from the Economic Development Agency); or
- Any necessary private infrastructure assistance can be provided for in situational-dependent authorizations either immediately before or after disasters, in the PA Program or other assistance programs, primarily HUD's Community Development Block Grant (CDBG) Program.²²⁹

However, in an evaluation of PA Program eligibility, Congress may determine that the existing eligibility should be expanded to authorize assistance to private facilities. If so, Congress may then consider whether private facilities require grant or loan assistance, or some combination of the two (for example, providing grant assistance up to a certain amount, and then loan assistance thereafter). As has been done for PNPs, Congress may also consider whether only certain private facilities should receive PA Program assistance, such as those determined by the President or Secretary of DHS to be critical infrastructure. Here, the policy argument for providing assistance through the PA Program is perhaps strongest. As defined by statute, infrastructure is considered *critical* if the “incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”²³⁰ However, Congress may consider the definition of *critical infrastructure* to be not inclusive enough, as what is critical to any one community may not be critical to the nation (e.g., a local factory). Additional restrictions on the assistance to private infrastructure may also be considered, such as mandating that owners and operators commit to obtaining and maintaining sufficient insurance or structurally mitigating all of their facilities from similar consequences in future disasters.

Hazard Mitigation Within the PA Program

As discussed earlier, hazard mitigation assistance can be provided as part of a permanent work project to repair an eligible facility in the PA Program.²³¹ This assistance is provided to reduce future risk to the facility, and is provided in addition to repairing the facility to current codes and standards. As shown earlier in **Figure 6**, between FY2000 and FY2013, FEMA obligated approximately \$3.7 billion in PA hazard mitigation assistance. Following Hurricane Sandy, for

²²⁹ The CDBG program has been authorized by Congress in the past to provide assistance to private sector entities, including following the 9/11 terrorist attacks in New York (P.L. 107-206, 116 Stat. 889). As a general rule, CDBG funds may be used to assistance private businesses so long as it promotes economic development. For more, see CRS Report RL33330, *Community Development Block Grant Funds in Disaster Relief and Recovery*, by (name redacted).

²³⁰ 42 U.S.C. §5195c(e). For more on critical infrastructure, see CRS Report RL30153, *Critical Infrastructures: Background, Policy, and Implementation*, by (name redacted).

²³¹ For more background, see the “Hazard Mitigation Assistance for Permanent Work” section of this report.

example, FEMA has approved over \$2 billion in PA hazard mitigation assistance, including \$589 million for the NYU Langone Medical Center.²³²

Other programs authorized by the Stafford Act, notably the Hazard Mitigation Grant Program (HMGP) authorized by Section 404, also specifically allow the President to provide assistance for hazard mitigation measures that are cost effective and substantially reduce future risk. See **Table 6** for a summary regarding the differences between the assistance provided by the HMGP and PA hazard mitigation assistance. Of note, every dollar of PA hazard mitigation assistance subsequently increases the amount of federal assistance provided through the formula described in statute for HMGP assistance. Additional HMGP assistance provided as a result of PA hazard mitigation expenditures between FY2000 and FY2013 could be as low as \$555 million, but could be as high as \$647 million or more.²³³ Other Stafford Act programs, such as the Predisaster Mitigation Grant Program, are also independently authorized and appropriated for by Congress.²³⁴ Therefore, Congress may consider whether there is a separate policy need for assistance in the PA Program given these other programs, or if the various mitigation authorities can be more closely aligned in statute or through FEMA's administrative policies.

Table 6. Summary of Differences Between Mitigation Assistance Programs
(Comparison of mitigation assistance provided by §404 and §406 of the Stafford Act)

	Hazard Mitigation Grant Program (HMGP)	PA Hazard Mitigation
Managed by...	The state or tribal government grantee.	Individual project applicants eligible for permanent assistance in the PA Program.
Eligibility is...	Generally available throughout the state/tribal area where the disaster was declared, in most cases including areas not directly impacted by the declared disaster.	Limited to facilities otherwise eligible for the PA Program in the declared disaster area (county or tribal area).
Amount of assistance provided	The formula for calculating the HMGP allocation for grantees with a standard mitigation plan is based on 15% of the first \$2 billion of estimated aggregate amounts of disaster assistance. For amounts greater than \$2 billion, a decreasing sliding scale is used to make allocation calculations. Grantees with enhanced mitigation plans are eligible for 20% of the first \$2 billion in the HMGP formula.	No program-wide limits on funds, but each project must be cost-effective and approved by FEMA per established criteria.

