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The Disaster Recovery Reform Act of 2018 (DRRA): Implementation Updates for Select Provisions

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SUMMARY

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The Disaster Recovery Reform Act of 2018 (DRRA): Implementation Updates for Select Provisions

Numerous natural disasters—including Hurricanes Harvey, Irma, and Maria in 2017 and the devastating wildfires in California during 2017 and 2018—served as catalysts for significant recent changes in federal emergency management policy. Most of these policy changes were included in the Disaster Recovery Reform Act of 2018 (DRRA; Division D of the FAA Reauthorization Act of 2018 (P.L. 115-254)). DRRA is the most comprehensive reform of the Federal Emergency Management Agency's (FEMA's) disaster assistance programs since the passage of the Sandy Recovery Improvement Act of 2013 (SRIA, Division B of P.L. 113-2) and the Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA, P.L. 109-295).

As with past disaster legislation, lessons learned from incidents and exercises revealed areas that could be improved through legislative and programmatic changes. DRRA was intended to improve disaster preparedness, response, recovery, and mitigation, including pre-disaster mitigation; clarify assistance program eligibility, processes, and limitations, including on the recoupment of funding; and increase FEMA's transparency and accountability. To accomplish these objectives, DRRA amended many sections of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, P.L. 93-288, as amended; 42 U.S.C. §§5121 et seq.), which is the foundational legislation for federal emergency authorities and disaster relief, as well as emergency management policy. In addition, DRRA included standalone authorities, and required rulemaking, reports to Congress, and other actions.

In DRRA's 46 sections, FEMA has identified 56 discrete requirements that are its responsibility to implement. As of December 7, 2020, FEMA reported that it has implemented 46 of these. This report examines select DRRA provisions that FEMA has implemented or is in the process of implementing, and focuses primarily on the DRRA provisions related to mitigation, Public Assistance, and oversight, for which FEMA is responsible for implementation. Particular attention is given to DRRA's provisions related to enhancing mitigation efforts. For example, a topic of significant congressional interest following DRRA's enactment related to the additional mitigation funding that would be made available through FEMA's new Building Resilient Infrastructure and Communities (BRIC) Grant Program, which replaced the Pre-Disaster Mitigation (PDM) Grant Program. Some of the in-progress DRRA provisions that are discussed herein relate to FEMA's rulemaking requirements. In particular, DRRA requires FEMA to review and revise the factors for evaluating a governor's request for Public Assistance (PA) pursuant to a major disaster declaration, which FEMA uses to make a recommendation to the President regarding whether to authorize the request for assistance. The effects of some of DRRA's provisions are interconnected. For example, the rulemaking to update the PA factors could result in fewer declared disasters. That, in turn, could result in a reduction in the amount of funding available for grant programs, such as BRIC. This could raise concerns about resilience if a decrease in federal assistance for response and recovery also results in a decrease in funding for preparedness and pre-disaster mitigation. Efforts to increase agency accountability, including with regard to recouping improper payments, a perennial subject of congressional interest, are also examined.

This report describes select significant implementation updates since DRRA's enactment, and includes policy considerations for Congress. A companion product, CRS Report R46774, *The Disaster Recovery Reform Act of 2018 (DRRA): Implementation Update Tables for Select Provisions*, provides tables that include updates on the status of FEMA's implementation of select DRRA provisions (i.e., implemented, in progress, or unverified). Further, detailed overviews of many DRRA sections, including descriptions of how various disaster assistance programs operated prior to DRRA's implementation and analysis of how DRRA's provisions modified these programs, as well as policy considerations, were previously examined in CRS Report R45819, *The Disaster Recovery Reform Act of 2018 (DRRA): A Summary of Selected Statutory Provisions*.

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Introduction

The Disaster Recovery Reform Act of 2018 (DRRA, Division D of P.L. 115-254) was enacted on October 5, 2018, and is the most comprehensive reform of the Federal Emergency Management Agency's (FEMA's) disaster assistance programs since the passage of the Sandy Recovery Improvement Act of 2013 (SRIA, Division B of P.L. 113-2) and the Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA, P.L. 109-295). DRRA's purpose is to improve pre-disaster planning and mitigation, response, and recovery, and increase FEMA accountability.[1] To accomplish these objectives, through DRRA, Congress amended many sections of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, P.L. 93-288, as amended; 42 U.S.C. §§5121 et seq.). The Stafford Act is the foundational legislation for federal emergency authorities, emergency management policy, and disaster relief to local, state, territorial, and Indian tribal governments, certain private nonprofit organizations, and individuals and families. DRRA also provided FEMA with new standalone authorities, and required rulemaking, reporting to Congress, and other actions.

DRRA is comprised of 46 sections (DRRA Sections 1201-1246). Most DRRA sections assign FEMA—specifically FEMA's Administrator—responsibility for implementing various required actions. In some cases, other federal entities or officers, such as the Department of Homeland Security Office of Inspector General (DHS OIG), are assigned responsibility for implementation. This report examines select DRRA provisions assigned to FEMA for implementation that the agency has reportedly implemented or is in the process of implementing. It focuses primarily on the DRRA provisions related to mitigation, Public Assistance, and accountability and oversight, for which FEMA is responsible for implementation. DRRA provisions assigned to non-FEMA federal entities or officers are not discussed herein.

As of December 7, 2020, FEMA reported that it had implemented 46 of DRRA's 56 discrete provisions assigned to the agency.[2] DRRA sections that FEMA is reportedly still in the process of implementing include provisions related to:

- rulemaking (see DRRA Sections 1211(a); 1235(d); and 1239(b));
- reporting to Congress (see DRRA Sections 1204(c); 1211; 1239(a); and 1240); and
- updating policies and issuing guidance (see DRRA Sections 1216(c); and 1228).

This report also offers policy considerations for Congress related to the enforcement of DRRA's implementation deadlines, and DRRA's implementation in light of the nation's response to the Coronavirus Disease 2019 (COVID-19) pandemic.

Some of the DRRA provisions described in this report are included in the tables of the companion report, CRS Report R46774, *The Disaster Recovery Reform Act of 2018 (DRRA): Implementation*

[1] U.S. Congress, House Committee on Transportation and Infrastructure, *Disaster Recovery Reform Act: Summarizing Division D of H.R. 302, As Amended*, 115th Cong, last accessed December 2018. This document is no longer available online, but copies may be requested by contacting CRS.

[2] Federal Emergency Management Agency (FEMA), "FEMA Bulletin: Week of December 21, 2020," December 23, 2020, https://content.govdelivery.com/accounts/USDHSFEMA/bulletins/2b2c129/. See also the Disaster Recovery Reform Act of 2018 (DRRA; Division D of the FAA Reauthorization Act of 2018 (P.L. 115-254)); and FEMA, *Disaster Recovery Reform Act (DRRA) Annual Report*, October 2019, https://www.fema.gov/sites/default/files/2020-07/fema_DRRA-annual-report_2019.pdf (hereinafter FEMA, *2019 DRRA Report*). With regard to DRRA's various provisions exceeding the number of DRRA sections, some DRRA sections include subsections that require one or more specific implementation actions.

Update Tables for Select Provisions. These provisions are indicated with an asterisk (*) in the tables of the companion report.

Additional background information on many of DRRA's provisions can be found in CRS Report R45819, *The Disaster Recovery Reform Act of 2018 (DRRA): A Summary of Selected Statutory Provisions*, which includes:

- an overview of the federal assistance programs as they existed prior to DRRA's enactment, and a discussion of how they were modified following DRRA's enactment;
- the context or rationale for program modifications or changes to disaster assistance policies following DRRA's enactment;
- potential considerations and issues for Congress;
- a table of amendments to the Stafford Act following DRRA's enactment; and
- tables of deadlines associated with DRRA's reporting, rulemaking and regulations, and other implementation actions and requirements (note that the tables included in this report are more up-to-date than the tables included in CRS Report R45819, and the tables in this report are organized by implementation status rather than the type of implementation action required).

Report Limitations and Caveats

The following limitations and caveats apply to this report:

- This report provides implementation updates for select aspects of provisions enacted in DRRA. It does not provide a universal analysis.
- The information included in this report is subject to change, including due to subsequent administrative or congressional actions.
- The implementation information included represents the best available information as of February 11, 2021 (or the date noted in the associated text or footnote).

Implementation status information is based on publicly available information and information reported by FEMA, including through correspondence between CRS staff and FEMA Office of External Affairs staff, FEMA's *Disaster Recovery Reform Act (DRRA) Annual Report*, 2019 (hereinafter FEMA, *2019 DRRA Report*), and FEMA's "Disaster Recovery Reform Act of 2018" website, available at https://www.fema.gov/disasters/disaster-recovery-reform-act-2018.

DRRA's Implementation

The following sections provide detailed information related to FEMA's actions to implement select DRRA provisions, including provisions prioritized by FEMA for implementation and other provisions that significantly changed federal assistance or authorities under the Stafford Act.

FEMA stated that it prioritized the implementation of five DRRA provisions that reduce risks from hazards and build capabilities:

1. Section 1215 (Management Costs);
2. Section 1222 (Stafford Act to Title V Hiring Authority (Performance of Services));
3. Section 1232 (Major Disaster Declaration Factors (Local Impact));
4. Section 1234 (National Public Infrastructure Pre-Disaster Hazard Mitigation); and

5. Section 1239 (Public Assistance Declaration Factors (Cost of Assistance Estimates)).[3]

In the two years since DRRA's enactment, FEMA has reported making progress towards implementing these provisions.[4]

Select DRRA provisions that significantly changed federal assistance or authorities under the Stafford Act are also discussed in more detail in this report, including with regard to:

- increasing support for mitigation efforts, including by replacing FEMA's Pre-Disaster Mitigation Grant Program with the Building Resilient Infrastructure and Communities (BRIC) Grant Program, and by providing funding for building code adoption and enforcement, authorizing Hazard Mitigation Grant Program (HMGP) funding for Fire Management Assistance Grant (FMAG) declarations, and authorizing the use of BRIC and HMGP assistance for activities that reduce earthquake risk and build early warning capability;
- amending FEMA's Public Assistance (PA) program, including with regard to the PA Alternative Procedures program and by allowing FEMA to provide PA to repair, reconstruct, or replace eligible facilities in accordance with "the latest published editions of relevant consensus-based codes, specifications, and standards that incorporate the latest hazard-resistant designs";
- requiring FEMA to issue rules, including to define the term "resilience," and revise the procedures for evaluating requests for PA pursuant to a major disaster declaration;
- increasing FEMA's accountability by requiring FEMA to publicly report information;
- preventing waste, fraud, and abuse of program assistance, including by amending the Stafford Act's duplication of benefits provision and providing clarification regarding the delivery sequence; and
- establishing statutes of limitations for the recoupment of federal assistance provided to individuals and households, and to PA Applicants.

These additional provisions focus on issues of congressional interest since DRRA's enactment.[5]

This report organizes discussion of DRRA implementation updates by:

- the type of FEMA assistance the provision relates to, including Mitigation and Public Assistance; or
- the function of the DRRA provision with regard to FEMA accountability and oversight, including management costs, timely closeout incentives, audit and review requirements for reimbursement, and prohibition on recoupment.

[3] FEMA, *2019 DRRA Report*, pp. v and 3. FEMA did not publish a DRRA Annual Report in 2020, but DRRA implementation updates can be found on FEMA's "Disaster Recovery Reform Act of 2018" webpage, available at https://www.fema.gov/disasters/disaster-recovery-reform-act-2018 (email from FEMA Office of External Affairs staff, October 15, 2020).

[4] FEMA, *2019 DRRA Report*, p. 1. According to FEMA, in order to expedite DRRA's implementation, FEMA identified accountable executives for each provision and established a Policy Coordination Group to oversee FEMA's implementation efforts.

[5] See U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, *Disaster Preparedness: DRRA Implementation and FEMA Readiness*, 116th Cong., 1st sess., May 22, 2019, p. vi.

FEMA's implementation priorities (with the exception of DRRA Section 1222) as well as select DRRA provisions that significantly changed federal assistance or authorities under the Stafford Act are described in more detail below.

Mitigation

FEMA provides the majority of funding for both pre- and post-disaster mitigation. It administers three mitigation programs, collectively referred to as Hazard Mitigation Assistance (HMA): (1) the Hazard Mitigation Grant Program (HMGP); (2) the Flood Mitigation Assistance Grant Program (FMA); and (3) the Pre-Disaster Mitigation Grant Program (PDM), which was reframed in 2020 as the Building Resilient Infrastructure and Communities (BRIC) program.[6]

The HMGP is authorized by Stafford Act Section 404—Hazard Mitigation[7] and is funded through the Disaster Relief Fund (DRF). HMGP's key purpose is to ensure that the opportunity to take critical mitigation measures is not lost during the reconstruction process following a disaster. HMGP funding is made available when it is requested by a governor or tribal chief executive following a major disaster declaration or the approval of a Fire Management Assistance Grant (FMAG). Eligible applicants include state, territorial, and local governments; federally recognized tribes or tribal organizations; and certain nonprofit organizations. The HMGP funding available for a given disaster is based on a percentage of the estimated total federal assistance provided under the Stafford Act.[8] The HMGP recipient must provide a 25% cost share, which can include a combination of cash and in-kind sources.

Funding for FMA and BRIC are awarded competitively. Applicants for all three programs must have hazard mitigation plans that meet the requirements of Stafford Act Section 322—Mitigation Planning[9] and 44 C.F.R. Part 201. The following sections provide updates on select DRRA provisions affecting FEMA's HMA programs.

Section 1234: National Public Infrastructure Pre-Disaster Hazard Mitigation[10]

DRRA Section 1234 authorized the President to annually set aside 6% of the estimated aggregate amount of grants made under seven sections of the Stafford Act, and move those funds from the Disaster Relief Fund (DRF) into a new National Public Infrastructure Pre-Disaster Mitigation Fund.[11] FEMA's expectation was that this fund would receive, on average, $300-$500 million per year to be used for pre-disaster mitigation.[12] The disaster assistance associated with the COVID-

[6] FEMA, "Building Resilient Infrastructure and Communities (BRIC)," https://www.fema.gov/bric.

[7] 42 U.S.C. §5170c.

[8] Hazard Mitigation Grant Program (HMGP) funding is based on the estimated aggregate grant amount made under 42 U.S.C. §§5170b, 5172, 5173, 5174, 5177, and 5173. See 44 C.F.R. §206.432(b) for the sliding scale to calculate HMGP assistance.

[9] 42 U.S.C. §5165.

[10] This section authored by Diane P. Horn, Analyst in Flood Insurance and Emergency Management.

[11] Stafford Act Sections 403, 406, 407, 408, 410, 416, and 428. For additional information, see CRS Report R45819, *The Disaster Recovery Reform Act of 2018 (DRRA): A Summary of Selected Statutory Provisions*, coordinated by Elizabeth M. Webster and Bruce R. Lindsay.

[12] U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, *Disaster Preparedness: DRRA Implementation and FEMA Readiness*, Serial No. 116-17 (House Hearing), 116th Cong., 1st sess., May 22, 2019, p. 90, https://www.govinfo.gov/content/pkg/CHRG-116hhrg40590/pdf/CHRG-116hhrg40590.pdf.

19 major disaster declarations,[13] however, has resulted in additional funding for pre-disaster mitigation. As of February 28, 2021, there was $1.055 billion set aside in the DRF for pre-disaster mitigation.[14] FEMA has not decided whether it will use all of BRIC's 6% set-aside funds each year, or retain some for future use.[15] If FEMA does not use all of the set-aside funding in a given year, it is unclear whether the funds will remain set aside for pre-disaster mitigation or be used for other disaster-related expenses.

Building Resilient Infrastructure and Communities (BRIC) Grant Program

As mentioned, the Building Resilient Infrastructure and Communities (BRIC) Grant Program[16] has replaced the Pre-Disaster Mitigation Grant Program. Any state that has had a major disaster declaration in the seven years prior to the application start date is eligible to apply.

All states, territories, and recognized tribal governments were eligible in FY2020 due to the COVID-19 disaster declarations. BRIC's FY2020 Notice of Funding Opportunity[17] was published on August 4, 2020. The application period opened on September 30, 2020, and applications had to be submitted by January 29, 2021.

A total of $500 million was made available in three categories:

1. state/territory allocation: $33.6 million;
2. tribal set-aside: $20 million; and
3. national competition: $446.4 million.

The priorities for BRIC in FY2020 are to incentivize:

- public infrastructure projects;
- projects that mitigate risk to one or more lifelines;
- projects that incorporate nature-based solutions; and
- adoption and enforcement of the latest published editions of building codes.

The maximum allocation for a state or territory in category (1) is $600,000. The state/territory allocation may be used for capability and capacity-building (C&CB) activities and/or mitigation projects. Up to $300,000 of the state/territory allocation may be used for mitigation planning and planning-related activities per applicant. States are no longer guaranteed a minimum amount as they were under PDM. However, according to FEMA, projects submitted in category (1) should be funded up to the $600,000 maximum if they submit eligible applications up to this limit.[18]

The maximum that a tribe may be awarded in category (2) is $600,000 for C&CB activities; however, a tribal applicant applying for assistance under the tribal set-aside can be awarded more than $600,000 if they also pursue mitigation projects. No single tribal entity can receive more than $600,000 federal cost share for C&CB activities. Up to $300,000 of the tribal set-aside may be used for mitigation planning and planning-related activities per applicant. Up to 10% of any

[13] FEMA, *COVID-19 Disaster Declarations*, https://www.fema.gov/disasters/coronavirus/disaster-declarations.

[14] FEMA, *Disaster Relief Fund: Monthly Report as of February 28, 2021*, Fiscal Year 2021 Report to Congress, p. 4, March 11, 2021, https://www.fema.gov/sites/default/files/documents/fema_mar-2021-disaster-relief-fund-report.pdf.

[15] FEMA briefing on BRIC for House Homeland Security Committee staff and CRS, September 2, 2020.

