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FEMA Seeks Comment on Proposed Change to Disaster Declaration Criteria

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Just before the holidays, FEMA published an 86-page notice of proposed rulemaking in the Federal Register regarding a change to the "Estimated cost of the assistance" disaster declaration factor that FEMA uses to review a Governor's request for a major disaster under the Public Assistance Program. Any comments to the proposed rule must be submitted by February 12, 2021.

Pursuant to 44 C.F.R. § 206.48(a), FEMA considers several factors when determining whether to recommend that the President declare a major disaster authorizing aid under the Public Assistance Program. Federal disaster assistance is generally intended to supplement the resources of an impacted State and its local governments such that Federal aid is only provided when the response and recovery efforts are expected to overwhelm their capabilities. As such, a request for declaration considers the "estimated cost of assistance" against a State's ability to handle the recovery effort as a measure of whether the Federal government should step in and provide additional assistance. In making this determination, FEMA evaluates the estimated cost of Federal and nonfederal assistance against the statewide population to give some measure of the per capita impact within the State. Beginning in 1986, $1 per capita was used as an indicator that the disaster was large enough to warrant Federal assistance. In basic terms, a State with a population of 2 million would need to document an estimated cost of assistance of at least $2 million, including adjustments due to other available resources, to potentially qualify for a Federal declaration. In 1999, FEMA began adjusting this figure annually for inflation. This same year, FEMA established a minimum threshold of $1 million in damages per disaster based on the view that even the most sparsely populated States should be able to cover this level of damage.

Based in part on the increasing frequency of disasters and the resulting strain on FEMA's resources, and also pursuant to Congressional interest as noted in the Disaster Recovery Reform Act of 2018 (DRRA), FEMA's proposed changes purport to more accurately capture a State's financial ability to handle the necessary response and recovery work following a disaster. As noted in the notice of proposed rulemaking, FEMA proposes to:

- increase the per capita indicator to account for increases in inflation from 1986 to 1999;
- adjust the individual States' indicators by their total taxable resources (TTR) to allow FEMA to more accurately gauge a State's fiscal capacity by accounting for taxable resources other than the State's population, such as business income, undistributed corporate profits, and out-of-state residents;
- increase the minimum disaster damage threshold by accounting for inflation from 1999 to 2019, and annually thereafter; and
- use the U.S. Census Bureau's annual population estimates produced under the Population Estimates Program (PEP) instead of the decennial census population data produced every 10 years, which FEMA currently uses to calculate each State's Cost of Assistance (COA) Indicator.

FEMA views these changes as necessary to allow a more accurate evaluation of declaration requests, as the annual updates have not kept pace with the economic resources and financial capacity of some States. FEMA estimates that 27% of the 585 disasters it approved from 2008 to 2017 would not have qualified under the system it is proposing to adopt. FEMA goes so far as to postulate that the current factors may equate to a disincentive for State and local governments to engage in robust mitigation and resiliency efforts, in favor of reliance on the Federal government to step in when disaster strikes. Further, FEMA asserts that disbursing Federal resources to numerous small response and recovery operations weakens its ability to quickly respond to and aid recovery efforts for larger, or concurrent catastrophic disasters. FEMA suggests that smaller events should be handled by States so that FEMA's already constrained resources are reserved for those events that are truly overwhelming.

For some, FEMA's current proposal may bring back memories of the "disaster deductible" concept circulated for comment several years ago. Like that concept, the current changes are likely to generate mixed feelings among the State and local government community and disaster recovery industry professionals. If FEMA's proposed revisions go forward, States would no longer be on equal footing, with more affluent States required to document higher damages to trigger Federal aid. On the other hand, some may believe such a change is warranted to help *promote* equal footing. Regardless, FEMA's proposal would result in increasing declaration thresholds for every State, and all are very likely to agree that the timing is harsh given the demands that the ongoing pandemic is placing on State and local governments. Also like the past deductible concept, these changes are proposed in the midst of a change in Administration, so it's too soon to tell whether these proposed adjustments may come to fruition or whether we will all be "back to the drawing board" in 2021.

For more information, please contact Wendy Huff Ellard or any member of Baker Donelson's Disaster Recovery and Government Services Team.