²³² This single PA hazard mitigation award is almost 16% of the total amount awarded between FY2000 and FY2013. Office of Senator Charles Schumer, "Schumer announces over \$1.1 billion in Sandy Federal Funding for Repair and Mitigation Projects at NYU's Langone Medical Center," press release, July 29, 2014, <http://www.schumer.senate.gov/newsroom/press-releases/schumer-announces-over-1-1-billion-in-sandy-federal-funding-for-repair-and-mitigation-projects-at-nyus-langone-medical-center>.

²³³ In order to calculate an exact ratio, one would need to determine how much each additional dollar affected the HMGP formula, whether the state was receiving 20% instead of 15% for an enhanced state mitigation plan. For the figures provided, CRS used a simple calculation of the total PA hazard mitigation assistance provided in FY2000-FY2013, \$3.7 billion, and multiplied the figure by 15% (\$555 million) and 17.5% (\$647 million).

²³⁴ See 42 U.S.C. §5133, Section 203 of the Stafford Act. For more on PDM, see CRS Report RL34537, *FEMA's Pre-Disaster Mitigation Program: Overview and Issues*, by (name redacted).

	Hazard Mitigation Grant Program (HMGP)	PA Hazard Mitigation
Types of mitigation measures	Both structural measures and non-structural measures such as planning, property acquisition (i.e., “buyouts”), and other new projects throughout disaster area.	Applies only to structural measures on permanent work repair projects and does not allow for entirely new project to be created.

Source: CRS analysis of the Stafford Act and Table 9 of Federal Emergency Management Agency, *Public Assistance Guide*, June, 2007, p. 124, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

Separately, Congress may also wish to review the current criteria and policy FEMA uses to provide hazard mitigation assistance. Congress may evaluate numerous issues, including whether

- The methods used under FEMA’s criteria for determining if mitigation measures will lessen the costs (societal and financial) of future disasters;²³⁵
- A reform to PA mitigation assistance made for the SRIA alternative procedures should be made permanent or revoked. For normal projects, PA mitigation funds are not available for alternate projects or improved projects that involve relocation or facility replacement at same site. In SRIA alternative procedures, FEMA is allowing PA mitigation assistance on these projects, so long as it is approved and included in the fixed-estimate grant;²³⁶ and
- There should be a cap on the total amount of PA mitigation assistance that can be provided per project. Current policy does not formally cap the amount of mitigation assistance, though there are additional restrictions on PA mitigation assistance over 15% of the total project cost, and then again over 100% of the project amount.²³⁷ As previously discussed, CRS analysis of data provided by FEMA indicates that PA mitigation assistance accounts for 38% of the total federal obligation for projects with any mitigation assistance.²³⁸

Congress may also wish to evaluate if assistance should be provided and/or required by the PA Program for mitigation measures not otherwise required by the local and state building codes and standards (i.e., in effect, boosting those standards specifically only for the PA project). It could be argued, for instance, that if a hazard mitigation measure is considered necessary by FEMA’s criteria, it could be a requirement of the community’s standards. Correspondingly, Congress may consider whether the PA Program should begin allowing as an eligible cost those measures associated with repairing/replacing facilities to improved codes and standards implemented post-disaster by grantees, as was done pre-1999.²³⁹

²³⁵ These methods are outlined in Section VII.B of FEMA, *Hazard Mitigation Funding Under Section 406 (Stafford Act)*, 9526.1, March 30, 2010, p. 3, at <http://www.fema.gov/hazard-mitigation-funding-under-section-406>.

²³⁶ See FEMA, *Public Assistance Alternative Procedures Pilot Program, Guide for Permanent Work*, Version 2, December 19, 2013, p. 14, at <https://www.fema.gov/media-library/assets/documents/89754>.

²³⁷ See Section VII.B of FEMA, *Hazard Mitigation Funding Under Section 406 (Stafford Act)*, 9526.1, March 30, 2010, p. 3, at <http://www.fema.gov/hazard-mitigation-funding-under-section-406>.

