Congressional Research Service

MEMORANDUM July 23, 2009

To: Honorable Eleanor Holmes Norton, Chair
Subcommittee on Economic Development, Public Buildings and Emergency Management
Committee on Transportation and Infrastructure

From: Francis X. McCarthy, Analyst, Emergency Management Policy, Government and Finance Division

Subject: **"Post Katrina: What it Takes to Cut the Bureaucracy and Assure a More Rapid Response After a Catastrophic Disaster"**

TESTIMONY OF

FRANCIS X. MCCARTHY

ANALYST IN EMERGENCY MANAGEMENT POLICY

GOVERNMENT AND FINANCE DIVISION

CONGRESSIONAL RESEARCH SERVICE

LIBRARY OF CONGRESS

BEFORE THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

JULY 27, 2009

Good afternoon. It is an honor to appear before you today to present testimony regarding legislative options for catastrophic disasters. My work at the Congressional Research Service over the last three years has centered on disaster recovery programs and processes. Prior to my work at CRS I was privileged to have a 25 year career at the Federal Emergency Management Agency (FEMA) in work that is directly related to the issues being considered in this hearing.

Several fundamental issues arise in considering how to cut the red tape and accelerate federal assistance following a catastrophic or mega-disaster. Arguably the first question is the respective roles of the executive and legislative branches. Traditionally, both have played a key role in the response to large disaster events. The executive branch, particularly FEMA, has administered, on behalf of the President, the Robert T. Stafford Disaster Relief and Emergency and Assistance Act, Public Law 93-288.[1] Congress has authorized that statute and amended it through the years. Also Congress has, through both annual appropriations and supplemental appropriations, funded those FEMA Stafford Act response and recovery programs and, in addition, has also provided funds through other departments and agencies to meet specific post-disaster needs. Often times, this process has been an effective and complementary inter-branch partnership to address the complicated problems following a large disaster event that overwhelms a state or several states.

Within the context of this discussion some have suggested that, for catastrophic events, the FEMA Administrator could be provided, through legislation, the discretionary authority to create lump sum or block grant payments as needed, and other additional authorities, to speed up the recovery process and eliminate some of the "red tape."

Some have also argued that while discretion to designate a disaster a catastrophic event could be exercised by the President, it might be a more reliable approach to have a catastrophic "trigger" based on the amount of estimated damage. When that trigger is activated, lump sum or block grant payments to a jurisdiction would be authorized along with other administrative changes. Also more favorable cost-shares for state and local governments could be triggered similar to the current FEMA cost-share policy.[2]

The creation of a threshold dollar amount to trigger increased cost-shares as well as other exceptional procedures such as lump sum payments may be a critical part of the debate. Current cost-share thresholds are clear, but these standards are under pressure from states seeking a waiver of costs even if their per capita damage amounts do not meet the threshold. While most observers would agree that Hurricane Katrina was an outlier of remarkable cost and scope, officials in other states affected by disasters may consider Katrina not an outlier but a precedent and expect similar considerations. With extraordinary measures available for catastrophic events, and concern with federal expenditure levels, it becomes even more important to define a catastrophic event.

In my testimony I will discuss several suggested approaches. An additional consideration may be that when the threshold for expanded assistance has been reached, it could also trigger the President's official notification to Congress of the use of catastrophic authorities, similar to notification procedures for emergency spending.[3] The notification could also serve as the vehicle to engage the Congress with

[1] 42 U.S.C. 5121-5206.

[2] U.S. Department of Homeland Security, Federal Emergency Management Agency, "Cost Share Adjustment History," June 4, 2009, http://www.fema.gov/media/fact_sheets/cost-share.shtm.

[3] 42 U.S.C. 5193. This section directs the President to report to Congress when emergency costs exceed $5 million. The report must identify emergency assistance requirements and any legislation that may be needed.

suggested funding requirements and potential legislation that could move the response and recovery along.