[16] FEMA, "Building Resilient Infrastructure and Communities (BRIC)," https://www.fema.gov/bric.

[17] Department of Homeland Security, *Notice of Funding Opportunity (NOFO) FY 2020 Building Resilient Infrastructure and Communities*, https://www.fema.gov/sites/default/files/2020-08/fema_fy20-bric-notice-of-funding-opportunity_federal-register_August-2020.pdf.

[18] FEMA briefing on BRIC for House Homeland Security Committee staff and CRS, September 2, 2020.

sub-application may be used for information dissemination activities. If the $20 million tribal set-aside is not fully used for C&CB activities, the remainder will be available to tribes for mitigation projects. If more than $20 million in applications are submitted under the tribal set-aside, the highest-ranked C&CB activities and mitigation projects applications will be selected. All remaining tribal mitigation project applications will be evaluated under the national competition.

Applicants may submit an unlimited number of mitigation project applications in category (3), each valued up to $50 million. There is no minimum amount that applicants can request. BRIC's $50 million cap for an individual mitigation project represents a significant increase; the largest amount available to an individual for PDM activities in FY2019 was $10 million. Since the PDM program was established in 2003, only two projects have been awarded more than $4 million, and 280 projects (approximately 7%) have been awarded more than $1 million.[19] A new feature of BRIC is that it will provide nonfinancial direct technical assistance[20] for communities to build capacity and develop applications.

Another feature of BRIC is that projects submitted to the national competition will be reviewed on both technical criteria[21] and qualitative criteria,[22] such as risk reduction effectiveness, partnerships, and future conditions. If needed, based on the number of applications, FEMA is to use the technical criteria evaluation as a screening tool for the qualitative evaluation review and is to send applications valued up to twice the amount of available funding for qualitative evaluation. At least one eligible application from each applicant is to be sent for qualitative review. FEMA is to convene a National Review Panel to score applications on qualitative criteria. This panel is to include FEMA Regional Office and Headquarters staff, as well as representatives from state, local, tribal, and territorial governments and other federal agencies.

The most heavily weighted technical criteria relate to building code activities,[23] reflecting FEMA's emphasis on disaster resilience through strong building codes. Applications can receive technical criteria points for mandatory building code adoption requirements and rating in the Building Code Effectiveness Grading Schedule.[24] Incorporation of nature-based solutions[25] also attracts technical points, as does mitigating risk to one or more community lifelines,[26] such as safety and security, health and medical, energy, communications, transportation, hazardous material management, and food, water, and shelter.

BRIC's focus on future conditions represents a departure from PDM, and applications will be evaluated on how the project would anticipate future conditions, such as population and

[19] CRS analysis of OpenFEMA data set on Hazard Mitigation Assistance Projects—v2, at https://www.fema.gov/openfema-data-page/hazard-mitigation-assistance-projects-v2. Accessed January 25, 2021.

[20] FEMA, *BRIC Direct Technical Assistance*, program support material, August 2020, https://www.fema.gov/sites/default/files/2020-08/fema_bric-direct-techinical-assistance_support_document_08-2020.pdf.

[21] FEMA, *BRIC Technical Criteria*, program support material, August 2020, https://www.fema.gov/sites/default/files/2020-08/fema_bric-technical-criteria-support-document_08-01-2020_0.PDF.

[22] FEMA, *BRIC Qualitative Criteria*, program support material, August 2020, https://www.fema.gov/sites/default/files/2020-08/fema_bric-qualitative-criteria_support_document_08-2020.pdf.

[23] FEMA, *BRIC Building Code Activities*, program support material, August 2020, https://www.fema.gov/sites/default/files/2020-08/fema_bric-and-building-codes_support_document_August_2020.pdf.

[24] Insurance Services Office (ISO), *ISO's Building Code Effectiveness Grading Schedule (BCEGS)*, https://www.isomitigation.com/bcegs/.

[25] FEMA, *Building Community Resilience with Nature-Based Solutions: A Guide for Local Communities*, https://www.fema.gov/sites/default/files/2020-08/fema_riskmap_nature-based-solutions-guide_2020.pdf.

[26] FEMA, "Community Lifelines," https://www.fema.gov/emergency-managers/practitioners/lifelines.

demographics, climate change, and sea level rise. BRIC also puts a new emphasis on partnerships,[27] which can receive both technical and qualitative points.

The increase in funding for pre-disaster mitigation may lead to challenges in meeting the nonfederal cost share for small, impoverished, or rural communities. Generally, BRIC's cost share is 75% federal and 25% nonfederal, but small, impoverished communities are eligible for an increase in cost share up to 90% federal and 10% nonfederal. FEMA encourages innovative use of public and private-sector partnerships to meet the nonfederal cost share, which may consist of cash, donated or third-party in-kind services, materials, or any combination thereof.[28] Despite this, many communities have found it difficult to meet the cost share requirements, particularly as state, local, tribal, and territorial (SLTT) resources have been reduced during the pandemic. Requests for increases in the federal cost share have received bipartisan support.[29]

Some stakeholders have expressed concern that smaller or more traditional projects may be less likely to obtain support in BRIC, and that small, impoverished, or rural communities may not have the capacity to apply for and administer larger amounts, which could be funded by BRIC.[30] FEMA has tried to mitigate such concerns through the introduction of new criteria for assessing applications, such as Qualitative Criterion 4: Population Impacted,[31] which includes factors such as the percentage of the population that will directly benefit from the project and the impacts of the project on socially vulnerable populations. FEMA's intention with this criterion is to ensure that a small community proposing a project that would benefit 95% of the population would score higher than a large city proposing a project that would only benefit one or two neighborhoods.[32]

FEMA has released some information about the applications to BRIC in FY2020. FEMA received 980 applications for BRIC, the highest number received to date for pre-disaster mitigation, with total requests of nearly $3.6 billion. Fifty-three states and territories applied for BRIC funding. Tribes submitted 62 sub-applications requesting an estimated $20.2 million in funding. Twenty-five states each submitted multiple projects totaling $50 million or more federal share, and five states each submitted applications totaling over $200 million federal share. FEMA received seven applications for which project amounts reached the maximum of $50 million.[33] Congress may wish to examine the awards under BRIC to look at the balance of funding between large and small awards. Congress may also wish to require FEMA to report on lessons learned from the first year of the BRIC program.

[27] FEMA, *BRIC Partnership Activities*, program support material, August 2020, https://www.fema.gov/sites/default/files/2020-08/fema_bric-partnership-activities_support_document_08-2020.pdf.

[28] FEMA briefing on BRIC for House Homeland Security Committee staff and CRS, September 2, 2020.

[29] See, for example, Letter from Rep. Bill Pascrell, D-NJ, Rep. John Rutherford, R-FL, et al. to President Donald J. Trump, April 20, 2020, https://pascrell.house.gov/uploadedfiles/fema_cost_share_letter_to_potus_-_final.pdf; and Letter from Max Rose, D-NY, https://insurancenewsnet.com/oarticle/reps-rose-calls-for-fema-to-expand-hazard-funding-to-include-covid-19-pandemic-response-efforts.

[30] See, for example, FEMA, "Summary of Stakeholder Feedback: Building Resilient Infrastructure and Communities (BRIC)," https://www.fema.gov/sites/default/files/2020-06/fema_bric-summary-of-stakeholder-feedback-report.pdf.

[31] FEMA, "BRIC Qualitative Criteria," program support material, August 2020, https://www.fema.gov/sites/default/files/2020-08/fema_bric-qualitative-criteria_support_document_08-2020.pdf.

[32] FEMA briefing on BRIC for House Homeland Security Committee staff and CRS, September 2, 2020.

[33] FEMA, *Fiscal Year 2020 Flood Mitigation Assistance and Building Resilient Infrastructure and Communities Update*, provided by FEMA Congressional Affairs Staff, March 17, 2021.

Information on how the COVID-19 pandemic may affect the BRIC program, as well as considerations for Congress, can be found in the "DRRA Section 1234 Available BRIC Funding Based on the Estimated Aggregate Amount of Funding Awarded for COVID-19" section.

Sections 1206(a) and 1206(b): Eligibility for Code Implementation and Enforcement[34]

DRRA Section 1206(a) amended Stafford Act Section 402—General Federal Assistance[35] to allow state and local governments to use general federal assistance funds for the administration and enforcement of building codes and floodplain management ordinances. This section included assistance for inspections for substantial damage[36] compliance, a requirement of the National Flood Insurance Program. If a building in a Special Flood Hazard Area (SFHA)[37] is determined to be substantially damaged, it must be brought into compliance with local floodplain management standards. FEMA does not make a determination of substantial damage. This is the responsibility of local governments, and making such determinations may be challenging, particularly after a major flood where many properties may need to be assessed at the same time. DRRA Section 1206(a) provides an additional source of funding for local governments to carry out such activities.

Section 1206(b) amended Stafford Act Section 406—Repair, Restoration, and Replacement of Damaged Facilities[38] to add base and overtime wages for extra hires to facilitate implementation and enforcement of adopted building codes as an allowable expense for a period of not more than 180 days after the major disaster is declared.

FEMA implemented these two sections by publishing the "Building Code and Floodplain Management Administration and Enforcement" Policy on October 19, 2020. The policy went into effect on November 1, 2020.[39] The policy's intent is to provide communities with the resources needed to administer and enforce state and local building codes and local floodplain ordinances. FEMA chose to implement this policy only for Public Assistance.[40] For all disasters declared on or after November 1, 2020, eligible costs under Section 1206(b) can be reimbursed under the provisions of this policy. For major disaster declarations that were declared between August 1, 2017, and November 1, 2020, PA Applicants could choose whether or not to opt in to the policy and have eligible costs reimbursed. However, they were required to opt in no later than February 1, 2021, or 90 days after the date of the Recovery Scoping Meeting (RSM) for Applicants that have not yet participated in their RSM.[41]

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[34] This section authored by Diane P. Horn, Analyst in Flood Insurance and Emergency Management.

[35] 42 U.S.C. §5170a.

[36] 44 C.F.R. §59.1 defines *substantial damage* as damage of any origin sustained by a structure in a Special Flood Hazard Area (SFHA) whereby the cost of restoring the structure to its before-damaged condition would equal or exceed 50% of the structure's market value before the damage occurred.

[37] An SFHA is defined by FEMA as an area with a 1% or greater risk of flooding every year.

[38] 42 U.S.C. §5172.

[39] FEMA, *Building Code and Floodplain Management Administration and Enforcement*, FEMA Policy FP 204-079-01, October 19, 2020, pp. 1-2, https://www.fema.gov/sites/default/files/2020-10/fema_building-dode-floodplain-management-ddministration-enforcement-policy_drra-1206_signed_10-15-2020.pdf (hereinafter FEMA, *Building Code and Floodplain Management Administration and Enforcement*).

[40] FEMA, *Building Code and Floodplain Management Administration and Enforcement*, p. 1.

[41] FEMA, *Building Code and Floodplain Management Administration and Enforcement*, p. 12.

FEMA instituted a separate procedure to support communities who lack the capacity to perform or contract for data collection for substantial damage determinations due to the extreme catastrophic nature of an event or a demonstrated lack of resources. Such work can be funded on request through FEMA's Substantial Damage Data Collection Contract, which is funded as a task order under the Risk Management Division of FEMA's Federal Insurance and Mitigation Administration.[42]

Building Codes

Building codes are officially adopted comprehensive specifications regulating building construction, materials, and performance to protect public health, safety, and welfare.[43] Building codes in the United States are not regulated at the federal level, and there are no national building codes. Rather than create and maintain their own codes, most states and local jurisdictions adopt model codes that are created on a national or international level by standards-developing organizations, and amend them prior to adoption into state laws and local ordinances, making compliance a requirement for builders and building owners. The most commonly-used building codes are developed by the International Code Council (ICC),[44] known as International Codes, or I-Codes, which are updated every three years. The most recently released version is the 2021 edition; however, FEMA has defined 'modern building codes' as the two most recent editions of the I-Codes (2015 and 2018 editions).[45]

Although the process of developing building codes is often initiated at the state level through a legislative and public policy process, the final adoption, administration, and enforcement of a building code is a local responsibility. The federal government cannot mandate the level of code enforcement in states or communities. Currently, most states adopt building codes at the state level, though many do not require or enforce building codes at the local level, allowing local jurisdictions to manage their own adoption practices. To address local concerns, states and communities typically make amendments and modifications, including higher or lower standards, additions, and deletions.[46] Some states have rigorous enforcement programs, some designate responsibility for code enforcement to local jurisdictions, and some states and other jurisdictions do not require enforcement.[47] Adoption of building codes is uneven within and across states, even in areas with high levels of hazard. Less than half of jurisdictions have hazard-resistant codes, with residential buildings accounting for over 80% of damage.[48]

Risk reduction from the implementation of building codes is due to both the extent of the code as it applies to new construction and the degree of local adoption and enforcement. The implementation of provisions of a strict building code depends on both the permitting and the inspection process.[49] However, building code adoption and enforcement is an ongoing process

[42] FEMA, *Building Code and Floodplain Management Administration and Enforcement*, pp. 8-9.

[43] FEMA, Building Science Branch Brochure, January 2016, p. 2, https://www.fema.gov/sites/default/files/2020-07/fema_bsb_factsheet_02112016.pdf.

[44] The International Code Council (ICC) is a non-profit organization which was formed to develop national model construction codes. See https://www.iccsafe.org/ for further information.

[45] FEMA, *Building Codes Save: A Nationwide Study, Losses Avoided as a Result of Adopting Hazard-Resistant Building Codes*, Washington, DC, November 27, 2020, p. 1-1, https://www.fema.gov/sites/default/files/2020-11/fema_building-codes-save_study.pdf (hereinafter FEMA, *Building Codes Save*).

[46] FEMA, *Building Codes Save*, p. 1-5.

[47] FEMA, *Building Codes Save*, pp. 3-4 and 3-5.

[48] FEMA, *Building Codes Save*, p. 1-1 (see "Natural Disaster Snapshot of the US" textbox).

[49] Ellen Vaughan and Jim Turner, *The Value and Impact of Building Codes*, 2014, pp. 1-27,

that must be continuously maintained. Many jurisdictions across the United States face budgetary challenges, particularly since the beginning of the COVID-19 pandemic. At the local level, where code adoption and enforcement is conducted, the financial and technical lack of resources can affect the ability of local officials to ensure that new buildings satisfy the code requirements.[50] The provisions of DRRA Section 1206 provide some additional resources to assist local governments under the circumstances described above.

Section 1204: Wildfire Mitigation[51]

Section 1204 of DRRA amended Stafford Act Sections 420—Fire Management Assistance and 404(a)—Hazard Mitigation[52] to add Hazard Mitigation Grant Program (HMGP) funding as an available form of assistance for Fire Management Assistance Grant (FMAG) declarations. HMGP funds mitigation and resiliency projects and programs. The receiving state, territory, or tribal government can use HMGP funding for any eligible activity that reduces risk and builds resilience. Prior to Section 1204, HMGP was only provided for a major disaster declared pursuant to the Stafford Act. There have been 107 FMAG declarations since DRRA's enactment: 4 in 2018, 25 in 2019, and 78 in 2020.[53] Information is not readily available on publicly accessible websites indicating how much HMGP funding has been awarded for FMAG declarations.

DRRA Section 1204 also required FEMA's Administrator to submit a report one year after enactment (and annually thereafter) summarizing any mitigation projects carried out under an FMAG declaration (including funding amounts) to the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Transportation and Infrastructure, and the House and Senate Committees on Appropriations. At the time of this writing, the DRRA 1204 congressional report is drafted and moving through the concurrence review process within FEMA's Mitigation Directorate.[54]

Section 1233: Additional Hazard Mitigation Activities[55]

DRRA Section 1233 authorized FEMA to provide hazard mitigation assistance through the Hazard Mitigation Grant Program (HMGP) and the Building Resilient Infrastructure and Communities Program (BRIC) for activities that reduce earthquake risk and build early warning capability. One approach to accomplish these goals is developing an earthquake early-warning (EEW) system that would send a warning after the occurrence of an earthquake, but before the damaging seismic waves reach a potentially affected community.[56] Section 1233 addressed three areas of earthquake mitigation, all related to improving the capability for an EEW system:

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http://www.coalition4safety.org/ccsc-toolkit/.

[50] Ellen Vaughan and Jim Turner, *The Value and Impact of Building Codes*, 2014, p. 18, http://www.coalition4safety.org/ccsc-toolkit/.

[51] This section authored by Bruce R. Lindsay, Specialist in American National Government.

[52] Stafford Act Section 420, 42 U.S.C. §5187; Stafford Act Section 404(a), 42 U.S.C. §5170c(a).

[53] CRS analysis of Fire Management Assistance Grant (FMAG) declarations at https://www.fema.gov/disasters/disaster-declarations. No data for 2021 is available on this website. Information regarding the FMAG declaration process can be found on the FEMA "Fire Management Assistance Grants" website, available at https://www.fema.gov/assistance/public/fire-management-assistance.

[54] Per email from FEMA Office of External Affairs staff on January 5, 2021.

[55] This section authored by Anna E. Normand, Analyst in Natural Resources Policy.

[56] U.S. Geological Survey (USGS), Earthquake Hazards, "Early Warning," https://www.usgs.gov/natural-hazards/earthquake-hazards/early-warning (hereinafter USGS, "Early Warning").

1. improvements to regional seismic networks;
2. improvements to geodetic networks; and
3. improvements to seismometers, global positioning system (GPS) receivers, and associated infrastructure.