²³⁸ See the “Obligations for Hazard Mitigation within the PA Program” section of this report.

²³⁹ FEMA previously allowed costs to be eligible if the code was applicable at the time of the project being approved, as opposed to being applicable at the time of the disaster. Prior to this change, FEMA believed there were unintended consequences of the past policy, including “protracted delays in repairing eligible projects as applicants debate the adoption of codes and standards that will affect eligible damaged facilities and the amount of Federal assistance they will receive.” Additional policy arguments for and against this change are elaborated on in the rulemaking. See the (continued...)

Implementing Executive Order 13960 for the PA Program

As described in another CRS product,²⁴⁰ the President recently revised E.O. 11988, *Floodplain Management*, with the issuance of Executive Order 13960, *Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input*.²⁴¹ Implementation of E.O. 13960 will primarily involve the development and application across the federal government of a new Federal Flood Risk Management Standard (FFRMS).²⁴² Succinctly, E.O. 13960 and the FFRMS could ultimately revise federal regulations on federal investment in floodplains, and the amount of hazard mitigation that is required to protect those investments from future flooding. In the context of the PA Program, the current requirements that may be revised are found in regulations on floodplain management.²⁴³ It is too early to know exactly how the PA Program will be affected by the FFRMS, but it seems likely that the FFRMS will, at a minimum, increase existing requirements by requiring additional “freeboard” for any facility that is being replaced as a permanent work project (one that exceeds the 50% threshold of damage). Freeboard is the height of the facility above base flood elevation (BFE) in the 1 in 100 year flood hazard area (1% flood zone). These requirements would increase the total cost of the project, and therefore the federal and applicant obligations as cost-shared under normal procedures. As it is further refined and as FEMA proposes regulations to implement the FFRMS, Congress may consider the effects of E.O. 13960 and the FFRMS on the PA Program to determine if it is in alignment with current Congressional intentions. For example, Congress may choose to increase or decrease the number of circumstances in which the proposed FFRMS freeboard requirements are imposed for PA permanent work projects (i.e., apply the FFRMS to all PA permanent work projects instead of just replacement projects, or conversely, apply it only to projects that are damaged by 75% or more instead of 50%, etc.). Congress may also choose to change the freeboard requirement writ large, such as requiring +1 foot, or +3 feet, above BFE for facilities (instead of the proposed +2 for most types of facilities).²⁴⁴

(...continued)

notice of public rulemaking for an explanation at FEMA, “Disaster Assistance; Restoration of Damaged Facilities,” 61 *Federal Register* 55262, October 25, 1996; and the final rule at FEMA, “Disaster Assistance; Restoration of Damaged Facilities,” 63 *Federal Register* 5895, February 5, 1998.

²⁴⁰ CRS Report IF10150, *E.O. 13690 and Federal Flood Risk Management Standard*, by (name redacted), (name redacted), and (name redacted).

²⁴¹ See both

Executive Order 11988, “Floodplain Management,” 42 *Federal Register* 26951, May 24, 1997, as amended; and Executive Order 13960, “Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input,” 80 *Federal Register* 6425, February 4, 2015.

²⁴² See Executive Office of the President, *Federal Flood Risk Management Standard*, January 30, 2015, at <https://www.fema.gov/media-library/assets/documents/101759>.

²⁴³ Namely, 44 C.F.R. Part 9.

²⁴⁴ The proposed FFRMS may require replaced facilities to have an additional two feet of freeboard above BFE for all facilities except those that would fulfill the requirement of it being a federal “critical action,” such as a hospitals and public utilities, which would be required to be +3 BFE or to the 500 year flood level. See Executive Office of the President, *Federal Flood Risk Management Standard*, January 30, 2015, at <https://www.fema.gov/media-library/assets/documents/101759>.