Lump Sum Payments in Recent Legislation

Hurricanes Katrina and Rita

The Consolidated Appropriations Act of 2009 directed FEMA to accept lump sum payment requests from several specific categories of applicants.

> Sec. 546. Notwithstanding any other provision of law, and not later than 30 days after the date of submission of a request for a single payment, the President shall provide a single payment for any eligible costs under Section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5172) for any police station, fire station, or criminal justice facility that was damaged by Hurricane Katrina of 2005 or Hurricane Rita of 2005: Provided, That the President shall not reduce the amount of assistance provided under section 406(c)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5172(c)(1) for such facilities: Provided further, That nothing in the previous proviso may be construed to alter the appeal or review process relating to assistance provided under section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5172).[4]

There has been congressionally directed funding in the past that directed some forms of FEMA disaster spending, but P.L. 110-329 may have contained the first legislative direction that stipulated a single payment for a discrete group of applicants. The rationale for this direction would arguably be the importance of the public safety infrastructure in the recovery of a community. It is possible that similar arguments could be made on behalf of other types of public damage involving roads, buildings, and public water and utility facilities. However, FEMA reports that despite the authority granted in P.L. 110-329, neither the state of Louisiana nor any applicant has requested a single payment.[5]

H.R. 3247, the proposed "Hurricanes Katrina and Rita Recovery Act of 2007"

As considered by the 110th Congress, H.R. 3247 would have provided specific relief to another discrete group: public facilities that were used in response operations.[6] These included meeting centers that sustained damage from their use as shelters and also lost income through cancellations due to their disaster-associated use. The bill would have allowed for their compensation and established the boundaries of that compensation.

The same legislation also sought increased lump sum payments for all smaller project applicants.[7] To accomplish this, the bill would have expanded the payments for Section 422 of the Stafford Act, the Simplified Procedures section, up to $100,000.[8] Section 422 is sometimes called the "small projects" section and its limit was initially set at $35,000, but through annual increases, the limit is now just over

[4] P.L. 110-329, Title V, Section 546, 122 Stat. 3689-3690.

[5] E-mail correspondence from Nicole Dyson, FEMA Office of Congressional Affairs, May 21, 2009.

[6] H.R. 3247, "Hurricanes Katrina and Rita Recovery Facilitation Act of 2007," Section 3(g).

[7] Ibid, Section 3 (e).

[8] 42 U.S.C. 5189.

$64,000.[9] This section permits payments that are based on estimates, and as such were the precursor of the cost-estimating procedure authorized in the Disaster Mitigation Act of 2000. As Congress did not approve H.R. 3547, these provisions did not take effect.

9-11 Attacks – New York

One other notable outlier was contained in the Consolidated Appropriations Resolution of 2003. The language in the Act provided for spending outside of the parameters of the Stafford Act so that the City and State of New York could complete projects related to the 9-11 attacks that did not fall within the eligibility regulations of the Stafford Act. The language was contained in the Administrative Provisions of the bill.

> Notwithstanding any other provision of law, funds appropriated to the Federal Emergency Management Agency (FEMA) for disaster relief for the terrorist attacks of September 11, 2001, in Public Law 107-117, may be used to provide funds to the City of New York and the State of New York for costs associated with such attacks that are unreimbursable under the Stafford Act, including but not limited to the non-Federal share of relevant programs.[10]

Existing Authorities for Alternative Approaches

The Disaster Mitigation Act of 2000, Public Law 106-390, provided FEMA the authority to pay for large public assistance projects based on cost estimates in place of the reimbursable system currently employed. It also called for establishment of an expert panel to develop procedures for such estimates. This authority appears as a part of Section 406 of the Stafford Act that addresses the repair, restoration, and replacement of damaged facilities.[11]

FEMA convened the "expert panel," as established in law, in the fall of 2002 and conducted workshops to develop the regulations to implement this authority.[12] But regulations have never been promulgated to actually implement the authority in the law in the intervening years. FEMA has developed cost-estimating formats; in fact they have been working in that area since 1998, but those have not led to rapid awards or to cumulative settlements. Some observers have speculated that one sticking point is that the cost-estimating procedure, if fully carried out and agreed to initially, could still be appealed and the repair and restoration work would then revert to the current system.[13] Others have speculated that FEMA leadership was uncertain of maintaining accountability and also feared an increase in expenditures, and a speeding up of outlays, if costs were based on estimates and paid out early in the disaster.