On September 30, 2020, FEMA published a factsheet titled "Disaster Recovery Reform Act and Earthquake Early Warning Systems" describing how FEMA would begin to consider proposals for certain assistance under this authority and how the agency continues discussing how to evaluate other authorized assistance.[57] Because FEMA's hazard mitigation assistance programs require long-term effectiveness, FEMA determined that any improvements awarded by the programs must be part of a system that enables end user notification of EEW.[58] Currently, the Advanced National Seismic System (ANSS) ShakeAlert system, which the U.S. Geological Survey (USGS) and the states of California, Oregon, and Washington are building cooperatively, is the only EEW system that enables end user notification.[59] For now, FEMA will consider proposals under both HMGP and BRIC to fund the purchase and installation of seismometers, GPS receivers, and associated infrastructure (telemetry and signal processing) to build additional capability for ANSS ShakeAlert.[60] Increasing the density of this infrastructure can reduce earthquake detection times, thus allowing warnings to be issued faster.[61]

In the factsheet, FEMA reported that it was coordinating with the USGS and other key stakeholders to determine how to document and evaluate other EEW instrumentation projects and activities. Other seismically active western states, such as Alaska, may also be incorporated into an early-warning system and eligible for assistance, but such expansion may include challenges (e.g., the vast size and remote locations of the seismically active area).[62] Another challenge facing EEW systems is the current limitations of mass messaging technologies that are unable to send messages to large numbers of cell phones without delays.[63] Section 1233 assistance does not address that challenge.

FEMA stated that additional earthquake risk reduction activities already eligible under the current Hazard Mitigation Assistance Guidance of 2015, including seismic retrofits, remained eligible.[64]

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[57] FEMA, "Disaster Recovery Reform Act and Earthquake Early Warning Systems," fact sheet, September 30, 2020, https://www.fema.gov/sites/default/files/2020-09/fema_drra-earthquake-early-warning-systems_fact-sheet_September-2020.pdf.

[58] FEMA also stated that the public must be able to access data for free and that FEMA would not fund operations or maintenance cost for support of a network or earthquake early-warning (EEW) system operations.

[59] D.D. Given et al., *Revised Technical Implementation Plan for the ShakeAlert System—An Earthquake Early Warning System for the West Coast of the United States*, USGS, Open-File Report 2018–1155, 2018, https://doi.org/10.3133/ofr20181155. ShakeAlert is operational in California and Oregon. Washington's EEW program is scheduled to be operational in May 2021 (personal correspondence between CRS and USGS Legislative Affairs, March 12, 2021; J.J. McGuire et al., *Expected Warning Times from the ShakeAlert Earthquake Early Warning System for Earthquakes in the Pacific Northwest*, U.S. Geological Survey, Open-File Report 2021–1026, 2021, https://doi.org/10.3133/ofr20211026).

[60] FEMA stated that it would evaluate proposals for technical feasibility, cost-effectiveness, and other program requirements, but would not need a traditional benefit-cost analysis.

[61] USGS, "Early Warning."

[62] J.B. Salisbury et al., *Earthquake Early Warning System for Alaska: Fact Sheet*, Alaska Division of Geological and Geophysical Surveys, DGGS IC 88, May 2020, https://dggs.alaska.gov/webpubs/dggs/ic/text/ic088.pdf.

[63] USGS, "Early Warning"; David J. Wald, "Practical Limitations of Earthquake Early Warning," *Earthquake Spectra* 36, no. 3 (August 2020), pp. 1412-1447, https://doi.org/10.1177/8755293020911388.

[64] FEMA, *Hazard Mitigation Assistance Guidance*, February 27, 2015, https://www.fema.gov/sites/default/files/2020-07/fy15_HMA_Guidance.pdf.

Public Assistance[65]

FEMA's Public Assistance (PA) program, authorized in the Stafford Act, provides grant assistance to state, tribal, territorial, and local governments as well as eligible nonprofits (Applicants) for eligible response and recovery costs following a Stafford Act emergency or major disaster declaration.[66] Following an incident, a governor or tribal chief executive may find that state, local, tribal, or territorial (SLTT) resources are insufficient to meet the demands of response and recovery, and then request federal assistance. The President may then authorize PA through a Stafford Act declaration.[67] The Stafford Act authorizes the President, through FEMA, to reimburse Applicants for at least 75% of the eligible costs of response (called *Emergency Work)* and reconstruction (called *Permanent Work*). The following sections provide updates on select DRRA provisions affecting FEMA's PA program.

Section 1207(c) and (d): Program Improvements (Public Assistance Alternative Procedures)

DRRA Sections 1207(c) and (d) modify the process known as PA Alternative Procedures. The Sandy Recovery Improvement Act (SRIA) amended the Stafford Act to authorize Alternative Procedures in the wake of Hurricane Sandy in 2012, in order to reduce costs, reward timely and adept completion of PA projects, and allow Applicants to complete projects on basis of need rather than pre-disaster design.[68] Alternative Procedures modify the standard procedures used to deliver PA to Applicants. Under standard procedures, PA awards are based on the actual costs of executed response and recovery work. Under Alternative Procedures, the awards are capped based on up-front estimates of the cost of work to be completed.[69] Applicants are responsible for any costs that exceed estimates, but they may retain excess funds if estimates exceed actual costs, in addition to other flexibilities. Applicants have followed Alternative Procedures on a project-by-project basis in disasters in 49 states and five territories as of August 2020, according to FEMA data.[70]

Section 1207(c)—Conditioning of Assistance on Use of Alternative Procedures

DRRA Section 1207(c) reinforced SRIA's requirement that Applicants must voluntarily elect to use Alternative Procedures.[71] Congress revisited this issue again following the declaration of a

[65] This section authored by Erica A. Lee, Analyst in Emergency Management and Disaster Recovery.

[66] Public Assistance is authorized under Stafford Act Sections 402, 403, 406, 407, 418, 419, 428, and 502; 42 U.S.C. §§5170a, 5170b, 5172, 5173, 5185, 5186, 5189f, and 5192. See also 44 C.F.R. §§206.200-209, §§206.220-228, and §§206.250-253; and FEMA, *Public Assistance Program and Policy Guide (PAPPG)*, FP 104-009-2, effective June 1, 2020, https://www.fema.gov/sites/default/files/documents/fema_pappg-v4-updated-links_policy_6-1-2020.pdf (hereinafter FEMA, *PAPPG 2020*).

[67] For more information, see CRS In Focus IF11529, *A Brief Overview of FEMA's Public Assistance Program*, by Erica A. Lee.

[68] The Sandy Recovery Improvement Act (SRIA), P.L. 113-2, 127 Stat. 39; Stafford Act Section 428. The Public Assistance Program Alternative Procedures are codified at Section 1102 of SRIA; 42 U.S.C. §5189(f).

[69] For more information, see CRS Report R46609, *The Status of Puerto Rico's Recovery and Ongoing Challenges Following Hurricanes Irma and María: FEMA, SBA, and HUD Assistance*, coordinated by Elizabeth M. Webster, pp. 15-18.

[70] CRS Analysis of data provided to CRS by the FEMA Office of External Affairs, as of August 2020. The data do not reflect any Section 428 projects for the state of Utah.

[71] Section 1207(c) of DRRA, P.L. 115-254, as it amends §428(d) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5189f(d). See also The Sandy Recovery Improvement Act (SRIA), P.L. 113-2, 127 Stat. 39; Stafford Act

major disaster in Puerto Rico for Hurricanes Irma and María. In November 2017, President Donald J. Trump increased the federal cost share for PA for hurricane recovery in Puerto Rico from 75% to 90% on the condition that all large PA reconstruction projects proceed under Alternative Procedures.[72] Members of Congress expressed concern over whether Puerto Rico had voluntarily elected to use Alternative Procedures in this case,[73] as required by SRIA.[74] Subsequently, the enactment of DRRA Section 1207(c) explicitly prohibited the President from conditioning the provision of Stafford Act assistance on the use of Alternative Procedures.

In October 2019, FEMA reported on the provision's implementation. FEMA explained that the provision "reinforces current law and policy that use of PA Alternative Procedures is voluntary and optional for each applicant."[75] Additionally, FEMA incorporated this guidance into the most recent *Public Assistance Program and Policy Guide*.[76]

Section 1207(d)—Alternative Procedures Cost Estimates

DRRA Section 1207(d) modified FEMA's authorities to evaluate PA Alternative Procedures cost estimates.[77] The provision requires that FEMA consider costs "reasonable and eligible" once estimates are accepted by FEMA and certified by a professionally licensed engineer, unless there is evidence of fraud.[78] Previously, FEMA had the discretion to determine the reasonability and eligibility of these costs.

Defining "Reasonable" Costs

Federal regulations define a cost as reasonable "if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." 2 C.F.R. §200.404.

In October 2019, FEMA reported that this provision was "immediately effective" upon DRRA's enactment.[79] FEMA released additional guidance explaining that after FEMA and Applicants agree to PA Alternative Procedures cost estimates, "FEMA will not adjust Federal funding on the

Section 428. The Public Assistance Program Alternative Procedures are codified at Section 1102 of SRIA; 42 U.S.C. §5189(f).

[72] FEMA, "Puerto Rico; Amendment No. 5 to Notice of a Major Disaster Declaration," 82 *Federal Register* 53514, November 16, 2017. In FY2017, large projects were defined as those that exceed $123,100. FEMA, "Per Capita Impact Indicator and Project Thresholds," https://www.fema.gov/assistance/public/applicants/per-capita-impact-indicator.

[73] Letter from Peter A. DeFazio, Ranking Member, Committee on Transportation and Infrastructure, Bennie G. Thompson, Ranking Member, Committee on Homeland Security, and Frank Pallone, Jr., Ranking Member, Committee on Energy and Commerce, to William B. "Brock" Long, FEMA Administrator, March 20, 2018; Letter from Senators Robert Menendez, Sherrod Brown, Elizabeth Warren, and Catherine Cortez Masto, to Kathy Kraniger, OMB Program Associate Director, July 10, 2018, pp. 2-3; Rep. DeFazio, U.S. Congress, House Committee on Transportation and Infrastructure, *Emergency Response and Recovery: Central Takeaways from the Unprecedented Hurricane Season*, hearing, 115th Cong., 1st sess., Nov. 2, 2017, H.Hrg. 115-29 (Washington, DC: GPO, 2017), p. 95.

[74] Section 1102 of SRIA, P.L. 113-2, 127 Stat. 41, as codified at 42 U.S.C. §5189f(f), Section 428(d)(1) of the Stafford Act.

[75] FEMA, *2019 DRRA Report*, p. 16.

[76] FEMA, *PAPPG 2020*.

[77] Section 1207(d) of DRRA, P.L. 115-254, as it amends §428(e)(1) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5189f(e)(1).

[78] Section 1207(d) of DRRA, P.L. 115-254, as it amends §428(e)(1) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5189f(e)(1).

[79] FEMA, *2019 DRRA Report*, p. 16.

basis of reasonableness or eligibility provided the Applicant completes the approved scope of work."[80]

Section 1235(b) and (d): Additional Mitigation Activities

DRRA Section 1235 modifies PA authorities to support Congress's stated aim to incentivize "building and rebuilding better to facilitate recovery efforts … [and] save [through] avoided disaster recovery costs."[81] FEMA explained that new authorities will "increase the resiliency of communities after a disaster … protect lives and property … and support the efficient use of federal dollars."[82]

Section 1235(b)—PA to Repair to Hazard-Resistant and Resilient Standards

DRRA Section 1235(b) requires FEMA to provide PA for the costs of repairing, reconstructing, and replacing eligible disaster-damaged facilities in accordance with the most recent, consensus-based building codes and standards and hazard-resistant design.

Prior to DRRA's enactment, the Stafford Act authorized FEMA to provide PA for the costs of reconstructing a disaster-damaged facility

> (i) on the basis of the design of the facility as the facility existed immediately before the major disaster; and
>
> (ii) in conformity with codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or under the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) applicable at the time at which the disaster occurred.[83]

Under this authority, FEMA regulations required facilities receiving PA to rebuild in accordance with codes that met specific criteria established in regulations, with additional standards established in evolving agency policy.[84]

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[80] FEMA, "Fact Sheet: Disaster Recovery Reform Act Public Assistance Program Amendments," July 2019, pp. 1-2, https://www.fema.gov/sites/default/files/2020-07/fema_pa_disaster-recovery-reform-act_factsheet.pdf.

[81] U.S. Congress, House Committee on Transportation and Infrastructure, *Disaster Recovery Reform Act*, report to accompany H.R. 4460, 115th Cong., 2nd sess., H.Rept. 115-1098, part 1 (Washington, DC: GPO, 2018), pp. 15-16; see also U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Disaster Recovery Reform Act of 2018*, report to accompany S. 3041, 115th Cong., 2nd sess., S.Rept. 115-446 (Washington, DC: GPO, 2018), pp. 2-4.

[82] FEMA, "Interim Policy: Consensus-Based Codes, Specifications and Standards for Public Assistance (Version 2)," December 20, 2019, p. 18, https://www.fema.gov/sites/default/files/2020-05/DRRA1235b_Consensus_BasedCodes_Specifications_and_Standards_for_Public_Assistance122019.pdf (hereinafter FEMA, "Interim Policy: Consensus-Based Codes V. 2").

[83] Stafford Act Section 406 (e)(1)(A); 42 U.S.C. §5172(e)(1)(A) (2012 Supplement V, January 12, 2018); see also Stafford Act Section 323; 42 U.S.C. §5165a.

[84] See 44 C.F.R. §§206.400-402 and §206.226(d). For the most recent guidance on the provision of PA with respect to building codes and standards prior to the enactment of DRRA, see FEMA, *Public Assistance Program and Policy Guide*, v. 3.1, FP 104-009-2, April 2018, pp. 87-94, https://www.fema.gov/sites/default/files/documents/fema_pappg-v3.1-archived_policy_5-4-2018.pdf. See also, FEMA, *Disaster Risk Reduction Minimum Codes and Standards*, FEMA Policy 204-078-2, September 6, 2016, https://www.iccsafe.org/wp-content/uploads/FP-204-078-2.pdf; and FEMA, *Public Assistance Required Minimum Standards*, FEMA Recovery Policy FP-104-009-4, September 30, 2016, https://www.fema.gov/sites/default/files/2020-05/FEMA_Public_Assistance_Minimum_Standards_Policy_signed_9-30-16.pdf.

Prior to DRRA's enactment, some Members of Congress expressed concern that PA may have been provided to rebuild facilities to pre-disaster condition—even if those facilities were subject to weak building codes and/or situated in disaster-prone areas. As Representative Peter DeFazio explained:

> As I have noted many times before, it is nonsensical that the Federal Government pays to rebuild communities after disaster back to inadequate standards only to have those facilities destroyed in another disaster with the Federal Government once again coming in and building back to the original standard as opposed to a more resilient and more robust standard. It is time to get smarter about how we respond and how we rebuild after disasters.[85]

DRRA Section 1235(b) requires FEMA to estimate the cost of PA to repair, reconstruct, or replace eligible facilities in accordance with "the latest published editions of relevant consensus-based codes, specifications, and standards that incorporate the latest hazard-resistant designs."[86] DRRA Section 1235(b) also requires FEMA to estimate the cost of reconstructing "in a manner that allows the facility to meet the definition of resilient," following the definition of resilient to be determined in FEMA rulemaking undertaken per DRRA Section 1235(d) (see following section).[87] The provision applies to

> disasters declared on or after August 1, 2017, disaster in which a cost estimate has not yet been finalized for a project, or for any project for which the finalized cost estimate is on appeal.[88]

FEMA released two iterations of interim guidance implementing DRRA Section 1235(b), the most recent published in December 2019.[89] The guidance interprets this provision to generally require that reconstruction of specific types of facilities funded through PA comply with the most recently published standards by the International Code Council for relevant hazards or standards (e.g., the International Building Code) and codes by other national and international bodies (e.g., the American Social of Civil Engineers).[90]

FEMA's guidance requires certain facilities to comply with these requirements, including buildings, electric power facilities, roads, bridges, and potable water and wastewater facilities owned or legally maintained by Applicants.[91] Facilities not explicitly included in this list that are eligible for PA include flood control, navigation, irrigation, and reclamation projects not covered by codes identified for potable water structures, as well as parks and certain recreational

[85] Rep. Peter DeFazio, oral testimony, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *FEMA: Prioritizing a Culture of Preparedness*, 115th Cong., 2nd sess., April 11, 2018, S.Hrg. 115-442, pp. 6-7.

[86] Section 1235(b) of DRRA, Division D of P.L. 115-254, as it amends §406(e)(1)(A) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5172(e)(1)(A).

[87] Section 1235(b) of DRRA, Division D of P.L. 115-254, as it amends §406(e)(1)(A) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5172(e)(1)(A).

[88] Section 1235(b) of DRRA, Division D of P.L. 115-254, as it amends §406(e)(1)(A) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5172(e)(1)(A).

[89] FEMA, "Interim Policy: Consensus-Based Codes V. 2."

[90] Appendix A of FEMA, "Interim Policy: Consensus-Based Codes V. 2," p. 9. See the collected volumes of the International Code Council at https://codes.iccsafe.org/.

[91] FEMA, "Interim Policy: Consensus-Based Codes V. 2," p. 5.

facilities.[92] These facilities remain subject to FEMA's other policies and regulations on minimum codes and standards according to the date of the relevant declaration.[93]

The guidance requirements apply only to facilities damaged in disasters that received declarations on or after November 6, 2019.[94] Applicants for earlier disasters may request to opt in if the projects meet certain criteria.[95] Applicants may also use locally adopted codes if the Applicant's engineer or design professional certifies that local codes are more stringent than the listed consensus-based codes and standards.[96]

Section 1235(d)—Defining Resiliency

DRRA Section 1235(d) requires FEMA to define the terms "resilient" and "resiliency" that apply in other DRRA authorities.[97] FEMA is required to issue definitions in interim guidance (due 60 days after enactment, December 4, 2018), final rulemaking (due 18 months after enactment, April 5, 2020), and guidance on final rulemaking (due 90 days after the issuance of final rulemaking).[98] These definitions would apply to PA authorized for the costs of repairing or replacing eligible facilities to a resilient standard, as authorized in DRRA Section 1235(b).