Clarifying the Role of the PA Program with Other Federal Agencies' Disaster Assistance Authorities

The broad eligibility of the PA Program frequently overlaps with other federal agencies' disaster assistance authorities. As a result, there are numerous circumstances where emergency work activities and permanent work on certain types of public facilities could be eligible for federal assistance through other federal programs. In compliance with specific legal restrictions in the Stafford Act against the duplication of benefits,²⁴⁵ grantees can only receive assistance for the same activity from one federal program. Further, FEMA contends that it is bound by legal prohibitions against augmentation of appropriations from providing assistance for an activity under the broad authority of the Stafford Act when there is a more specifically authorized federal program for that purpose. FEMA also contends, for the same augmentation of appropriations reason, that this restriction applies even when the other more specific federal program does not have sufficient (or any) appropriations to provide assistance. Therefore, FEMA and other federal agencies have sought to eliminate redundancies by delineating the circumstances under which the PA Program will defer to another agency's more *specific* assistance authorities. FEMA believes there is a firm legal restriction against providing permanent work assistance when another agency has more specific authority. However, in FEMA's regulations on the subject, it suggests that FEMA is only "generally" prevented from providing such assistance, not legally restricted.²⁴⁶

For example, FEMA, in conjunction with the U.S. Army Corps of Engineers (USACE) and the Natural Resources Conservation Service (NRCS), has issued policy guidance delineating the circumstances where the more specific authorities of these agencies to provide rehabilitation assistance for watershed developments, levees, and other flood control works takes precedence over the PA Program authorities.²⁴⁷ Both *flood control* and *watershed development* are included in the definition of what a public facility is in the Stafford Act.²⁴⁸ Therefore, restoration of these types of facilities may otherwise be eligible for assistance under Stafford Act authority were USACE and NRCS authority not more specific. FEMA acknowledges that the eligibility of each activity is not necessarily distinguishable through existing policy guidance or regulation, and therefore FEMA will make assessments of eligibility on a "case-by-case" basis when other federal authorities may be more specific than the Stafford Act (and thereby, take precedent over the Stafford Act).²⁴⁹

The overlap between the PA Program authorities and other federal agencies' assistance authorities can be a general source of confusion and frustration for many grantees, as they are frequently unsure which federal program will provide assistance to fulfill their post-disaster needs. In addition, different programs have different cost shares and cost eligibility regulations, so the eligibility decision between one federal program or the PA Program may affect the ultimate

²⁴⁵ 42 U.S.C. §5155, Section 312 of the Stafford Act.

²⁴⁶ 44 C.F.R. §206.226(a). See also the Federal Register notices for this regulation at FEMA, "Disaster Assistance; Public Elementary and Secondary School Facilities (Proposed Rule)," 57 *Federal Register* 29854, July 7, 1992; and FEMA, "Disaster Assistance; Public Elementary and Secondary School Facilities (Final Rule)," 58 *Federal Register* 55021, October 25, 1993.

²⁴⁷ See FEMA, *Rehabilitation Assistance for Levees and other Flood Control Works*, RP9524.3, September 23, 2011, at <https://www.fema.gov/public-assistance-9500-series-policy-publications/95243-rehabilitation-assistance-levees-other-flood>.

²⁴⁸ See 42 U.S.C. §5122(10)(a), Section 102(10)(a) of the Stafford Act.

²⁴⁹ Telephone conversation with FEMA program staff from the Office of the Chief Counsel, November 13, 2014.

amount of spending required by the grantee. For example, the USACE's Rehabilitation and Improvement Program (RIP) generally has a cost-share of 80% federal, 20% grantee for non-federal projects;²⁵⁰ whereas the PA Program has a minimum of 75% federal share that can increase to 90% in regulation for a more severe disaster.²⁵¹ Therefore, depending on the PA Program's cost share for a declared major disaster, it can be fiscally beneficial to the grantee if a project is eligible under the PA Program and not the RIP, and vice versa.

However, the greatest challenge is presented when FEMA determines another agency's assistance program is more specific than the PA Program, and that other program does not have appropriations sufficient to cover the expense of assisting the applicant. In these situations, an activity that may otherwise be eligible for aid under the Stafford Act through the PA Program can be denied assistance because the agency with more specific authority takes legal precedence. FEMA has argued that it cannot provide assistance in these situations because doing so would augment the appropriation from Congress for the other agency's program, even if the appropriation from Congress was zero. FEMA cited several Comptroller General Opinions for CRS on appropriations law in explaining its legal interpretation.²⁵² However, no record could be found of a Comptroller General opinion specifically on the overlapping of PA Program authorities in the Stafford Act with other federal agencies' more specific disaster authorities.