The Post-Katrina Emergency Management Reform Act (PKEMRA, P.L. 109-295) authorized a Public Assistance Pilot Program to reduce federal costs, increase administrative flexibility, and speed up the process to improve program performance.[14] One area evaluated in the Pilot Program is "Grants Based on

---

[9] U.S. Department of Homeland Security, Federal Emergency Management Agency, "Notice of Adjustment of Disaster Grant Amounts," 73 *Federal Register* 60302, Oct. 10, 2008.

[10] Public Law 108-7, 117 Stat. 517.

[11] 42 U.S.C. 5172. The estimating section is (e) (1) and (2).

[12] Federal Emergency Management Agency, *Public Assistance – Expert Panel on Cost Estimating – Recommendation Report of Federal Advisory Committee,* Oct. 2002, at [http://www.fema.gov/pdf/government/grant/pa/cefrep.pdf].

[13] 42 U.S.C. 5172 (e)(2)(C).

[14] 6 U.S.C. 777, Section 689(j), 120 Stat. 1455.

Estimates." In its conclusion, FEMA's report on the Pilot Program notes the cost-estimating authority that already exists.

> The Grants Based on Estimates procedure allowed FEMA to implement a component of Stafford Act authority on cost estimating methodology that Congress authorized in the Disaster Mitigation Act of 2000 and for which the development of regulations is underway. [15]

The report does not explain the delay in the development of the regulations, but appears to indicate that work is moving in the direction of implementing regulations. Despite the long-standing hesitancy to implement this authority, this existing provision of law does provide the basis for formulating block grants for state and local governments that might speed federal aid after a catastrophic event.

Alternative Funding Proposals for Public Assistance

The idea of alternatives to the Public Assistance (PA) program has received attention in the past (as in the Cost Estimation authority discussed above) and has recently been the subject of some academic interest. In a recent paper, several observers pointed to rapid payments as a key to improved recovery following a catastrophic event.

> Where possible, money appropriated by Congress following a catastrophe should also be provided directly to state and local governments in the form of block grants. This will eliminate the burden and associated time delays placed on federal agencies as they distribute the assistance, and it will give state and local governments flexibility in using the money as they see fit.[16]

Advocates of rapid lump sum or block grants would still want to ensure some of the same accountability that is present in a reimbursable program, as the PA program is presently constituted. Arguably, there are examples of block grant programs that do retain accountability. For example, the Community Development Block Grant (CDBG) program at the Department of Housing and Urban Development (HUD) already plays a significant role in disaster recovery work. The CDBG program has 25 categories of eligible activities that present a broad array of possible projects.

A similar block grant could be developed for a post-disaster environment with categories adjusted to reflect the Stafford Act coverage and arguably to expand beyond it. One question of implementation would be how to determine that the amount of the block grant meets the needs of the affected area.

It is important to note at this point that while assistance to individuals and hazard mitigation grants are capped, there is no cap on the amount that may be spent for eligible PA projects. So the block grant is appealing for speed and clarity but it would likely be an amount certain while the PA amounts can change and accrue as the process is completed. One option might be to use the initial block grant as an incremental "down payment" on public disaster costs. Following the initial block grant, the regular PA Section 406 process could then be used to assure eligibility and to complete the funding of any projects beyond the initial block grant amount.

---

[15] U.S. Department of Homeland Security, Federal Emergency Management Agency, *FEMA Public Assistance Pilot Program, Fiscal Year 2009 Report to Congress,* May 20, 2009, p. 11.

[16] Mitchell Moss, Charles Schellhamer, and David A. Berman, "The Stafford Act and Priorities for Reform," *Journal of Homeland Security and Emergency Management,* vol. 6, Issue 1, 2009, p.14.