As of January 15, 2021, implementation of DRRA Section 1235(d) is incomplete. In July 2019, FEMA's then-Deputy Administrator of Resilience reported that FEMA was evaluating different definitions of resilience, including the National Institute of Standards and Technology (NIST) definition:

> the ability to prepare for anticipated hazards, adapt to changing conditions, and withstand and recover rapidly from disruptions.[99]

In October 2019, FEMA reported that it would conduct required rulemaking to adopt the NIST definition of resilience.[100] FEMA subsequently discussed the rulemaking in December 2019 guidance, explaining the implementation of DRRA Section 1235(b) (see above). FEMA explained that the building standards issued in the guidance on DRRA Section 1235(b) "will be effective regardless of whether a final rulemaking defining resilient and resiliency has been completed."[101] Since that time, FEMA has used definitions of resilience different from the NIST definition. In a November 2020 report on hazard-resistant building codes, FEMA used the Department of

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[92] See definition of "Public Facility," §102(10) of the Stafford Act, 42 U.S.C §5122(10).

[93] FEMA, *Frequently Asked Questions: Consensus-Based Codes, Specifications and Standards for Public Assistance*, February 2020, p. 5, https://www.fema.gov/sites/default/files/2020-07/fema_DRRA-1235b-public-assistance-codes-standards-faqs.pdf (hereinafter FEMA, *FAQ: Consensus-Based Codes, Specifications and Standards for PA*).

[94] FEMA, *FAQ: Consensus-Based Codes, Specifications and Standards for PA*, p. 1.

[95] FEMA, "Interim Policy: Consensus-Based Codes V. 2," p. 3; FEMA, *FAQ: Consensus-Based Codes, Specifications and Standards for PA*, pp. 5-6.

[96] FEMA, *FAQ: Consensus-Based Codes, Specifications and Standards for PA*, p. 4.

[97] Section 1235(d) of DRRA, Division D of P.L. 115-254, as it amends §406(e) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5172(e).

[98] Section 1235(d) of DRRA, Division D of P.L. 115-254, as it amends §406(e) of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5172(e).

[99] FEMA then-Deputy Administrator for Resilience Daniel Kaniewski, submitted testimony, U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, *Disaster Preparedness: DRRA Implementation and FEMA Readiness*, hearing, 116th Cong., 1st sess., May 22, 2019, no. 116-18, p. 105 (hereinafter House T&I, *DRRA Implementation*), https://www.congress.gov/116/chrg/CHRG-116hhrg40590/CHRG-116hhrg40590.pdf.

[100] FEMA, *2019 DRRA Report*, October 2019, pp. 10-11.

[101] FEMA, "Interim Policy: Consensus-Based Codes V. 2," p. 8.

Homeland Security's definition of resilience.[102] As of January 25, 2021, FEMA is in the drafting stage for this rulemaking.[103]

DRRA Section 1235(d) also requires FEMA to report to Congress on this rulemaking and related guidance within 24 months of enactment. It is unclear whether FEMA has reported to Congress as required by the provision.

Congressional oversight may include the monitoring of FEMA guidance and rulemaking regarding the definition of resilience and resiliency. In addition, Congress may wish to consider whether these definitions should be incorporated in guidance for other FEMA programs, such as Individual Assistance and Hazard Mitigation Assistance. Congress may also wish to monitor guidance from FEMA regarding the incorporation of these definitions into PA guidance. Congress may also wish to monitor guidance on what personnel and procedures will determine whether Applicants' PA proposals and facilities meet the definition of resilient, per DRRA Sections 1235(b) and 1235(d).

Section 1232 and Section 1239: Factors to Authorize PA for Major Disasters[104]

DRRA Sections 1232 and 1239 require FEMA to review and revise the procedures for evaluating requests for PA for a major disaster declaration. To assess a PA request, FEMA determines whether there are unmet needs that may warrant assistance. Based on this assessment, FEMA recommends to the President whether the request should be authorized.

For requests to authorize PA for major disasters, FEMA considers relevant information, including but not limited to six mostly quantifiable factors.[105] Historically, the primary factor has been the *Cost of Assistance* estimates.[106] To determine the cost of assistance, FEMA estimates the cost of PA across the affected jurisdiction using a Preliminary Damage Assessment (PDA) conducted by federal and SLTT representatives.[107] The PDA measures work eligible for PA, particularly the uninsured costs to reconstruct eligible disaster-damaged facilities. FEMA typically recommends PA when these estimates exceed $1 million across a state or territory or $250,000 across a tribe.[108] Additionally, FEMA generally recommends PA only when damages exceed a certain per capita threshold—for FY2021, these thresholds are $1.55 across a state, tribe, or territory and $3.89 across affected counties, municipalities, and parishes.[109] FEMA annually updates the thresholds to reflect inflation, as required by federal regulation.[110]

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[102] FEMA, *Building Codes Saves: A Nationwide Study*, November 2020, p. xiii, https://www.fema.gov/sites/default/files/2020-11/fema_building-codes-save_study.pdf.

[103] Emails from FEMA Office of External Affairs staff, January 25, 2021, and February 4, 2021. FEMA has not issued interim guidance to specifically define the terms "resilient" and "resiliency," but has relied on the "Consensus-Based Codes, Specifications, and Standards for Public Assistance Interim Policy" (see FEMA, "Interim Policy: Consensus-Based Codes V. 2.").

[104] This section authored by Erica A. Lee, Analyst in Emergency Management and Disaster Recovery.

[105] 44 C.F.R. §206.48.

[106] 44 C.F.R. §206.48(a)(1).

[107] For more information, see CRS Report R44977, *Preliminary Damage Assessments for Major Disasters: Overview, Analysis, and Policy Observations*, by Bruce R. Lindsay.

[108] 44 C.F.R. §206.48(a)(1); FEMA, *Tribal Declarations Pilot Guidance*, January 2017, https://www.fema.gov/sites/default/files/2020-04/tribal-declaration-pilot-guidance.pdf.

[109] FEMA, "Per Capita Impact Indicator and Project Thresholds," https://www.fema.gov/assistance/public/applicants/per-capita-impact-indicator.

[110] 44 C.F.R. §206.48(a)(1).

While no single factor determines whether FEMA recommends PA authorization, the cost of assistance estimates have historically proved crucial. In 2012, the Government Accountability Office (GAO) found that FEMA used the estimates as "eligibility thresholds"—99% of major disaster declaration approvals reflected damage estimates where these thresholds were met or exceeded.[111] However, regulations provide that FEMA may exercise discretion. For example, regulations specify that FEMA may consider a hazard's particularly severe impacts on a locality, how mitigating measures may have reduced damages, or a recent history of disasters that exhausted SLTT capacity.[112] FEMA may recommend PA authorization, given such factors, even when the thresholds have not been met.

Section 1232: Local Impact

Prior to DRRA's enactment, some Members of Congress expressed concern that FEMA did not sufficiently consider a hazard's severe impacts in a particular locality when assessing PA requests.[113] As written, federal regulations authorize FEMA to evaluate the impact of a disaster at the county, local, and tribal level where "there are extraordinary concentrations of damages that might warrant Federal assistance" even where cost of assistance thresholds are not met.[114] Some Members of Congress proposed legislation that required FEMA to give greater weight to such severe localized impacts when evaluating requests for major disaster declarations.[115]

Subsequently, Section 1232 of DRRA required FEMA to "give greater consideration" to severe local impacts and recent disasters when considering requests for PA.[116] The provision also stated that FEMA "shall make corresponding adjustments to the Agency's policies and regulations regarding such consideration."[117] The provision additionally required FEMA to report to the House Committee on Transportation and Infrastructure and the Senate Committee on Homeland Security and Governmental Affairs on the provision's implementation.[118]

FEMA reported that it had implemented this provision by soliciting relevant information in FEMA's cover letter for declaration requests.[119] FEMA also issued guidance to Regional Administrators on May 1, 2019, directing them to include in their recommendations appropriate

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[111] U.S. Government Accountability Office (GAO), *Federal Disaster Assistance: Improved Criteria Needed to Assess a Jurisdiction's Capability to Respond and Recover on Its Own*, GAO-12-838, September 2012, p. 24, https://www.gao.gov/assets/650/648162.pdf (hereinafter GAO, *Improved Criteria*).

[112] 44 C.F.R. §206.48(a)(2)-(5).

[113] See, for example, Todd Gleason and Jim Meadows, "Duckworth Raises Questions About FEMA Aid During Tour of Taylorville Tornado Damage," *Illinois Public Media*, December 10, 2018, https://will.illinois.edu/news/story/duckworth-raises-questions-about-fema-aid-during-tour-of-taylorville-tornad; website of Rep. Rodney Davis, "Reps. Davis, Bustos Win Provision to Bring Fairness to Disaster Declaration Process in FEMA Reform Bill," April 15, 2015, https://rodneydavis.house.gov/news/documentsingle.aspx?DocumentID=398640.

[114] 44 C.F.R. §206.48(a)(2).

[115] 44 C.F.R. §206.48(a)(2). See Section 309 of H.R. 1471, FEMA Disaster Assistance Reform Act of 2015, as passed in the U.S. House of Representatives, 114th Cong., 2nd sess., February 29, 2016; S. 600, Fairness in Federal Disaster Declarations Act of 2017, as Introduced in 115th Cong., 1st sess., March 9, 2017.

[116] Section 1232 of DRRA, Division D of P.L. 115-254, as it amends §401 of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5170.

[117] Section 1232 of DRRA, Division D of P.L. 115-254, as it amends §401 of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5170.

[118] Section 1232 of DRRA, Division D of P.L. 115-254, as it amends §401 of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5170.

[119] FEMA, *2019 DRRA Report*, p. 5.

information regarding severe local impacts and the history of recent multiple disasters.[120] Additionally, FEMA published a notice of proposed rulemaking in December 2020 that solicited comment on whether the current regulations sufficiently consider recent multiple disasters. Under current regulations, FEMA considers disasters that took place over the previous 12 months. FEMA solicited comment on whether the "12-month time limit currently in place is sufficient to address [recent multiple disasters], as required by the DRRA."[121] It is unclear whether FEMA reported its implementation of this section to Congress, as DRRA's Section 1232 requires.

Congressional oversight could include the monitoring of FEMA's authorization of PA since the publication of updated declaration request templates to gauge the consideration of particularly severe impacts on localities, parishes, and municipalities. For example, Congress may wish to review declarations for major disasters that do not meet state per capita thresholds but did cause severe damages at the local level.[122]

Section 1239: Cost of Assistance Estimates

DRRA Section 1239 requires FEMA to review and initiate rulemaking to revise the factors considered when evaluating a governor's request for a major disaster authorizing PA. In December 2020, FEMA proposed a rule increasing the thresholds that generally must be met in order for FEMA to recommend that the President authorize PA for a major disaster. FEMA estimates that the proposed rule, had it been finalized, would have reduced the number of major disaster declarations authorizing PA by approximately 27% and reduced the total amount of PA provided by several billion dollars over the rule's study period.[123]

In 2012, GAO and the DHS OIG assessed FEMA's procedures to assess PA requests.[124] Both entities found that the thresholds FEMA used to identify unmet needs that may warrant authorization of PA for major disasters had not consistently kept pace with inflation and per-capita income gains.[125] GAO concluded that FEMA had recommended PA authorization for major disasters where SLTTs may have had the capacity to respond and recover.[126]

In response, GAO recommended in 2012 that FEMA increase the thresholds or identify another metric to assess SLTT capacity to respond and recover.[127] The DHS OIG concurred. In response to the recommendation, FEMA published a notice of proposed rulemaking creating a "disaster deductible" in January 2016.[128] The proposal required each state or territory requesting PA to

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[120] Jeff Byard, Associate Administrator, FEMA Office of Response and Recovery, Memorandum for Regional Administrators on Declaration Factors for Local Impact and Recent Multiple Disasters, May 1, 2019, https://www.fema.gov/sites/default/files/documents/fema_final-byard-memo_declaration-factors.pdf.

[121] FEMA, Department of Homeland Security (DHS), "Proposed Rule: Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program," 85 *Federal Register* 80719-80745, December 14, 2020 (hereinafter FEMA, "Proposed Rule: Cost of Assistance"), quote at 80725.

[122] Decisions regarding PA authorization and declaration requests may be found in PDA Reports, available at FEMA, "Preliminary Damage Assessment Reports," https://www.fema.gov/disasters/preliminary-damage-assessment-reports.

[123] FEMA, "Proposed Rule: Cost of Assistance," p. 80732.

[124] GAO, *Improved Criteria*. Department of Homeland Security Office of Inspector General (DHS OIG), *Opportunities to Improve FEMA's Public Assistance Preliminary Damage Assessment Process*, OIG-12-79, pp. 5-7, https://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-79_May12.pdf (hereinafter DHS OIG, *Opportunities*).

[125] GAO, *Improved Criteria*, pp. 24-29; DHS OIG, *Opportunities*, pp. 5-7.

[126] GAO, *Improved Criteria*, pp. 24-29.

[127] GAO, *Improved Criteria*, pp. 24-33.

[128] FEMA, "Proposed Rule: Establishing a Deductible for FEMA's Public Assistance Program," 81 *Federal Register* 3082, January 20, 2016; FEMA, "Proposed Rule: Establishing a Deductible for FEMA's Public Assistance Program,"

meet a minimum financial contribution specific to the jurisdiction. FEMA would provide PA only after the jurisdiction met its deductible. In 2018, FEMA reported to GAO that it would not be promulgating the rule due to concerns that the proposal was overly complex.[129]

Following this debate, DRRA Section 1239 required FEMA to revise the PA cost of assistance estimates.[130] FEMA initiated rulemaking pursuant to this provision in December 2019 and published a notice of proposed rulemaking in December 2020.[131] FEMA held public meetings on the proposed rule on February 24, 2021, March 22, 2021, and March 23, 2021.[132] Comments for the proposed rule could be submitted until April 12, 2021.[133]

FEMA proposed to increase the cost of assistance thresholds that must be met in order for states and territories to receive PA for permanent work. As a result, less costly disasters may not receive PA. Under the proposed rule, total PA-eligible costs across a state or territory associated with a disaster would be required to meet or exceed $1.535 million in order for FEMA to recommend PA.[134] The current threshold is $1 million. Additionally, if the proposed rule were to be finalized, the costs of assistance would be required to exceed a baseline value of $2.32 per capita across the state or territory.[135] FEMA has proposed to adjust this value annually based on a calculation of the state or territory's individual "Total Taxable Resources," a value calculated by the U.S. Department of the Treasury that estimates a state or territory's fiscal capacity (including taxable resources from business income, undistributed corporate profits, and out-of-state residents).[136] Currently, the per-capita threshold is $1.55 across all states and territories and no adjustments are made according to Total Taxable Resources. FEMA estimates, based on the FY2019 per capita threshold, that the state and territory per capita thresholds may increase between 2% and 149%.[137]

FEMA forecasted that the rule, if finalized, would reduce the number of major disaster declarations and associated costs authorized under the Stafford Act. FEMA estimated that 159 fewer major disaster declarations authorizing PA would have been declared between 2008 and 2017, an average of 16 fewer per year.[138] This represents a 27% reduction in disasters authorized during the specified time period.[139] According to FEMA, 7,456 Applicants that received PA

82 *Federal Register* 4064, January 12, 2017.

[129] GAO, *Emergency Management: FEMA Has Made Progress, but Challenges and Future Risks Highlight Imperative for Further Improvements*, GAO-19-617T, June 25, 2019, p. 14, https://www.gao.gov/assets/700/699957.pdf.

[130] Section 1239 of DRRA, Division D of P.L. 115-254, as it amends §401 of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5170.

[131] FEMA, "Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program," RIN 1660-AA99, December 2019, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1660-AA99&operation=OPERATION_PRINT_RULE; hereinafter FEMA, "Proposed Rule: Cost of Assistance," p. 80719.

[132] FEMA, "Proposed Rule: Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program; Public Meeting," 86 *Federal Register* 8334, February 5, 2021; and FEMA, "Proposed Rule: Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program; Public Meeting; Extension of Comment Period," 86 *Federal Register* 14067, March 12, 2021.

[133] FEMA, "Proposed Rule: Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program; Public Meeting; Extension of Comment Period," 86 *Federal Register* 14067, March 12, 2021.

[134] FEMA, "Proposed Rule: Cost of Assistance," p. 80731.

[135] FEMA, "Per Capita Impact Indicator and Project Thresholds," https://www.fema.gov/assistance/public/applicants/per-capita-impact-indicator; FEMA, "Proposed Rule: Cost of Assistance," p. 80731.

[136] See U.S. Department of the Treasury, "Total Taxable Resources," https://home.treasury.gov/policy-issues/economic-policy/total-taxable-resources; FEMA, "Proposed Rule: Cost of Assistance," p. 80720.

[137] These calculations are based on FY2019. FEMA, "Proposed Rule: Cost of Assistance," p. 80728.

[138] FEMA, "Proposed Rule: Cost of Assistance," p. 80732.

[139] FEMA, "Proposed Rule: Cost of Assistance," p. 80732.

between 2008 and 2017 would have experienced a reduction in grant funding if the proposed rule had been in effect.[140]

Congress may wish to review the forecasted impacts of the proposed rulemaking on federal and SLTT emergency management partners and their budgets, particularly given the costs of the ongoing COVID-19 pandemic.[141] One recent study has concluded that state spending on response and recovery is highly variable and not consistently tracked.[142] However, SLTT representatives have noted the sizeable response and recovery costs borne by nonfederal entities under the current PA thresholds.[143] For example, the National Association of Counties noted that in 2003 FEMA estimated that 3,500-3,700 disasters are handled without requests for federal assistance.[144] FEMA conceded that "[s]tate and local governments respond on their own to countless small incidents." However, FEMA explained that the current, low thresholds for PA disincentivize SLTT investment in response, recovery, and mitigation, "since Federal assistance will be provided."[145] FEMA claimed that redistributing costs to states will incentivize SLTT investment in emergency management and mitigation and thereby promote a "resilient and prepared Nation."[146] Public comments submitted in response to the proposed rule question whether the proposed rulemaking will, in fact, incentivize mitigation or could potentially reduce funding for mitigation (for further discussion, see "DRRA Section 1239 Rulemaking and the Adoption of Total Taxable Resources").[147]

Congressional oversight may include the monitoring of FEMA's rulemaking process, including feedback FEMA was provided during the public meeting and comments submitted on the proposed rulemaking,[148] and consideration of (1) additional opportunities to support SLTT

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[140] FEMA, "Proposed Rule: Cost of Assistance," p. 80732.