In the Stafford Act, Congress has helped clarify the potential redundancy of PA Program assistance and the SBA's disaster loan program assistance. For permanent work, the law allows PNPs that provide critical services to apply first to FEMA for permanent work assistance, whereas all other PNPs must apply first to SBA's disaster loan program.²⁵³ In other cases,

²⁵⁰ 33 C.F.R. §203.83(f).

²⁵¹ See the "Grantee Cost-Shares" section of this report.

²⁵² Email correspondence from the FEMA's Office of Chief Counsel, received November 21, 2014. In an explanation provided to CRS, FEMA maintains that in *Honorable Clarence Cannon, Chairman, Committee on Appropriations, House of Representatives*, B-139510, 1959 U.S. Comp. Gen. LEXIS 2385 (May 13, 1959), the Comptroller General

questioned the Department of Navy's intent to use a general Navy appropriation for "Shipbuilding and Conversion" to deepen a channel near Pascagoula, MS to permit the transportation of submarines.... The Comptroller General advised that the Navy's appropriation could not be used to dredge the channel because Department of the Army was specifically charged by law with the responsibility of carrying out improvements of rivers and harbors and other waterways for navigation, flood control, and other purposes. Further, that Congress had failed to appropriate funds for the Army to carry out the project under its more specific authority did not correspondingly expand the availability of the Navy's general appropriation.

Further, FEMA maintains that in *Internal Revenue Service "Informant/Witness" Expenditures*, B-183922, 1975 U.S. Comp. Gen. LEXIS 1872 (Aug. 5, 1975) and other cases, the Comptroller General has established a principle that in "situations where agencies having overlapping appropriations to carry out a certain activity does not necessarily mean that one agency's appropriation will be available to the absolute exclusion of the other, even where one agency's appropriation is more specific than the other." In this opinion, FEMA maintains that Comptroller General concluded that the Department of Justice (DOJ) had a more specific authority to provide witness protection than the Internal Revenue Service (IRS), and

to the extent that the DOJ exerted that authority and expended appropriated funds in carrying out that more specific authority—the IRS could not use its more general authority and appropriation as that would constitute an augmentation of DOJ's appropriations. However, at the point where the DOJ administratively determined that the witness did not qualify for protection under its more specific authority, the IRS could use its more general appropriation to place the witness under its protection.

It is beyond the scope of this report to independently evaluate FEMA's legal interpretation of these Comptroller General opinions.

²⁵³ See 42 U.S.C. §5172(a)(3), Section 406(a)(3) of the Stafford Act. For further explanation, see the "Eligible (continued...)"

Congress has rescinded the disaster assistance authorities of other federal agencies and as a result eliminated any potential redundancy with the other authority and the Stafford Act. For example, Congress revoked an authority the Department of Housing and Urban Development (HUD) had to repair public housing facilities²⁵⁴ and repealed an authority the U.S. Department of Education had to provide disaster assistance to schools.²⁵⁵ In other circumstances, FEMA interprets existing legal provisions as permitting the PA program to pay for activities authorized by other federal assistance programs. As an example, FEMA interprets a provision found in the authorization for the Emergency Federal Law Enforcement Assistance (EFLEA) Program as allowing FEMA to reimburse the Department of Justice for the deployment of federal law enforcement officers, if the officers are providing PA emergency protective measures authorized by the Stafford Act.²⁵⁶

Congress has also enacted new disaster assistance authorities, and revised old authorities, to specifically clarify the role of the Stafford Act and PA Program with regard to the other federal agency authority. For example, in the creation of the new Public Transportation Emergency Relief Program in MAP-21, Congress provides that the new program did not “affect the ability of any other agency of the Government, including the Federal Emergency Management Agency, or a State agency, a local governmental entity, organization, or person, to provide any other funds otherwise authorized by law.”²⁵⁷ FEMA believes this provision allows it to provide assistance to public transit agencies through the PA Program without augmenting appropriations for the new transit program.²⁵⁸ Also in MAP-21, Congress amended the Federal Highway Administration’s Emergency Relief Program to specifically allow for the program to provide debris removal assistance only in incidents that have not been declared major disasters under the Stafford Act.²⁵⁹ Therefore, the PA Program is now the primary source of debris removal assistance, though not permanent repairs, for federal-aid roads when there is a disaster declaration.