Currently, for most disasters, FEMA and the state jointly develop a preliminary damage assessment (PDA) to guide decision-making during the declaration process. FEMA's description of the PDA process follows.

> The PDA process is a mechanism used to determine the impact and magnitude of damage caused by a disaster. It summarizes resulting needs of individuals, businesses, public sector, and community as a whole. [17]

PDAs are carried out by FEMA regional staff along with state and local officials. In some instances, officials from the American Red Cross (ARC) and the Small Business Administration (SBA) or other organizations may also be invited to participate.

If the PDAs become central to a proposed block grant process, it may also be important to look at the PDA process and how it can be improved.[18] Further, if increased assistance for a catastrophic disaster becomes law, the importance of damage estimates will greatly increase. Not all damage is readily apparent at the outset of a disaster and it is also difficult to determine the extent of damage until flood waters recede or inspectors can assess seismic or other forms of damage. The facts behind the damage estimate will drive these processes, so their quality and accuracy will only grow in importance.

Discretion, Triggers and Thresholds

In discussions of alternative approaches for Public Assistance, the proposals generally assume that such alternate options would be available under a catastrophic or mega-disaster. What defines a catastrophic or mega-disaster? It could be left to the discretion of the President (or whomever he has delegated the authority) to determine what constitutes that level of disaster. By investing these authorities in the executive branch beforehand, it arguably would permit the swiftest, most flexible action without the necessity of new authorities being legislated as the disaster event unfolds. However, providing such discretion to leadership might only provide the possibility of effective action. Some executives may choose not to exercise the increased authority to designate a catastrophic event and instead seek out consistent policies with ample historical precedents. Conversely, the executive branch might also be tempted, or pressured, to invoke the use of the discretionary power too easily. While the measurements of pain and physical loss are difficult to set at certain levels, that approach may be necessary.

> For the purpose of establishing a national decision-and-action mechanism to take extraordinary steps, a definition is needed of conditions under which such a capacity would be brought to play. Otherwise, a special mechanism to respond could risk becoming a new form of moral hazard. Governors and congressional delegations would be tempted to pressure the President to declare their hurricane, fire, or blizzard eligible for special status in the hope that an extraordinary procedure would produce more financial and other aid than would be obtained through ordinary channels.[19]

A starting point for the triggering of a catastrophic tier could be built upon FEMA's current approach to adjusting the federal cost-share (from 75% to 90%) based on the per capita eligible disaster damage within a state. Under FEMA's current policy, a state is not considered for a reduced cost-share until it has

[17] *Preliminary Damage Assessment (PDA)* at [http://www.fema.gov/rebuild/recover/pda.shtm]. Note: this section of the FEMA web site includes actual PDA's used to determine both declarations and turn-downs.

[18] For additional discussion regarding PDA's, see CRS Report RL34146, *FEMA's Disaster Declaration Process: A Primer* by Francis X. McCarthy, Jan. 23, 2009, p. 8.

[19] Marc Landy and Richard Nathan, *The Role of the Federal Government in Mega disasters: Based from Lessons on Hurricane Katrina,* The Nelson Rockefeller Institute of Government, Feb. 9, 2009, p. 8.

reached per capita damage (that is the amount of eligible disaster damage divided by the population of the state) of $122.[20] However, recent congressional actions appear to have set aside this threshold for several disaster declarations and indicate the vulnerability of such a threshold not being observed.[21]

The per capita amounts in the existing cost-share waiver provisions arguably demonstrate the scope of an event and serve as at least a partial indicator of the impact on the state as a whole. In reviewing previous large disasters, only three have sustained damage that resulted in a per capita amount above $1,000. Those three events are the Northridge earthquake (California, $1,142), Hurricane Andrew (Florida, $2,628), and Hurricane Katrina (Louisiana, Mississippi, and Alabama, $6,545). Based on those events, a threshold amount for a catastrophic event in the range of $2,500 to $5,000 per capita, it could be argued, would be an initial indicator of great need and evidence that a disaster was catastrophic. Use of this amount would add some precision to the decision-making but would also emphasize the need for rapid assessments and estimates of damage.