[141] For more information on state budgets, see CRS Report R46298, *General State and Local Fiscal Assistance and COVID-19: Background and Available Data*, by Grant A. Driessen; and "How the COVID-19 Pandemic Is Transforming State Budgets," *Urban Institute*, updated March 12, 2021, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-pages-covid-edition. For more information on Public Assistance and the proposed rule, see CRS Insight IN11534, *Authorizing Stafford Act Public Assistance*, by Erica A. Lee. See also FEMA, "Proposed Rule: Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program," comment # FEMA-2020-0038-0032 by representatives of Pew Charitable Trust, p. 5, and comment #-2020-0038-0028 by representatives of the U.S. Council of the International Association of Emergency Managers, available at https://www.regulations.gov/document/FEMA-2020-0038-0001/comment.

[142] Pew Charitable Trusts, *What We Don't Know About State Spending on Natural Disasters Could Cost Us*, June 2018, p. 10, https://www.pewtrusts.org/-/media/assets/2018/06/statespendingnaturaldisasters_v4.pdf.

[143] For further information and discussion, see comments for Proposed Rule on Cost of Assistance Estimates, available at https://www.regulations.gov/document/FEMA-2020-0038-0001/comment.

[144] Testimony of Sallie Clark, then President of National Association of Counties, U.S. Congress, House Committee on Transportation and Infrastructure, *Controlling the Rising Cost of Federal Response to Disaster*, hearing, 114th Cong., 2nd sess., May 12, 2016, no. 114-40, p. 13, https://www.govinfo.gov/content/pkg/CHRG-114hhrg20214/pdf/CHRG-114hhrg20214.pdf.

[145] FEMA, "Proposed Rule: Cost of Assistance," p. 80723.

[146] FEMA, "Proposed Rule: Cost of Assistance," p. 80720.

[147] See, for example, Proposed Rule on Cost of Assistance Estimates, comment # FEMA-2020-0038-0032 by representatives of Pew Charitable Trust, pp. 4-5, and comment #FEMA-2020-0038-0025 by representatives of South Carolina Emergency Management Division, p. 1, https://www.regulations.gov/document/FEMA-2020-0038-0001/comment. See also National Governor's Association, "Coalition Letter on FEMA's Notice of Proposed Rulemaking: 'Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program,'" March 5, 2021, https://www.nga.org/advocacy-communications/letters-nga/coalition-letter-fema-assistance-estimates/.

[148] Comments received during the rulemaking process are generally available on http://www.Regulations.gov. The docket for this rule, "Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program," Docket ID: FEMA-2020-0038, is available at https://www.regulations.gov/docket/FEMA-2020-0038.

investment in response, recovery, and mitigation capabilities; and (2) how the increased cost of assistance thresholds may encumber rural or less wealthy counties seeking PA, as well as populous states with high Total Taxable Resources.[149]

For example, PA authorization is based on the estimated costs of PA-eligible work; commercial, personal, and federal property are ineligible. Some Members of Congress and SLTT stakeholders have noted that the use of the higher thresholds may disadvantage small, rural, or less wealthy areas with less costly eligible facilities.[150] Also, states with relatively high Total Taxable Resources may find it more difficult to qualify for federal assistance.[151]

Another issue of congressional interest is the challenges faced by states and localities that experience recurring or slow-onset events. PDAs only measure costs incurred during a certain time period (the FEMA-defined "incident period").[152] FEMA may consider a recurring flood or episode of slow-onset events like sea level rise to be multiple discrete incidents, none of which may independently meet or exceed the cost of assistance thresholds.[153] Increased cost of assistance thresholds may make it harder for jurisdictions to qualify for federal assistance for such events. As a result, states and localities facing such hazards may not receive major disaster declarations authorizing PA and thus face greater demands on SLTT disaster response and recovery resources.

Accountability and Oversight Provisions

Congress has the authority to require executive agencies to take specific actions through legislation, and to oversee executive agencies' fulfillment of assigned responsibilities by using the tools of congressional oversight.[154] The following sections describe some of DRRA's provisions that support effective congressional oversight and increase FEMA's accountability and transparency.

[149] See concerns raised in National Low Income Housing Coalition, "Proposed FEMA Rule Would Create Roadblocks for Presidential Disaster Declarations," December 22, 2020, https://nlihc.org/resource/proposed-fema-rule-would-create-roadblocks-presidential-disaster-declarations; Thomas Frank, "FEMA Seeks to Slash Disaster Aid as Trump Heads for Exit," December 14, 2020, *E&E News*, https://www.eenews.net/stories/1063720573.

[150] See, for example, testimony of former Senator Begich, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *The Path to Efficiency: Making FEMA More Effective for Streamlined Disaster Operations*, 113th Cong., 2nd sess., July 24, 2014, pp. 9-11; Rep. Rodney Davis, "Davis Urges FEMA to Consider Local Impact When Determining Latest Illinois Disaster Request," March 9, 2016, https://rodneydavis.house.gov/news/documentsingle.aspx?DocumentID=398970. See also Proposed Rule on Cost of Assistance Estimates, comments #FEMA-2020-0038-003, submitted December 17, 2020, and #FEMA-2020-0038-0020, submitted February 5, 2021, https://www.regulations.gov/document/FEMA-2020-0038-0001/comment.

[151] See concerns raised in National Low Income Housing Coalition, "Proposed FEMA Rule Would Create Roadblocks for Presidential Disaster Declarations," December 22, 2020, https://nlihc.org/resource/proposed-fema-rule-would-create-roadblocks-presidential-disaster-declarations.

[152] 44 C.F.R. §206.32(f).

[153] United Nations Climate Change, "Slow Onset Events," https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/areas-of-work/slow-onset-events.

[154] For additional information on congressional oversight authorities and activities, see CRS In Focus IF10015, *Congressional Oversight and Investigations*, by Todd Garvey and Walter J. Oleszek.

Management Costs

Section 1215: Management Costs[155]

DRRA Section 1215 amends Section 324 of the Stafford Act to expand the definition of "management cost" to include direct and indirect costs for both the state management costs and project level administrative costs.[156] Section 1215 also establishes caps on the percentage of reimbursable management costs. For the Hazard Mitigation Grant Program (HMGP), reimbursable management costs cannot exceed 15% of the grant award, with not more than 10% retained by the state and not more than 5% provided to the sub-grantee. Reimbursable management costs for the PA program cannot exceed 12% of the total award amounts provided under Stafford Act Sections 403, 406, 407, and 502, with not more than 7% provided to the state, and not more than 5% provided to the sub-grantees.

Prior to DRRA's enactment, both FEMA and Congress debated various approaches to providing funding for the administrative costs associated with federal disaster assistance. The processes and procedures utilized by federal, state, and local agencies to determine eligible management costs related to disaster assistance generally includes two types of management costs: (1) state-level management costs associated with administering all the federal disaster assistance provided under the Stafford Act, and (2) sub-grantee management costs specific to individual eligible projects. Management costs can generally be further broken down by costs associated with specific funding streams provided by the Stafford Act, such as the PA program and the HMGP. Consequently, state grant recipients traditionally have management costs associated with administering funding provided by PA and HMGP broadly, and sub-grantees traditionally have management costs associated with specific projects awarded funding under PA and HMGP. A history of the rate calculations for PA and HMGP is included in **Appendix A**.

The implementation of the management cost provisions in Section 1215 of DRRA deviated from past FEMA policies on management costs for Stafford Act programs in some areas, while aligning with past practice in other areas.

- First, in implementing DRRA provisions, FEMA deviated from previous definitions of "management costs" by expanding the definition to include both state administrative costs and project-specific administrative costs. As discussed, this appears to be the first time FEMA defined "management costs" to be all encompassing of both state and sub-grantee administrative costs.
- Second, DRRA implementation deviated from past procedures by establishing a cap on the percentage rate for management costs rather than setting a flat percentage rate. Both the Disaster Mitigation Act of 2000 (DMA2K, P.L. 106-390) and the FEMA voluntary, alternative recovery policy, Public Assistance Alternative Procedures for Direct Administrative Costs (DAC), provisions established a flat percentage rate, while DRRA set caps for the amounts that could be reimbursed for management costs.
- Third, DRRA implementation deviated from past practice by using the total PA and HMGP amount provided to the state, after insurance and other reductions, as the base amount for the percentage calculation. DMA2K applied the flat

[155] This section authored by Natalie Keegan, Analyst in American Federalism and Emergency Management Policy.

[156] Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288, as amended by the Disaster Recovery Reform Act, P.L. 115-254.

percentage to the federal share only, while a new voluntary, alternative recovery policy issued by FEMA used the full eligible project costs at the sub-grantee level, prior to insurance reductions.[157]

- Finally, FEMA deviated from previous approaches by not promulgating the management cost rates in regulations. In previous changes in the law discussed in more detail in **Appendix A**, FEMA issued both a Notice of Proposed Rulemaking and an Interim Final Rule in the *Federal Register* promulgating the proposed management cost rates.[158]

According to FEMA's latest DRRA implementation report, Section 1215 is "Implemented."[159] However, FEMA has not issued any notices in the *Federal Register* regarding implementation of DRRA's management cost percentage cap provisions. According to the FEMA *DRRA Annual Report 2019* and other FEMA documents, as of February 2021, FEMA had only issued grant program guidance to implement the DRRA Section 1215 provisions.[160] Unlike federal regulations, grant guidance can be changed by FEMA at any time and without public comment. While agency discretion to adjust grant policy guidance without traditional rulemaking requirements may help FEMA adapt to the challenges created by the pandemic, only amending internal policy and documents, such as grant guidance, reduces transparency and accountability in DRRA implementation.

The implementation of DRRA management cost provisions in Section 1215 aligned with past FEMA policies and practices in some ways. First, FEMA continues to allow two types of management cost reimbursements: (1) the costs directly associated with specific PA or HMGP projects that can be itemized as part of the allowable project costs (i.e., project-specific management costs); and (2) the more general management costs associated with administration of federal funding that are not already reimbursed as project-specific expenses. Notably, however, the current implementation represents the first time that both types of management cost reimbursements have been combined under the expanded definition of "management costs" set forth in DRRA. Prior to DRRA, there was a clearer distinction between project-specific management costs and general management costs.[161]

The implementation of the expanded definition of "management costs" raises the risk of duplication of payments. There is also the possibility of increased administrative burden on the

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[157] The Disaster Mitigation Act of 2000 (DMA2K, P.L. 106-390). The new voluntary, alternative recovery policy was issued by FEMA on October 25, 2017, and was called the Public Assistance Alternative Procedures for Direct Administrative Costs policy, which used the full eligible project costs at the sub-grantee level, prior to insurance reductions.

[158] See FEMA, "Management Costs," 67 *Federal Register* 56130- 56136, August 30, 2002; and FEMA, "Management Costs," 72 *Federal Register* 57869- 57879, October 11, 2007.

[159] FEMA, *2019 DRRA Report*, p. 3.

[160] FEMA, "Hazard Mitigation Grant Program Management Costs, (Interim)," FEMA Policy FP 104-11-1, November 14, 2018, https://www.fema.gov/sites/default/files/2020-07/fema_DRRA-1215-hazard-mitigation-grant-program-management-costs-interim-policy.pdf; FEMA, "Public Assistance Management Costs," FEMA Recovery Policy FP 104-11-2, November 14, 2018, https://www.fema.gov/sites/default/files/2020-07/pa_management_costs_interim_policy.pdf; FEMA, "Public Assistance Management Costs Interim Policy," fact sheet, February 8, 2019, https://www.fema.gov/sites/default/files/2020-07/pa_fact_sheet_management_costs_interim_policy.pdf; FEMA, "HMGP Management Costs Policy (Interim)," frequently asked questions, February 28, 2020. https://www.fema.gov/sites/default/files/2020-07/hma_management-cost-faq_3-23-2020.pdf.

[161] For example, see the definition of "management costs" in FEMA, "Management Costs," 67 *Federal Register* 56130-56136, August 30, 2002.

states to ensure that sub-grantees do not receive reimbursements twice for the same management cost by claiming the cost under a general management cost category and a project-specific management cost category. DRRA implementation also aligns with the past practice of providing management cost reimbursements separately for PA and HMGP. While FEMA initially proposed consolidating PA and HMGP management costs into a single grant award to the states, ultimately, the interim final rule continued to separate PA and HMGP management cost reimbursements and FEMA implemented different flat percentage rates depending on the program.[162] While separating management costs by program possibly increases state and sub-grantee administrative burdens, combining the programs may create other concerns, such as reducing state flexibility in the use of funds and possibly generating divisive policy at the state and sub-state level.[163]

Considerations related to how the COVID-19 pandemic may affect the implementation of the DRRA Section 1215 can be found in the "DRRA Section 1215 Management Cost Caps During the Pandemic" section.

Timely Closeout Incentives

Section 1221: Closeout Incentives[164]

Section 1221 of DRRA amends Section 705 of the Stafford Act to add a new section addressing challenges to disaster assistance grant closeouts by providing FEMA's Administrator authority to develop incentives and penalties to encourage state, local, and tribal governments to close out disaster assistance grants in a timely fashion. DRRA Section 1221 further directs FEMA's Administrator to issue regulations to implement procedures that "improve closeout practices and reduce the time to close disaster program awards."[165]

According to the FEMA *DRRA Annual Report 2019*, this section's implementation is in progress.[166] However, FEMA has developed incentives and penalties for Stafford Act program grant closeouts in previous grant guidance. In 2017, FEMA issued guidance on PA Alternative Procedures for direct administrative costs for eligible projects that provided an additional 1% closeout incentive to sub-grantees. Under the PA Alternative Procedures, sub-grantees could opt to receive management cost reimbursements based on 4% of the full eligible project costs prior to insurance reductions, and could receive the additional 1% closeout incentive if the projects were closed out within 90 days of the end of the period of performance.[167] FEMA has also utilized penalties as a mechanism to encourage timely closeout. In 2020, FEMA issued grant guidance that withheld up to 3% of eligible management cost reimbursements from grantees until closeout documents were submitted by the grantee.[168] FEMA may consider similar approaches in the implementation of DRRA Section 1221.

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[162] See FEMA, "Management Costs," 67 *Federal Register* 56130-56136, August 30, 2002; and FEMA, "Management Costs," 72 *Federal Register* 57869-57879, October 11, 2007.

[163] FEMA, "Management Costs," 72 *Federal Register* 57870-57871, October 11, 2007.

[164] This section authored by Natalie Keegan, Analyst in American Federalism and Emergency Management Policy.

[165] DRRA Section 1221, P.L. 115-254.

[166] FEMA, *2019 DRRA Report*, p. 8.

[167] FEMA, "Recovery Policy, Public Assistance Alternative Procedures for Direct Administrative Costs," October 25, 2017. Pursuant to 2 C.F.R. §200.343, the Office of Management and Budget guidance to federal agencies recommends that federal grant closeout documentation be submitted by the sub-grantees within 90 days of the end of the period of performance.

[168] FEMA, "Frequently Asked Questions: Hazard Mitigation Grant Program Management Costs Policy (Interim),"

FEMA Accountability and Oversight

Section 1210: Duplication of Benefits[169]

Section 312(a) of the Stafford Act prohibits "financial assistance to persons, business concerns, or other entities suffering losses as a result of a major disaster or emergency ... [for] which [they have] received financial assistance under any other program or from insurance or any other source."[170] Further, Stafford Act Section 312(c) states that the recipient of duplicative assistance is liable to the United States and that the agency that provided the duplicative assistance is responsible for debt collection.

While Section 312 is intended to prevent waste, fraud, and abuse, its application has led to financial hardships for some disaster victims. This can occur when individuals and households receive multiple sources of assistance to recover from an incident. For example, if a disaster victim has recovery needs that are not covered by insurance, they can receive assistance from FEMA and/or the Housing and Urban Development's (HUD's) Community Development Block Grant—Disaster Recovery (CDBG-DR), often in the form of a grant, as well as a disaster loan from the Small Business Administration's (SBA) Disaster Loan Program.[171] The use of multiple recovery sources is allowable provided the assistance does not exceed the recipient's unmet recovery need. Generally, a duplication of benefit occurs when an agency provides disaster assistance that was another agency's primary responsibility, and the agency with primary responsibility later mistakenly provides recovery assistance for the same incident. Additionally, duplication may occur when multiple applicants in a household receive an award for the same item or type of assistance from another program, from insurance, or from any other recovery source.

In some cases, disaster victims have received repayment notifications long after they had already applied their assistance for recovery purposes.[172] For some, repaying or appealing the duplication can be financially and emotionally burdensome. Critics argue that unintentional duplication stems, in part, from the procedural guidance outlined in 44 C.F.R. §206.191 (known as a "delivery sequence"). The delivery sequence identifies duplication of benefits, and determines which agency must be repaid for the duplication. According to critics, the delivery sequence is confusing and lacks specificity. For example, HUD's CDBG-DR Program is often duplicated with other assistance sources, but is not listed in the delivery sequence (see **Figure 1**).

February 28, 2020, p. 8.

[169] This section authored by Bruce R. Lindsay, Specialist in American National Government.