Congress may wish to evaluate the role of the PA Program in consideration of the potential redundancies in eligibility presented by the broadly scoped PA Program and other federal authorities. To do so, Congress could consider several options, including, but not limited to,

(...continued)

Applicants” section of this report.

²⁵⁴ 42 U.S.C. §1437g(k) (2006 edition), revoked by Section 2804 of P.L. 110-289, 122 Stat. 2866. The difficulties created by the redundancy in authorities of HUD and FEMA for public housing authorities was discussed by Members and witnesses in U.S. Congress, House Committee on Financial Services, Subcommittee on Housing and Community Opportunity (Joint Hearing with Committee on Homeland Security, Subcommittee on Emergency Communications, Preparedness, and Response), *Examining the Roles and Responsibilities of HUD and FEMA in Responding to the Affordable Housing Needs of Gulf Coast States Following Emergencies and Natural Disasters*, Joint Hearing, 110th Cong., 2nd sess., June 4, 2008, H.Hrg. 110-116 (Washington: GPO, 2008).

²⁵⁵ 20 U.S.C. §241-1 (1988 edition), repealed by Section 331 of P.L. 103-382, 108 Stat. 3965.

²⁵⁶ 42 U.S.C. §10503(e) states that “Nothing in this chapter shall be construed to limit any authority to provide emergency assistance otherwise provided by law.” The Office of Legal Counsel in the Department of Justice has issued an opinion suggesting that this clause allows appropriations for the Stafford Act, namely the Disaster Relief Fund, to provide the funding for federal law enforcement officer deployments authorized by the EFLEA statute. See Office of Legal Counsel, Department of Justice, *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, March 05, 2012, at <http://www.justice.gov/sites/default/files/olc/opinions/2012/03/31/state-local-fleo-stafford-act-deployments.pdf>.

²⁵⁷ See Section 20017 of P.L. 112-141, 126 Stat. 703; as codified at 49 U.S.C. §5324(c)(2).

²⁵⁸ Email correspondence from FEMA staff from the Office of Chief Counsel, received November 21, 2014.

²⁵⁹ See Section 1107 of P.L. 112-141, 126 Stat. 437; as codified at 23 U.S.C. §125(d)(3).

- Requiring the President or FEMA to issue further regulations on the circumstances that Stafford Act authorities will provide assistance in the presence of more specific federal authorities, to possibly include revision of FEMA's regulation for permanent work on the matter;²⁶⁰
- Requesting a formal opinion from the Comptroller General on FEMA's legal interpretation of augmentations of appropriations law to determine if Stafford Act authorities can be used to provide assistance when another federal agency with more specific authority does not have sufficient appropriations to fund an activity;
- Giving further direction through law or report language to the executive branch regarding the conditions it should defer to more specific authorities in lieu of the more broadly scoped Stafford Act, perhaps in the form of a delivery sequence outlining the order of precedence of federal programs for assistance;²⁶¹ and
- Revising the Stafford Act to explicitly identify whether Stafford Act authorities may or may not provide assistance in substitution, or at grantee preference, for more specific federal disaster assistance authorities.

Ultimately, Congress may evaluate holistically whether the PA Program should be a backstop source of funding for disaster assistance (i.e., only available when other programs do not apply to the activity) or if it should be the principal, ascendant source of funding for disaster assistance (i.e., always eligible to provide assistance for all eligible activities under Stafford Act authority, regardless of other federal agency authorities).

²⁶⁰ 44 C.F.R. §206.226(a).

²⁶¹ The Individual and Housing Program (IHP) assistance provided by FEMA, as authorized by 42 U.S.C. §5174, Section 408 of the Stafford Act, has a "delivery sequence" that can serve as model for the PA Program. In regulations, the rationale for the IHP delivery sequence is explained at 44 C.F.R. §206.191(c)-(d), and the sequence can be seen at <http://www.fema.gov/pdf/about/regions/regioni/sequence2008.pdf>.