Also a fixed and agreed upon amount for a threshold would remove some of the pressure to consider each disaster event as a potentially catastrophic one. The devastation of a large or a smaller disaster may not be different on a personal level, but matters of scope are important in determining new and extraordinary policies.

In addition to a more favorable cost-share, other actions could be taken to address a catastrophic event. One disaster response consultant addressed the possible pieces of a catastrophic disaster annex or tier that would incorporate changes beyond current disaster law and policy.

> A catastrophic declaration should also provide other key changes to normal disaster practice, such as the following:
>
> • It would extend key timelines for the delivery of disaster relief programs and disaster unemployment assistance.
>
> • It would make the cost of so called straight-time, force-account labor eligible for reimbursement if it is directly tied to the disaster effort.
>
> • The Annex would provide increased funding caps for Community Disaster Loans (CDLs), which are to assist local governments who have lost tax revenues and cannot cover operational costs.
>
> • It would fund operations related to the housing and care of displaced populations, both within the affected states and in other states where evacuees are housed.
>
> • A catastrophic annex would establish "gap funding" out of the president's Disaster Relief Fund to support the front-funding of relief efforts of other federal departments and agencies when their existing budgets are insufficient to meet immediate disaster-related needs. This provision would last until Congress can approve supplemental funding (institutionalized through legislation regulation, as appropriate).
>
> • It would provide clear authority for the use of Disaster Relief Fund expenditures to provide technical assistance to support long-term local, regional and state recovery planning and coordination; [and]

[20] Federal Emergency Management Agency, Declarations Unit, *Major Disasters – Cost Share Adjustments – 1985-2009,* May 6, 2009.

[21] P.L. 111-32, 123 Stat. 1883.

• the passage of a catastrophic annex to the Stafford Act should encourage the application of "common sense" flexibility in the delivery of disaster relief programs (as long as it is not expressly prohibited by law or regulation), and the rapid issuance and/or revision of guidance and policy to meet disaster needs. [22]

Summary of Congressional Options

In considering the range of possible approaches to improve disaster recovery performance, the choices might be distilled down to several alternatives, several of which may be connected.

- Provide discretion to the President, within the Stafford Act, to invoke authorities (including the block-granting of funds to states and localities) to provide a more rapid and comprehensive recovery.
- Install in law a trigger that, if reached, would set in motion a catastrophic annex or tier of increased and more flexible assistance and also trigger a notification to Congress of potential needs in resources and authorities.
- Place in law a listing of Stafford Act program changes that would take effect for a catastrophic event, including cost-shares for specific programs such as Public Assistance but also including Other Needs Assistance and Hazard Mitigation Assistance.
- Clearly define FEMA's role, and that of other agencies and departments, in long-term recovery planning and work.
- Direct FEMA to create a National Recovery Framework (NRF) similar to the National Response Framework but with an emphasis on long-term recovery program needs (this could help to frame the discretionary authorities for catastrophic events). This framework could also include alternative housing scenarios when large numbers of residents are displaced and define the FEMA-HUD relationship in disaster housing.
- Consider other department or agency authorities that should also be triggered by a catastrophic event, such as the Community Development Block Grant program.
- Continue to have Congress create a legislative recovery package, across the government, to address the unique needs of particular catastrophic events.
- Consider establishing in law a reporting framework so that all disaster spending (including but not limited to the Disaster Relief Fund) is captured and summarized for congressional review, particularly for catastrophic events.

I appreciate the opportunity to appear before you today and would welcome any questions you may have. Thank you for your time and attention.

[22] Drew Sachs, Vice President, Crisis and Consequence Management, James Lee Witt Associates, EIIP Virtual Forum Presentation, Sept. 24, 2008 at [http://www.emforum.org/vforum/Ic080924.htm].