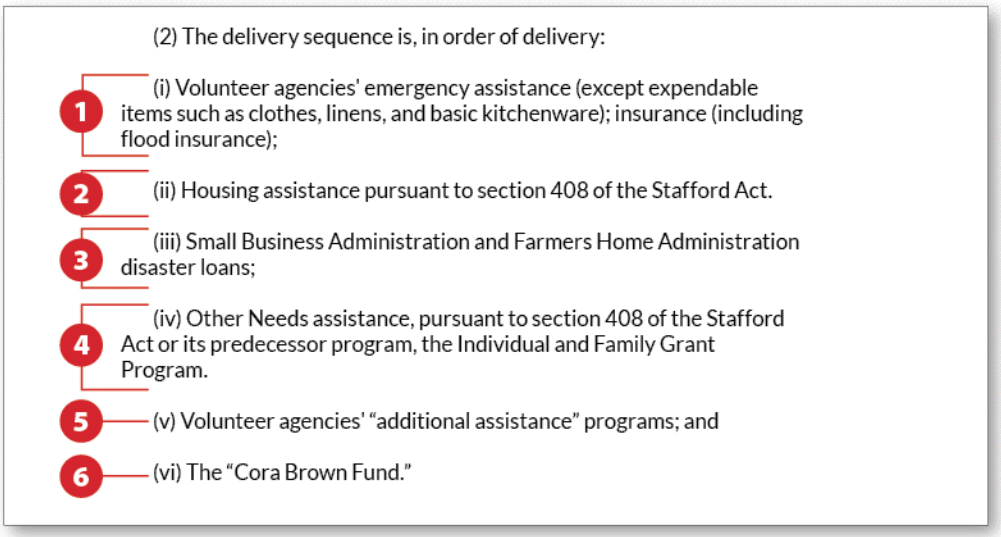
[170] 42 U.S.C. §5155.

[171] For more information on the SBA Disaster Loan Program, see CRS Report R44412, *SBA Disaster Loan Program: Frequently Asked Questions*, by Bruce R. Lindsay.

[172] For example, some Hurricane Sandy victims did not get notifications until two years after the incident. See Miles Park, "For Some Superstorm Sandy Victims, the Government Wants Its Money Back," *National Public Radio*, April 13, 2015, https://www.npr.org/2015/04/13/390442517/for-some-superstorm-sandy-victims-the-government-wants-its-money-back.

Figure 1. Delivery Sequence

44 C.F.R. §206.191(d)(2)



Source: Based on CRS interpretation of 44 C.F.R. §206.191.

Notes: Other Needs Assistance (ONA) under Section 408 includes both SBA-dependent and non-SBA-dependent ONA. SBA-dependent ONA may be available for applicants who do not qualify for an SBA disaster loan, or whose loan amount is insufficient; this type of ONA includes personal property, transportation, and moving and storage assistance. With regard to the "Cora Brown Fund," Cora Brown of Kansas City, MO, died in 1977, leaving a portion of her estate to the United States to be used as a special fund to relieve human suffering caused by natural disasters.

To improve clarity and reduce confusion, Congress passed DRRA Section 1210(5)(A), requiring FEMA's Administrator, in coordination with relevant federal agencies, to provide a report with recommendations to improve "the comprehensive delivery of disaster assistance to individuals following a major disaster or emergency declaration."[173] On June 22, 2020, FEMA provided the report to Congress addressing each of the requirements, which are summarized below.[174]

Coordination Between Agencies

According to the report, FEMA has taken steps to improve disaster assistance coordination efforts between agencies. Some of the steps include:

- incident planning and exercises to enhance interagency collaboration and coordination and identify areas in need of improvement;
- unity of effort webinars on Emergency Support Function #6, the coordinating structure led by FEMA that organizes agencies and resources for mass care, emergency assistance, temporary housing, and human services;[175]

[173] DRRA Section 1216, P.L. 115-254.

[174] FEMA, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020.

[175] For more information on Emergency Support Function #6, see FEMA, "Emergency Support Function #6: Mass Care, Emergency Assistance, Temporary Housing, and Human Services Annex," June 2016, https://www.fema.gov/sites/default/files/2020-07/fema_ESF_6_Mass-Care.pdf.

- planning and leading the National Mass Care Exercise to ensure disaster assistance providers are collaborating and identifying potential flaws in assistance delivery;[176] and
- holding Individual Assistance (IA) symposiums that bring together federal, state, tribal, and territorial officials to enhance their knowledge of IA programs and policies and to build capacity for implementing IA during disaster operations.

Clarification of the Delivery Sequence and Interpretation of Stafford Act Section 312

The report did not substantively change the delivery sequence. Rather, it elaborated on the existing structure by describing in detail which assistance programs fall within each delivery sequence. The report also provided an organizational chart of the delivery sequence (see **Figure B-1**).

FEMA reported the following interpretations of Stafford Act Section 312:

- FEMA views individuals applying for IA with insurance coverage as being ineligible for a waiver under Section 1210 of DRRA;[177] and
- a CDBG-DR grantee is prohibited from making a blanket determination that CDBG-DR assistance does not duplicate another category or source of assistance. The Stafford Act requires an individualized review of each applicant to determine that the amount of assistance will not cause a duplication of benefits by exceeding the applicant's unmet needs. The report also stated that "CDBG-DR grantees have discretion to develop policies and procedures that tailor their duplication of benefits analyses to their own programs and activities so long as the grantee's policies and procedures are consistent with duplication of benefits requirements."[178]

Communications

According to the report, FEMA has taken or plans to take steps to improve communications to disaster assistance applicants. These include:

- developing standardized communication templates to provide information to disaster survivors in a more timely, relevant, and comprehensible manner;
- redesigning the FEMA.gov website to ensure it provides correct information using the most up-to-date and easy-to-use technology; and
- translating information on the FEMA website and news releases into other languages (including American Sign Language), if necessary, and activating language interpreters.

The new Computer Matching Agreements (CMA) with FEMA, HUD, and SBA clarify data sharing agreements between the agencies and address duplication of benefits.[179] In addition to the CMA, in 2019, HUD launched a computer system that enables FEMA "to automatically transfer survivor data to HUD on a re-occurring basis." The system also "allows HUD to send data to

[176] For more information on the National Mass Care Exercise, see FEMA, *National Mass Care Exercise*, https://nationalmasscarestrategy.org/the-national-mass-care-exercise/ (hereinafter FEMA, *National Mass Care Exercise*).

[177] FEMA, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020, p. 12.

[178] FEMA, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020, pp. 12-13.

[179] FEMA, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020, p. 4.

FEMA about assistance that HUD has provided to an applicant in order to prevent duplication of benefits." Further, the system allows states, tribes, and territories to access the shared data.[180]

FEMA also "granted a small number of SBA employees full access to the FEMA National Emergency Management Information System (NEMIS) for additional data that may be needed during their loan review process," and enabled SBA to view specific FEMA information to determine which benefits those disaster survivors are receiving from FEMA.[181]

FEMA's data sharing efforts may help prevent duplication of benefits from occurring and make duplication notifications timelier. Greater delivery sequence detail may also help clarify agency roles and responsibilities with respect to duplication.[182]

Section 1224: Agency Accountability[183]

Section 1224 of DRRA amends Title VI of the Stafford Act to add a new subsection on agency accountability. The new subsection requires the FEMA Administrator to publish information on select PA grant awards, mission assignments, monthly Disaster Relief Fund (DRF) obligations, select federal contracts, and select state-level contracts executed using PA funds to the FEMA website.[184] According to FEMA, the agency already posts the required data and information on the FEMA.gov website, and FEMA updated its DRF monthly report to include the required information.[185]

The DRRA provisions requiring federal and grantee contract information remain in progress as FEMA updates its grant management systems to collect the required contract information.[186] FEMA began an extensive grant system modernization initiative in 2015 when the agency

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[180] FEMA, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020, p. 4.

[181] FEMA, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020, p. 4.

[182] DRRA Section 1210 applies to any emergency or major disaster between January 1, 2016, and December 31, 2021. The effective date of DRRA Section 1210 has been of congressional interest because it makes Hurricane Sandy disaster victims ineligible for duplication of benefits relief as Hurricane Sandy was declared a major disaster on October 30, 2012 (see FEMA, "New Jersey Hurricane Sandy (DR-4086-NJ)," https://www.fema.gov/ru/disaster/4086). According to a report issued by the New Jersey Resource Project:

> After Sandy ... numerous homeowners received money from insurance carriers ... or SBA loans after they had signed an [Reconstruction, Elevation, and Mitigation] grant. Frequently, homeowners were ... told ... that [Increased Cost Compliance] funds and SBA loans would not be considered a duplication of benefit, only to find out later on that this information was inaccurate. Adding to the confusion is the fact that homeowners were previously permitted to use CDBG money to pay off SBA loans, but guidance issued by HUD in November 2011 clarified that the entire SBA loan amount for which someone is deemed eligible is a benefit that cannot be duplicated. Because most homeowners were still short of funds necessary to rebuild even after receiving various forms of assistance available to them, they were baffled and frustrated by the notion that they were somehow 'double dipping.'

(New Jersey Resource Project, "The Long Road Home: Understanding Sandy Recovery and Lessons Learned for Future Storms Five Years Later," October 2017, pp. 24-25). It is likely that Congress will reexamine duplication issues related to Hurricane Sandy during the 117th Congress.

[183] This section authored by Natalie Keegan, Analyst in American Federalism and Emergency Management Policy.

[184] DRRA Section 1224, P.L. 115-254. For additional information on the required information to be included for each category under section 1224, see CRS Report R45819, *The Disaster Recovery Reform Act of 2018 (DRRA): A Summary of Selected Statutory Provisions*.

[185] FEMA, *2019 DRRA Report*, p. 20.

[186] FEMA, *2019 DRRA Report*, p. 20.

implemented the Grants Management Modernization Program (GMM).[187] As part of GMM, FEMA is developing an IT platform known as FEMA Grants Outcomes (FEMA GO) that will be utilized by a variety of grant stakeholders. Even though the GMM has been underway for approximately six years, it is unclear when FEMA will complete the grant management system updates sufficient to collect and report on the contract data required by Section 1224.

Audit and Review Requirement for Reimbursement

Section of 1225: Audit of Contracts[188]

Section 1225 of DRRA restricts FEMA's Administrator from reimbursing states, local, or tribal governments and certain nonprofit organizations for costs associated with activities pursuant to a contract that prohibits FEMA's Administrator or the Comptroller General of the United States from auditing or reviewing all aspects of the contract.[189] According to FEMA, this provision has been implemented.[190] FEMA updated the *Procurement Disaster Assistance Team (PDAT) Field Manual* in July 2020 to reflect this requirement.[191]

Prohibition on Recoupment

Section 1216: Flexibility[192]

DRRA Section 1216(a) authorized FEMA to waive debts owed by individuals who received assistance through the Individuals and Households Program (IHP), which is a form of Individual Assistance, provided the debt does not involve fraud, a false claim, or misrepresentation by the debtor or party having an interest in the claim,[193] if certain requirements are met (see the "Four Required Conditions for a Waiver" text box for more information).[194] This expanded FEMA's discretion with regard to debt collection.

Additionally, DRRA Section 1216(b) established a three-year statute of limitations on FEMA's ability to recoup IHP assistance received more than three years before FEMA provided notice of intent to recoup the funds.[195] According to a House Transportation and Infrastructure Committee

[187] FEMA, "Grant Management Modernization: Frequently Asked Questions," July 2020, p. 3.

[188] This section authored by Natalie Keegan, Analyst in American Federalism and Emergency Management Policy.

[189] DRRA Section 1225, P.L. 115-254.

[190] FEMA, *2019 DRRA Report*, p. 21.

[191] FEMA, "Procurement Disaster Assistance Team (PDAT) Field Manual," July 2020.

[192] This section authored by Elizabeth M. Webster, Analyst in Emergency Management and Disaster Recovery. For more information, see the "Section 1216: Flexibility" section of CRS Report R45819, *The Disaster Recovery Reform Act of 2018 (DRRA): A Summary of Selected Statutory Provisions*, coordinated by Elizabeth M. Webster and Bruce R. Lindsay.

[193] DRRA Section 1216(a)(2)(B), P.L. 115-254.

[194] DRRA Section 1216(a)(2)(A), P.L. 115-254. DRRA Section 1216(a)(1) defines *covered assistance* as assistance provided under Stafford Act Section 408 in relation to a presidential declaration of major disaster or emergency under Stafford Act Sections 401 or 501, respectively, on or after October 28, 2012.

[195] DRRA Section 1216(b)(2), P.L. 115-254. For purposes of DRRA Section 1216(b), *covered assistance* is assistance provided under Stafford Act Section 408 in relation to a presidential declaration of major disaster or emergency under Stafford Act Sections 401 or 501, respectively, on or after January 1, 2012.

report, this provision is intended to "ensure that FEMA initiates any collection actions as quickly as possible … and provide more certainty to individuals recovering from disasters."[196]

To support its implementation of DRRA Sections 1216(a) and (b), FEMA issued an instruction on May 14, 2019, updating its recoupment process for IA recipients.[197] The instruction provides specific guidance on how a debtor can satisfy the four elements that must be met before a waiver may be granted per DRRA Section 1216(a).[198] It also notes, per DRRA Section 1216(b), that the "IAD [Individual Assistance Division] will prioritize reviews of potential debt nearing the end of the 3-year period."[199] Additionally, FEMA added a waiver notice to all debt recoupment letters to instruct recipients on the waiver process.[200] The information provided to individuals focuses on affirmations that they were not at fault (i.e., there was no "Misrepresentation," "Failure to Disclose," "Knowledge of Error," "Misuse," or "Other Fault"), and that collection of the debt would be against equity and good conscience (i.e., they must show they "gave up a benefit because of the overpayment, or … changed … [their] position for the worse because of the overpayment" or "[c]ollection of the overpayment would

Four Required Conditions for a Waiver

According to FEMA's "Instruction 116-1-2: Individuals and Households Program Recoupment," the following four conditions must be met before a waiver may be granted (emphasis was added to the quoted text below):

1. "The covered assistance was distributed based on FEMA error. Even in circumstances where no debtor fault exists, not all ineligible assistance results from FEMA error." For example, FEMA payments provided in advance of other funds, such as insurance, would not be considered to be assistance that was distributed based on FEMA error.

2. "There was no fault on behalf of the debtor. 'Fault' exists if, considering all circumstances, it is determined that the debtor knew or should have known that an error existed but failed to take action to have it corrected." For example, fault could be the result of a direct or indirect act or omission by the debtor that was "erroneous or inaccurate or otherwise wrong." Fault is also presumed if the debtor misuses FEMA assistance, including to pay expenses not caused by the disaster, or using funds "in a manner inconsistent with their intended use."

3. "The collection of the debt would be against equity and good conscience. … The legal obligation to pay a debt to FEMA may be overcome by other consideration if enforcement of the debt would be unfair to the point of violating equity and good conscience." For example, if the collection of the debt would result in undue hardship, such as by depriving the debtor of basic necessities, it may be considered against equity and good conscience.

4. "There is no indication the debt involves fraud, the presentation of a false claim, or misrepresentation by the debtor or any party having an interest in the claim."

[196] U.S. Congress, House Committee on Transportation and Infrastructure (House Transportation and Infrastructure), *Disaster Recovery Reform Act (DRRA) Report*, committee print, 115th Cong., 2nd sess., December 21, 2018, H.Rept. 115-1098, p. 18.

[197] FEMA, "Instruction 116-1-2: Individuals and Households Program Recoupment," v. 2, May 2019.

[198] FEMA, "Instruction 116-1-2: Individuals and Households Program Recoupment," v. 2, May 2019, pp. 15-17.

[199] FEMA, "Instruction 116-1-2: Individuals and Households Program Recoupment," v. 2, May 2019, p. 3.

[200] FEMA, *2019 DRRA Report*, p. 18; and FEMA, "DRRA Provisions 1210(A)-1219," last accessed December 18, 2020, https://www.fema.gov/disasters/disaster-recovery-reform-act-2018/provisions-1210-1219 (see "Debt Waiver and Recoupment (Section 1216 a and b)"). FEMA's process for considering an IHP waiver request is detailed in "Instruction 116-1-2: Individuals and Household Program Recoupment." The general process is described as follows. After a debt has been established, individuals who would like to request a waiver may contact FEMA, and then the Office of Chief Financial Officer (OCFO) will mail them a waiver fact sheet to aid in their application. The OCFO then forwards completed waiver requests to FEMA's IHP staff for analysis and a recommendation. "The OCFO makes the final agency determination [as to] whether the criteria for [a] waiver [as] mandated by DRRA have been met and notifies the applicant." (Email from FEMA Office of External Affairs staff, February 11, 2021). A template debt letter can be found in "Appendix B: Template for a Notice and Debt Letter Resulting from a Major Disaster or Emergency Declared on or after October 28, 2012" and "Appendix C: Waiver Information Sheet" of FEMA, "Instruction 116-1-2: Individuals and Households Program Recoupment," v. 2, May 2019, pp. 37-42.

be unduly difficult, grossly unfair, or would prevent … [them] or [their] family members from obtaining basic necessities").[201]

DRRA Section 1216(c) changed the start of the three-year PA statute of limitations,[202] such that new administrative actions to recover payments cannot be initiated "after the date that is 3 years after the date of transmission of the final expenditure report for *project completion* [emphasis added]"[203] (rather than the final expenditure report for the disaster or emergency).[204] Prior to DRRA, FEMA could potentially recoup funding from projects completed and closed because the disaster was still open. The project-by-project statute of limitations may ease the administrative and financial burden that the management of disaster recovery programs places on state, territorial, and Indian tribal governments because it creates certainty as to the projects that may be subject to recoupment. It may also incentivize the timely closeout of PA projects by state and local governments, which may also ease FEMA's administrative and financial burdens.[205]

To support its implementation of DRRA Section 1216(c), FEMA is currently updating its "Recovery Policy: Stafford Act Section 705, Disaster Grant Closeout Procedures."[206] The public comment period for the draft policy ended on December 10, 2020, and as of February 2021, FEMA was adjudicating the public comments, which are focused on questions such as "what will constitute certification by the grantee (recipient) of project completion that will represent the statute of limitations start date, for both large and small projects."[207] Congress could continue monitoring FEMA's efforts to update its guidance to reflect the change to the statute of limitations, as the DHS OIG recommended.[208]

Section of 1237: Certain Recoupment Prohibited[209]

DRRA Section 1237 directs FEMA to deem certain disaster assistance to have been "properly procured, provided, and utilized" if FEMA deployed a technical assistance contractor to assist the local government with project activities and the technical assistance contractor provided

[201] "Appendix C: Waiver Information Sheet" of FEMA, "Instruction 116-1-2: Individuals and Households Program Recoupment," v. 2, May 2019, p. 41.