Appendix A. Brief Legislative History of the Public Assistance Grant Program

For the first half of the twentieth century, the federal government did not have an overall legal framework for disaster relief and emergency management. Instead, federal involvement was typically reactive and isolated to single large events, such as the Great Mississippi Flood of 1927.²⁶² Since that time, the legal framework has been gradually expanding. In 1950, Congress passed the Federal Disaster Relief Act (P.L. 81-875), establishing permanent authority for federal disaster relief activities and codifying an intergovernmental model for assistance. Additionally, this statute provided the President with the authority to determine when assistance would be provided through the first national disaster declaration process.²⁶³ It also authorized the basic tenets of what has evolved into emergency work assistance under the current PA Program, especially emergency protective measures.²⁶⁴

The Disaster Relief Act of 1970 (P.L. 91-606) first authorized a form of permanent work assistance grants for the repair and restoration of public facilities.²⁶⁵ It also formally authorized debris removal assistance separately from emergency work assistance.²⁶⁶ The Disaster Relief Act of 1974 (P.L. 93-288) authorized the expansion of permanent work assistance grants for the repair and restoration of certain nonprofit facilities, and added features such as the in-lieu contribution and simplified procedures.²⁶⁷ More than a decade later, the Disaster Relief and Emergency Assistance Amendments of 1988 altered this legislation to, among many other reforms, set minimum federal cost-shares for PA Program assistance, create an insurance requirement for facilities receiving assistance, and authorize the appeal process for PA assistance decisions.²⁶⁸

Following the passage of the 1988 amendments, the PA Program had many of the same core authorities and requirements as it does today. However, there have been a number of statutes since 1988 that have impacted the administration of the program. The main report discusses the notable changes made to the PA Program by the Disaster Mitigation Act of 2000 (P.L. 106-390,

²⁶² David Butler, “The Expanding Role of the Federal Government: 1927-1950,” in *Emergency Management: The American Experience 1900-2010*, ed. Claire B. Rubin, 2nd ed. (Boca Raton, FL: CRC Press, 2012), pp. 51-82.

²⁶³ (name redacted), “The Formative Years: 1950-1974,” in *Emergency Management: The American Experience 1900-2010*, ed. Claire B. Rubin, 2nd ed. (Boca Raton, FL: CRC Press, 2012), pp. 83-114.

²⁶⁴ See Section 3 of P.L. 81-875, 64 Stat. 1109, which authorized the President to direct federal agencies to perform “on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of local governments damaged or destroyed in such major disaster....” This text is similar to current statute, found at 42 U.S.C. §5170b, Section 403 of the Stafford Act, that authorizes emergency work assistance.

²⁶⁵ See Section 252 of P.L. 91-606, 84 Stat. 1757. This text is the foundation of current statute, found at 42 U.S.C. §5172, Section 406 of the Stafford Act.

²⁶⁶ See Section 224 of P.L. 91-606, 84 Stat. 1751. This text is similar to current statute, found at 42 U.S.C. §5173, Section 407 of the Stafford Act.

²⁶⁷ See Section 402(b) of P.L. 93-288, 88 Stat. 153 for text providing an expansion of permanent work assistance for certain PNPs; Section 402(f) for early in-lieu contribution text; and Section 419 (88 Stat. 159) for early simplified procedures text.

²⁶⁸ See Section of 106 of P.L. 100-707, 102 Stat. 4698, for revisions creating a defined minimum federal share; Section 105(h), 102 Stat. 4692, for the insurance requirement; and Section 106, 102 Stat. 4705, for the appeals process. In addition, this bill named the statute the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

DMA 2000), the Post-Katrina Emergency Reform Act (Title VI of P.L. 109-295, PKEMRA) and the Sandy Recovery Improvement Act of 2013 (Division B of P.L. 113-2, SRIA).

Appendix B. Worksheet Dataset Considerations

This Appendix highlights concerns CRS identified with the data that FEMA makes available to the public related to individual worksheets for PA grants. This information is intended to provide context for the analysis provided in this report and to identify potential caveats that should be considered when reviewing the results.

The analysis found throughout the report was primarily completed using two datasets: a publicly available dataset of PA Program project worksheets and a DRF obligation dataset provided directly by FEMA. The data that CRS received privately from FEMA included both projected and actual obligations for many programs funded through the DRF, including infrastructure-related spending for PA grants and Technical Assistance Contracts (TAC). These contracts are used to hire the necessary contract staff to manage and operate the PA Program. The actual obligations within each program for FY2000 through FY2013, provided by FEMA in January of 2015, were used to complete all analysis in the section entitled “Aggregate Spending on Public Assistance.”

For the section “Public Assistance Spending by Type of Work, Category, and Project Size” all figures were derived from publicly available data on the OpenFEMA website, accessed in December 2014.²⁶⁹ Obligation totals were based on the federal share obligated, with declarations being sorted into fiscal years by declaration date. For the additional sections related to obligations for private nonprofit facilities and hazard mitigation expenses within the PA Program, FEMA provided CRS with separate datasets. In each of these datasets, obligations were divided by declaration and funding category (A through Z), with totals based on the federal obligation through January 2015.

Scope of Project Worksheets

The method FEMA uses to characterize and administer discrete projects creates difficulties in understanding the number of actual “projects” within a given disaster. FEMA defines a project as “a logical method of performing work as a result of a declared event.”²⁷⁰ In determining the parameters of a project, an applicant has the ability to combine work items into a single project as long as the resulting project is considered logical and consistent with FEMA criteria. FEMA provides applicants with a list of generally accepted methods for consolidating projects. For instance, an applicant may combine work items that relate to the same broad infrastructure system or the same type of facility. In addition, a single “project” could be all the work for an applicant that falls within one geographic boundary or was awarded to one contractor.

While the ability to consolidate eligible activities onto a single project worksheet has administrative benefits for both FEMA and applicants, it makes it difficult to capture discrete work items and compare across disasters in aggregate. For example, FEMA may assign individual project worksheets to each gravel road damaged in one disaster, but group all gravel roads onto one worksheet in a different disaster, depending on the situation.²⁷¹ As a result, any comparison of

²⁶⁹ This data are made available by FEMA at <https://www.fema.gov/data-feeds/openfema-dataset-public-assistance-funded-projects-details-v1>.

²⁷⁰ FEMA, *Public Assistance Guide*, June 2007, p. 95, at <http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf>.

²⁷¹ *Ibid.*, p. 98, includes a list of accepted methods and criteria for combining work items.

total projects within a disaster would necessarily be impacted by the project consolidation decisions made by the applicant and FEMA.

Data Entries That Represent Financial Reconciliations Instead of Projects

The public project worksheet dataset used by CRS includes over 621,000 individual project worksheets. However, a number of project worksheets appear not to represent a *project* in the lay sense of the word, but a financial reconciliation for the grantee (or subgrantee) for other project worksheets that did represent real projects.

First, there are a substantial number of worksheets for which the total project amount of federal obligation is either negative or below the threshold for a PA grant (\$1,000). In discussions with FEMA, these entries were characterized as the result of adjustments that are made to an applicant for the purpose of financial reconciliation. These adjustments often led to the creation of a new worksheet to correct issues that were identified for a project that was currently listed under a separate worksheet.

Second, the individual project worksheet data include a number of obligations, both positive and negative, that were made to reconcile issues for a grantee in the aggregate. Each of these was made in Category Z, State Management. For this reason, there could be obligations included in Category Z that would be more properly assigned to categories A through G.

Third, the data include disaster declarations for which the obligation total was negative for an entire category. As described by FEMA, these instances occurred when a system-generated reconciliation was performed across all applicable categories, possibly as a result of a change in the cost-share between the federal and state government. While there were not many instances of this in the data, it is possible that similar reconciliations were performed to adjust costs that were not identified because the total for the category within the declaration remained positive.

For the above reasons, CRS limited the analysis on the number of projects or the average cost per project, as a project worksheet may not actually represent a separate discrete project. **Table 5** provides the only analysis based on numbers of project worksheets. As project worksheets for financial reconciliations are not systematically identifiable across the data, CRS was not able to adequately control for or eliminate all financial data entries. However, CRS did restrict the data for the most obvious of these entries, those project worksheets with reported obligations between \$-1 and 1. Even with this restriction, the data on the number of project worksheets likely inflate the number of real projects in a lay sense of the word.

Data Requiring Proper Manual Categorization or Characterization

The analysis provided in the report includes multiple categorizations that are not available in the publicly available data, including obligations for hazard mitigation, private nonprofit facilities, and projects using alternative procedures. To identify project worksheets that met these criteria, FEMA staff relied on text searches of FEMA data or other descriptors in their internal data. There could be inconsistencies in tracking these data across time, region, or declaration because the entry relies upon individual users including information in the text. As a result, the analysis

addressing these topics cannot be recreated using the publicly available dataset or verified by CRS.

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