[202] DRRA Section 1216(c), P.L. 115-254, as it amends §705 of the Stafford Act, P.L. 93-288, as amended, 42 U.S.C. §5205.

[203] 42 U.S.C. §5205(a)(1).

[204] 42 U.S.C. §5205(a)(1) (2017), https://www.govinfo.gov/content/pkg/USCODE-2017-title42/pdf/USCODE-2017-title42-chap68-subchapV-sec5205.pdf.

[205] According to FEMA, however, "this provision would not necessarily impact the timeliness/rate of closure of projects as the provision does not speak to the period of performance for the projects" (email from FEMA's Office of External Affairs staff, February 11, 2021).

[206] The current version of FEMA's "Recovery Policy: Stafford Act Section 705, Disaster Grant Closeout Procedures," FP 205-081-2, issued March 31, 2016, is available at https://www.fema.gov/sites/default/files/2020-07/fema_stafford-act-section-705-policy-FP-205-081-2_3-31-2016.pdf (last accessed April 26, 2021).

[207] Emails from FEMA Office of External Affairs staff, January 5, 2021, and February 11, 2021. See also FEMA, *2019 DRRA Report*, p. 18.

[208] DHS OIG, *FEMA Needs Revised Policies and Procedures to Better Manage Recovery of Disallowed Grant Funds*, OIG-21-28, March 11, 2021, pp. 5 and 10, https://www.oig.dhs.gov/reports/2021/fema-needs-revised-policies-and-procedures-better-manage-recovery-disallowed-grant-funds/oig-21-28-mar21. The DHS OIG found FEMA's internal guidance was not compliant with DRRA's amendment to Stafford Act Section 705(a), which established new time limits for debt recovery, and noted that "FEMA did not effectively communicate the changes to its staff and some officials were unaware the statute of limitations changed. In addition, FEMA did not update its guidance to remain compliant in a timely manner. As a result, FEMA may attempt to recover payments beyond the time limit."

[209] This section authored by Natalie Keegan, Analyst in American Federalism and Emergency Management Policy.

inaccurate information to the local government, and the local government relied on the inaccurate information to make project management decisions.[210] In cases where the project management decisions made under such conditions result in the withdrawal or de-obligation of disaster assistance after the DHS OIG conducts an audit of project costs, DRRA Section 1237 directs FEMA to restore the funding to the local government.[211]

According to FEMA, "this provision applied to a single instance for a single applicant in a single event"[212] and the provision was implemented pursuant to the agency directing the relevant FEMA Region to implement this provision for relevant PA projects, and by FEMA reinstating relevant PA project worksheets.[213] Although it appears that FEMA has interpreted DRRA Section 1237 to apply solely to a specific recoupment,[214] the text of DRRA Section 1237 appears to be broad enough that should the provision's criteria be met in a future recoupment instance, FEMA would have the authority to restore funding. FEMA acknowledged that this could be the case, and that future instances where DRRA 1237 may apply will be evaluated on a case-by-case basis.[215] Thus, FEMA's implementation of this provision is limited to a specific recoupment, and Congress may wish to consider whether to require FEMA to provide guidance that broadly implements DRRA Section 1237.

Even though Section 1237 provisions do not expressly stipulate an assumption of good faith on the part of relevant grant recipients, prohibitions on recoupment may encounter challenges when a grant recipient may be subject to prosecution. For example, in June 2020, the U.S. Department of Justice intervened in a lawsuit involving a FEMA technical assistance contractor who received more than $300 million under a FEMA contract to conduct site evaluations, prepare and review damage estimates, and make applicant eligibility determinations for PA funding.[216] According to the U.S. Attorney's Office, the technical assistance contractor was "responsible for providing FEMA with truthful and accurate information," but the lawsuit alleges that the contractor knowingly submitted false claims on behalf of applicants seeking PA program funds.[217] Additionally, the lawsuit alleges that "certain applicants falsely certified the accuracy of the information and are thus jointly and severally liable for false claims prepared and submitted by" the technical assistance contractor on their behalf. Although there has yet to be any determination of liability in that particular case, the lawsuit raises questions regarding implementation of recoupment prohibition provisions in general, and the extent to which such prohibitions might or might not protect disaster assistance recipients who may have knowingly submitted false claims for disaster funding.

Policy Considerations

The following sections address some additional potential DRRA implementation challenges and considerations that may be of interest to Congress, including enforcement of DRRA's

[210] DRRA Section 1237, P.L. 115-254.

[211] DRRA Section 1237, P.L. 115-254.

[212] Email from FEMA Office of External Affairs staff, March 17, 2021.

[213] FEMA, *2019 DRRA Report*, p. 23.

[214] Email from FEMA Office of External Affairs staff, April 8, 2021.

[215] Email from FEMA Office of External Affairs staff, April 8, 2021.

[216] U.S. Department of Justice, U.S. Attorney's Office, Eastern District of Louisiana, United States Joins Lawsuit Against AECOM Alleging False Claims in Connection with Hurricane Disaster Relief, press release, June 3, 2020.

[217] U.S. Department of Justice, U.S. Attorney's Office, Eastern District of Louisiana, United States Joins Lawsuit Against AECOM Alleging False Claims in Connection with Hurricane Disaster Relief, press release, June 3, 2020.

implementation deadlines as established in the enacted legislation, and considerations related to DRRA's implementation in light of the federal response to the COVID-19 pandemic.

Enforcement of Implementation Deadlines

FEMA's Administrator is identified as the officer charged with implementing many of DRRA's provisions. In some cases, other federal entities or officers, such as the DHS OIG, are assigned responsibility for implementation. Many of the DRRA provisions do not include specific deadlines; however, in some instances, FEMA's Administrator or another federal entity is required to take specific actions (e.g., promulgation of regulations) by a specific date (e.g., not later than two years after the date of DRRA's enactment).

As noted above, some of DRRA's implementation deadlines have passed, yet FEMA is still working toward implementation. In some cases, FEMA is working through final comments before issuing its final guidance. In other cases, FEMA's ability to implement DRRA's provisions may be affected by the change in Administration that occurred following the inauguration of President Joseph R. Biden Jr. in January 2021.[218] For example, FEMA extended the comment period for the rulemaking[219] undertaken pursuant to DRRA Provision 1239, citing the January 20, 2021, Biden Administration memorandum entitled "Regulatory Freeze Pending Review."[220]

There are various avenues that Congress or other actors may pursue to enforce deadlines established in legislation, including congressional oversight and judicial review.[221] As explained in CRS Report R45336, *Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking*:

> Congress has a number of tools that it can use to combat agency delay. To encourage agencies to act in a timely fashion, Congress may set nonbinding time frames or statutory deadlines for particular agency actions, or impose penalties on agencies should they fail to meet those deadlines. Even if Congress does not impose any specific timing requirements for a required agency action, the agency still must act within a "reasonable time" under the [Administrative Procedures Act].
>
> Persons alleging unreasonable delay by agencies may sue in court to compel agency action. However, the recourse such individuals will have, if any, depends on the statutory scheme and the severity of the delay. In the absence of specific deadlines, most courts employ a multifactor balancing test to determine whether the agency's delay is "unreasonable"; this test examines, among other things, the length of the delay, the importance of the regulation at issue, and the interests harmed by the delay. Courts are generally deferential to agencies in this analysis. In other situations, such as when Congress has imposed a specific statutory deadline, courts are more willing to compel agency action, with some courts holding that

[218] FEMA's Office of External Affairs noted that the Biden Administration's Presidential Actions should have no impact on the agency's DRRA implementation efforts, including related to its rulemaking requirements established in DRRA Sections 1235(d), 1211(a), and 1239(b) (email from FEMA Office of External Affairs staff, February 10, 2021).

[219] For additional information on the rulemaking process, including the Administrative Procedure Act of 1946 (APA), which is the statute governing the rulemaking process, see CRS Report R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, by Maeve P. Carey.

[220] FEMA, "Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program; Public Meeting," 86 *Federal Register* 8334-8335, February 5, 2021, https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02459.pdf. See the memorandum for the heads of executive departments and agencies from Ronald A. Klain, Assistant to the President and Chief of Staff, regarding "Regulatory Freeze Pending Review," January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/.

[221] For additional information on the rulemaking process, see CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey.

> an order compelling agency action is mandatory whenever a statutory deadline is violated.[222]

To enforce DRRA's implementation deadlines, Congress has and may continue to use its oversight authority, including by conducting hearings,[223] and requiring FEMA to report on the agency's implementation progress for specific provisions. DRRA includes many such reporting requirements.[224]

DRRA Implementation Considering the COVID-19 Pandemic

The COVID-19 pandemic has presented significant challenges for all 50 states, 5 territories, the District of Columbia, and the federally recognized Indian tribal governments, as well as local governments, private and nonprofit organizations, and individuals and households. Because DRRA was enacted prior to the onset of the pandemic, the pandemic environment may affect the application of some of DRRA's provisions in unforeseen ways. Select examples of this are included below.

DRRA Section 1234 Available BRIC Funding Based on the Estimated Aggregate Amount of Funding Awarded for COVID-19

Despite the substantial increase in overall funding for pre-disaster mitigation, post-disaster mitigation, realized in the Hazard Mitigation Grant Program (HMGP) and Public Assistance (PA), still receives more resources. GAO found that most of the hazard mitigation funding obligated by FEMA from FY2010 though FY2018 was for post-disaster mitigation. Of the approximately $11.3 billion obligated during that period, 88% ($10 billion) was for post-disaster grants through HMGP and PA. FEMA's competitive pre-disaster grant programs, FMA and PDM, accounted for about 12% ($1.3 billion) of the total.[225]

The 6% Building Resilient Infrastructure and Communities (BRIC) set-aside has increased pre-disaster mitigation funding significantly. However, post-disaster mitigation, awarded through both HMGP and PA mitigation measures funded under Section 406 of the Stafford Act, still receives far more resources.[226] Because HMGP and PA mitigation funds are only available to states following a major disaster declaration, they cannot be targeted at areas with greater risk of future losses. As a result, disasters determine, to a great extent, where the federal government

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[222] See CRS Report R45336, *Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking*, by Kevin J. Hickey, p. 2 (citations omitted). For additional information and a legal overview of the methods by which agencies may promulgate rules, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey. Further, for additional information on how both individuals and entities that are affected by a federal agency's actions may be able to challenge that action in federal court, see CRS Legal Sidebar LSB10536, *Judicial Review of Actions Legally Committed to an Agency's Discretion*, by Daniel J. Sheffner.

[223] See, for example, U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, *Disaster Preparedness: DRRA Implementation and FEMA Readiness*, 116th Cong., 1st sess., May 22, 2019.

[224] For additional information on the status of FEMA's implementation of select DRRA provisions, including their associated deadlines for implementation, see CRS Report R46774, *The Disaster Recovery Reform Act of 2018 (DRRA): Implementation Update Tables for Select Provisions*, coordinated by Elizabeth M. Webster.

[225] GAO, *Disaster Resilience: FEMA Should Take Additional Steps to Streamline Hazard Mitigation Grants and Assess Program Effects*, GAO-21-140, February 2, 2021, pp. 12-13, https://www.gao.gov/products/gao-21-140.

[226] CRS analysis of OpenFEMA data set on Hazard Mitigation Assistance Projects—v2, at https://www.fema.gov/openfema-data-page/hazard-mitigation-assistance-projects-v2 (last accessed January 25, 2021).

invests in disaster resilience. This emphasis on post-disaster funding may not incentivize states sufficiently to mitigate future risks prior to a disaster occurring.[227]

The funding differential between pre-disaster and post-disaster mitigation could be further widened if FEMA were to award HMGP funding for the COVID-19 disaster declarations (described below).[228] Additionally, as described in more detail in the following section, FEMA's proposed rulemaking under DRRA Section 1239 could reduce available funding for both pre- and post-disaster mitigation.

Currently, because of the COVID-19 disaster declarations, the amount of funding set aside in the Disaster Relief Fund for pre-disaster mitigation is significantly larger than FEMA's initial expectations when the BRIC program was established. FEMA's initial estimates suggested that as much as $3.7 billion could be provided for BRIC as a result of the COVID-19 major disaster declarations.[229] As of February 28, 2021, there was $1.055 billion set aside in the DRF for pre-disaster mitigation.[230]

Hazard Mitigation Grant Program Funding for the COVID-19 Disasters

HMGP funding is awarded as a formula grant triggered by a major disaster declaration or FMAG declaration.[231] Virtually every state, territory, and tribal government requested HMGP funding for the COVID-19 disasters. These requests have been under review since March 2020, [232] despite support from congressional offices to approve these requests,[233] and are still under review by the Biden Administration.[234] According to FEMA, there are no other instances of a major disaster declaration where HMGP funding was not awarded.[235]

Additional information on the BRIC program is included in the "Section 1234: National Public Infrastructure Pre-Disaster Hazard Mitigation" section.

DRRA Section 1239 Rulemaking and the Adoption of Total Taxable Resources

As noted, the ongoing COVID-19 pandemic and its lasting effects may affect some DRRA provisions once they are implemented. For example, the rule revising PA cost of assistance estimates required by DRRA Section 1239 proposes to "increase the per capita indicator to account for increases in inflation … and to adjust the individual States' indicators by their Total Taxable Resources (TTR)."[236] FEMA began estimating how this new rule may affect SLTT

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[227] GAO, Disaster Resilience: FEMA Should Take Additional Steps to Streamline Hazard Mitigation Grants and Assess Program Effects, GAO-21-140, February 2, 2021, p. 16, https://www.gao.gov/products/gao-21-140.

[228] FEMA, "COVID-19 Disaster Declarations," https://www.fema.gov/disasters/coronavirus/disaster-declarations.

[229] FEMA, *Disaster Relief Fund: Monthly Report as of December 31, 2020*, Fiscal Year 2021 Report to Congress, Washington, DC, January 8, 2021, p. 7, https://www.fema.gov/sites/default/files/documents/fema_jan-2021-disaster-relief-fund-report.pdf.

[230] FEMA, *Disaster Relief Fund: Monthly Report as of February 28, 2021*, Fiscal Year 2021 Report to Congress, p. 4, March 11, 2021, https://www.fema.gov/sites/default/files/documents/fema_mar-2021-disaster-relief-fund-report.pdf.

[231] For additional information on HMGP and other FEMA Hazard Mitigation Assistance, see CRS Insight IN11187, *Federal Emergency Management Agency (FEMA) Hazard Mitigation Assistance*, by Diane P. Horn.

[232] Emails from FEMA Congressional Affairs Staff, most recently March 29, 2021.

[233] See, for example, Senator Ben Cardin, "Maryland Delegation Presses FEMA for Approval of Additional Federal Disaster Assistance Resources to Support COVID-19 Recovery," press release, June 29, 2020.

[234] Emails from FEMA Congressional Affairs Staff, most recently March 29, 2021.

[235] Email from FEMA Office of External Affairs staff, November 10, 2020.

[236] FEMA, "Proposed Rule: Cost of Assistance," 80720. Total Taxable Resources (TTR) is defined as "the

governments before the onset of the COVID-19 pandemic. The pandemic response efforts and the economic effects of the pandemic have negatively affected SLTT government finances,[237] and may affect their TTR. TTR data, however, lags two years behind the current calendar year.[238] Depending on when the rule is finalized, the TTR data may or may not accurately reflect the state's ability to manage disaster response and recovery without federal assistance.

Additionally, the guidance for the recently updated rule for evaluating a governor's request for IA pursuant to a major disaster declaration accommodates this challenge by permitting states to provide supplemental information explaining why TTR data may not accurately reflect the state's ability to respond to and recover from the disaster.[239] It is unclear how this potential challenge may be resolved for the PA rule.

Given these factors, Congress is likely to consider how the proposed higher PA thresholds may affect the likelihood of a major disaster being declared, particularly for states with relatively high reported income flows.[240] Further, Congress may review the public meetings and comments on the proposed rulemaking to consider the burdens placed on SLTT governments.

Additional information can be found in the "Section 1239: Cost of Assistance Estimates" section.

DRRA Section 1215 Management Cost Caps During the Pandemic

DRRA Section 1215 establishes caps on state and sub-state grantee reimbursements for management costs.[241] FEMA implemented this provision by issuing several grant program guidance documents.[242] Notably, these documents were issued before the COVID-19 pandemic

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unduplicated sum of the income flows produced within a state (GSP) and the income flows received by its residents (SPI) which a state can potentially tax. The distinction between flows, which a state can potentially tax, and the actual fiscal choices made by states is critical. TTR says nothing about, nor does it consider, the actual fiscal choices made by the states. In sum, TTR is a flow concept, a comprehensive measure of all the income flows a state can potentially tax" (U.S. Department of the Treasury, "Treasury Methodology for Estimating Total Taxable Resources (TTR)," revised November 2002, p. 2, https://www.treasury.gov/resource-center/economic-policy/Documents/nmpubsum.pdf).

[237] For additional information on the nature and characteristics of state and local debt in light of the coronavirus disease 2019 (COVID-19) pandemic, see CRS In Focus IF11502, *State and Local Government Debt and COVID-19*, by Grant A. Driessen; and CRS Insight IN11351, *COVID-19 and State and Local Fiscal Conditions: Select Resources on Current Status, Impacts, and Federal Relief*, by Grant A. Driessen, Jared C. Nagel, and Maria Kreiser.

[238] FEMA, *Individual Assistance Declarations Factors Guidance*, June 2019, p. 8, https://www.regulations.gov/docket?D=FEMA-2014-0005.

[239] FEMA, *Individual Assistance Declarations Factors Guidance*, June 2019, p. 8, https://www.regulations.gov/docket?D=FEMA-2014-0005. The guidance states that "[t]he state's request should explain the circumstances that explain why TTR is inaccurate or misleading. It is possible that a State's TTR data could be strong or trending upwards when in fact recent events may have caused a significant drop in the State fiscal capacity that is not yet reflected. This significant drop could be caused by events such as a previous disaster or a financial downturn." and that "'Other Factors' is included … to provide the State the opportunity to raise and discuss any other additional factors related to the State's fiscal capacity such as burdens on a State treasury or a State's inability to collect funds. For example, a hurricane may cause extensive damage in a coastal area and negatively impact tourism, which in turn, will have a negative impact on the tax base and fiscal capacity."

[240] See concerns raised in National Low Income Housing Coalition, "Proposed FEMA Rule Would Create Roadblocks for Presidential Disaster Declarations," December 22, 2020, https://nlihc.org/resource/proposed-fema-rule-would-create-roadblocks-presidential-disaster-declarations; Thomas Frank, "FEMA Seeks to Slash Disaster Aid as Trump Heads for Exit," December 14, 2020, *E&E News*, https://www.eenews.net/stories/1063720573.

[241] Disaster Recovery Reform Act of 2018, P.L. 115-254.

[242] FEMA, "Hazard Mitigation Grant Program Management Costs (Interim)," FEMA Policy FP 104-11-1, November 14, 2018, https://www.fema.gov/sites/default/files/2020-07/fema_DRRA-1215-hazard-mitigation-grant-program-management-costs-interim-policy.pdf; FEMA, "Public Assistance Management Costs, FEMA Recovery Policy FP 104-11-2," November 14, 2018, https://www.fema.gov/sites/default/files/2020-07/

caused significant changes in state and local government disaster response activities. Establishing caps on management cost reimbursements at both the state and the sub-grantee level potentially reduces the flexibility for state and local governments to respond to unexpected disaster events. For example, prior to the pandemic, FEMA issued guidance on the DRRA management cost provisions that provided the following list of management activities that would be eligible for reimbursement:

> These activities may include, but are not limited to:
>
> a. Preliminary Damage Assessments,
>
> b. Meetings regarding the PA Program or overall PA damage claim,
>
> c. Organizing PA damage sites into logical groups,
>
> d. Preparing correspondence,
>
> e. Site inspections,
>
> f. Travel expenses,
>
> g. Developing the detailed site-specific damage description,
>
> h. Evaluating Section 406 hazard mitigation measures,
>
> i. Preparing Small and Large Projects,
>
> j. Reviewing PWs,
>
> k. Collecting, copying, filing, or submitting documents to support a claim,
>
> l. Requesting disbursement of PA funds,
>
> m. Training.[243]

The list of activities detailed in this guidance reflects the types of grant management activities that states and sub-grantees would undertake in administering PA grant projects. However, administering FEMA funding provided for the pandemic presents unique management challenges that likely increase the overall disaster grant management costs incurred by states and sub-grantees. For example, in November 2020, FEMA issued a policy that states "work and associated costs to support the distribution and administration of COVID-19 vaccines may be eligible for PA."[244] Given that this is the first time PA funding has been used for nationwide vaccine distribution, the associated management costs for such activities is unclear. Generally, management costs are higher when implementing a new program compared to administering awards under an existing program.

Although FEMA officials may broaden the list of eligible management activities to accommodate unexpected expenses, the statutory cap on management costs prohibits the reimbursement of any management costs in excess of the capped amount. Consequently, it is possible that unusual management expenses associated with the pandemic may not be reimbursed. For example, there were likely unforeseen administrative costs associated with state and local grant management

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pa_management_costs_interim_policy.pdf; FEMA, "Public Assistance Management Costs Interim Policy," fact sheet, February 8, 2019, https://www.fema.gov/sites/default/files/2020-07/pa_fact_sheet_management_costs_interim_policy.pdf; FEMA, "HMGP Management Costs Policy (Interim)," frequently asked questions, February 28, 2020, https://www.fema.gov/sites/default/files/2020-07/hma_management-cost-faq_3-23-2020.pdf.

[243] FEMA, "Public Assistance Management Costs, FEMA Recovery Policy FP 104-11-2," November 14, 2018, p. 4, https://www.fema.gov/sites/default/files/2020-07/pa_management_costs_interim_policy.pdf.

[244] FEMA, "COVID-19 Pandemic: Vaccination Planning Frequently Asked Questions," November 19, 2020, p. 3.

personnel administering grant projects while on mandatory telework. When combined with traditional disaster assistance grant management costs, these additional costs may cause overall management costs to exceed DRRA's management cost caps.

Additionally, the pandemic has not necessitated large-scale repair and replacement construction work, as could be needed following a natural disaster. Instead, it has required the purchase of supplies, such as personal protective equipment (PPE), which are smaller by comparison, but may require similar levels of administration and management costs. The administrative burden of managing the pandemic costs therefore may exceed traditional natural disaster levels, while the total dollar amount of grant awards may be lower under a pandemic disaster declaration. Given that the allowable reimbursement for management costs is based on the total award amount, it is possible that management costs to administer federal disaster assistance during a pandemic exceed the allowable amount under the DRRA management cost percentage caps. Congress may wish to consider whether waiver authority for the FEMA management cost caps would be necessary for events such as a pandemic.

Concluding Observations

The full effects of recently issued guidance and policies and regulatory changes remain to be determined. For example, the first application period for the new Building Resilient Infrastructure and Communities Grant Program closed at the end of January 2021, and any state, territory, or federally recognized tribe that had a major disaster declaration in the seven years prior to the application start date was eligible to apply for a portion of BRIC's $500 million—subject to the program funding caps. The COVID-19 major disaster declarations alone ensured the eligibility of all 50 states, 5 territories, the District of Columbia, and 1 federally recognized tribal government in FY2020. It remains to be seen which entities will be awarded BRIC funding,[245] and whether the projects completed with the funding will address BRIC's pre-disaster mitigation priorities.

Congress may continue overseeing the implementation of DRRA's provisions through hearings or other inquiries to ensure that the post-DRRA changes to disaster assistance programs and policies fulfill congressional intent. Congress may also review the effectiveness and impacts of FEMA's DRRA-related regulations and policy guidance, including assessing the effects of DRRA-related changes to federal assistance for past and future disasters, and other grant programs. The implementation of some DRRA provisions may directly affect the implementation of other provisions. For example, there could be a connection between FEMA's Public Assistance rulemaking and funding available for pre-disaster mitigation. FEMA has begun the rulemaking process to revise the factors that are evaluated when determining whether to authorize a request for a major disaster declaration authorizing PA. Although DRRA requires FEMA to give greater consideration to severe local impacts and recent disasters when considering PA requests, the rulemaking is focused on revising the PA cost of assistance estimates. FEMA proposed to increase the cost of assistance thresholds that must be met in order for states and territories to receive PA for permanent work. As a result, less costly disasters may not receive PA. It remains to be determined whether this may, in fact, reduce the number of incidents that are determined to be eligible for a major disaster declaration because the rule has not yet been issued and the President retains discretion to approve such requests. Ultimately, however, if the number of declared major disasters decreases, federal assistance for state, territorial, tribal, and local response and recovery

[245] The Pre-Award Selection Notice is scheduled for June 2021. FEMA, "Notice of Funding Opportunity for Hazard Mitigation Assistance Grants: Fiscal Year 2020 Building Resilient Infrastructure and Communities," fact sheet, August 2020, p. 3, https://www.fema.gov/sites/default/files/2020-09/fema_bric_fy-2020_nofo_fact-sheet.pdf.

could decline, which, in turn, could reduce funding for programs such as BRIC that receive a percentage of the estimated aggregate amount of funding awarded.[246] Thus, the effect of the PA rulemaking could directly affect funding to support pre-disaster mitigation and resiliency.

Disaster preparedness, mitigation, prevention, protection, response, and recovery operate on a sort of cyclical continuum,[247] and some DRRA provisions, such as those just mentioned, are interconnected in their potential effects. Issues of continuing congressional interest include the interconnected effects of these provisions as they are implemented, and whether these regulatory changes create outcomes that meet congressional intent. As novel disasters arise, Congress may continue evaluating whether the Stafford Act and FEMA have the authority and capacity to adequately support disaster response and recovery.

[246] Stafford Act Sections 403, 406, 407, 408, 410, 416, and 428. See CRS Report R45819, *The Disaster Recovery Reform Act of 2018 (DRRA): A Summary of Selected Statutory Provisions* for further details. See also Andrew Olson, "FEMA Proposed Rule Incorporates State Fiscal Capacity," *Federal Funds Information for States*, Issue Brief 21-02, January 29, 2021, pp. 6-7.

[247] See, for example, the "Recovery Continuum" detailed in FEMA's National Disaster Recovery Framework, 2nd ed., June 2016, figure 1, p. 5, https://www.fema.gov/sites/default/files/2020-06/national_disaster_recovery_framework_2nd.pdf.

Appendix A. History of FEMA Management Cost Rate Calculations

FEMA has taken several approaches to calculating management cost reimbursements over time. Prior to the enactment of the Disaster Mitigation Act of 2000 (DMA2K, P.L. 106-390), FEMA provided reimbursement for management costs on a sliding scale based upon grant program guidance, which resulted in states and sub-grantees each receiving separate reimbursements for PA projects and HMGP projects. DMA2K established a new section of the Stafford Act, Section 324, that expanded the program-level definition of management costs to encompass multiple Stafford Act programs, and directed the President to establish management cost rates by regulation.[248] DMA2K defined management costs as including:

> any indirect cost, any administrative expense, and any other expense not directly chargeable to a specific project under a major disaster, emergency, or disaster preparedness or mitigation activity or measure.[249]

In response to these statutory provisions, FEMA issued a Notice of Proposed Rulemaking in 2002 that proposed creating a new management cost grant program that awarded funds based on a flat percentage rate.[250] The proposed rate was 4.41% of the combined PA and HMGP total federal share for management costs for major disasters declared after October 1, 2002.[251] Notably, management costs were defined in the proposed rule as those expenses "including any direct or indirect cost, any administrative expense, and any other expense not directly chargeable to a specific project for PA and HMGP."[252]

The proposed rule would have changed the process for administering management costs to states for Stafford Act programs by creating three silos for management costs:

- a state management cost silo funded by the new management cost grant program;
- a sub-grantee silo for PA project-specific administrative costs funded under the PA program; and
- a sub-grantee silo for HMGP project-specific administrative costs.

The 4.41% flat rate for the proposed management cost grant program was intended to reimburse costs to the state for administering PA and HMGP disaster assistance and, unlike the DRRA provisions, there was not an additional breakout percentage for sub-grantees. It was left to the states, or any grant recipient defined in program regulation as a "state," to determine the reimbursement for sub-grantees for management costs not directly chargeable to a specific project funded by PA and HMGP. Comments on the proposed rule raised several concerns from states and other stakeholders, including the following:

- rates were inadequate to provide effective program management;
- the proposed process did not align with Office of Management and Budget (OMB) Circular No. A-87 allowing for indirect costs;

[248] Disaster Mitigation Act of 2000 (DMA2K, P.L. 106-390, 114 Stat. 1560).

[249] Disaster Mitigation Act of 2000 (DMA2K, P.L. 106-390, 114 Stat. 1560).

[250] FEMA, "Management Costs," 67 *Federal Register* 56134, August 30, 2002.

[251] FEMA, "Management Costs," 67 *Federal Register* 56134, August 30, 2002.

[252] FEMA, "Management Costs," 67 *Federal Register* 56130, August 30, 2002.

- the new grant process led to increased costs to grantees and sub-grantees;
- the combined rate for PA and HMGP reduced state flexibility to distribute funding as needed; and
- the combined rate for grantee and sub-grantee could create conflict when determining what percentage the state versus the sub-state level entity could receive.[253]

In response to these concerns, FEMA's Interim Final Rule in 2007 eliminated the proposed new management cost grant program and, instead, set three management cost rates for select Stafford Act programs:

- PA administrative costs for major disasters;
- HMGP administrative costs for major disasters; and
- PA administrative costs for emergency declarations.

For major disasters declared under the Stafford Act on or after November 13, 2007, the flat percentage rate of the federal share of projected eligible program costs was 3.34% for PA and 4.89% for HMGP.[254] For emergencies declared under the Stafford Act on or after November 13, 2007, the flat percentage rate of the federal share of projected eligible program costs was 3.90%. This approach to management cost rates remained until October 2017, when FEMA issued a recovery policy that established alternative procedures for measuring PA direct administrative costs.

On October 25, 2017, FEMA attempted to reduce the administrative burden at the project level by issuing a new voluntary, alternative recovery policy, Public Assistance Alternative Procedures for Direct Administrative Costs (DAC). DAC's voluntary alternative procedures allowed sub-grantees to use a flat 4% of the full eligible project costs for all PA projects.[255] The amount of project costs was calculated prior to reductions for insurance proceeds, cost shares, or other reductions. DAC also provided a closeout incentive of an additional 1% for projects that were closed out within 90 days of the end of the period of performance. The additional funds could be used for a variety of eligible activities selected by the sub-grantee, including for cost effective hazard mitigation activities. The management cost provisions in DRRA differed from both the DMA2K provisions and the DAC procedures.

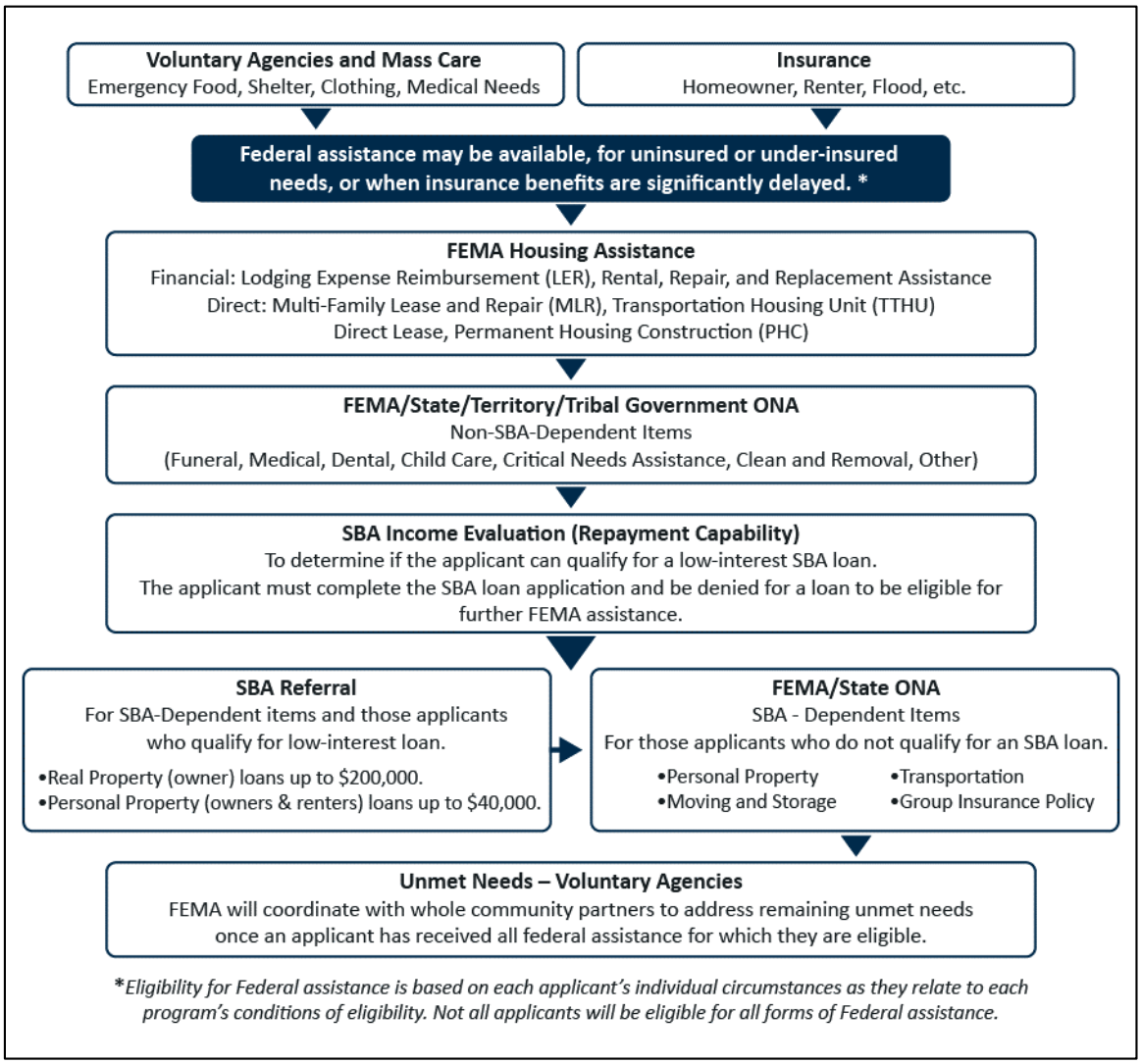
[253] FEMA, "Management Costs," 72 *Federal Register* 57870-57871, October 11, 2007.

[254] FEMA, "Management Costs," 72 *Federal Register* 57877, October 11, 2007.

[255] FEMA, "Recovery Policy: Public Assistance Alternative Procedures for Direct Administrative Costs," October 25, 2017, https://www.fema.gov/sites/default/files/2020-07/fema_PAAP-direct-admin-costs-policy-V1_10-25-2017.pdf.

Appendix B. Delivery Sequence

Figure B-1. Disaster Assistance Sequence of Delivery



Source: Federal Emergency Management Agency, *Delivery of Post-Disaster Assistance to Individuals*, Report to Congress, June 22, 2020, p. 21.

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