STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

For CSM Use Only	
Filing Date:	RECEIVED December 23, 2024 Commission on State Mandates
TC #:	24-TC-06

TEST CLAIM FORM AND TEST CLAIM AMENDMENT FORM (Pursuant to Government Code section 17500 et seq. and Title 2, California Code of Regulations, section 1181.1 et seq.)

Section 1

Proposed Test Claim Title:

AB781: Access to Emergency Information and Services: Emergency Shelters: Persons with Pets

Section 2

Local Government (Local Agency/School District) Name:

County of Sacramento

Name and Title of Claimant's Authorized Official pursuant to CCR, tit.2, § 1183.1(a)(1-5):

Chad Rinde, Director of Finance

Street Address, City, State, and Zip:

700 H Street, Suite 3650, Sacramento, CA 95814

Telephone Number: 9168747450

Email Address: rindec@saccounty.gov

Section 3 – Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be sent to this representative. Any change in representation must be authorized by the claimant in writing, and e-filed with the Commission on State Mandates. (CCR, tit.2, § 1183.1(b)(1-5).)

Name and Title of Claimant Representative:

Chad Rinde, Director of Finance

Organization: Sacramento County

Street Address, City, State, Zip:

700 H Street, Suite 3650, Sacramento, CA 95814

Telephone Number: 9168747450

Email Address: rindec@saccounty.gov

Section 4 – Identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to Government Code section 17553 and check for amendments to the section or regulations adopted to implement it:

Assembly Bill No. 781 (2023-24 Regular Session) ACCESSIBILITY TO EMERGENCY INFORMATION AND SERVICES: EMERGENCY SHELTERS: PERSONS WITH PETS, effective January 1, 2024

Government Code Section 8593.10 Subds. (b), (c) and (d). effective January 1, 2024

Statues of 2023, Chapter 344, Section 2: Accessibility to Emergency Information and Services: Emergency Shelters: Persons with Pets, effective January 1, 2024

☑ Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 12 / 23 / 2024

☑ A: Which is not later than 12 months (365 days) following [insert effective date] 01 / 01 / 2024, the effective date of the statute(s) or executive order(s) pled; or

☑ B: Which is within 12 months (365 days) of [insert the date costs were *first* incurred to implement the alleged mandate] 02 / 01 / 2024, which is the date of first incurring costs as a result of the statute(s) or executive order(s) pled. *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred*.

(Gov. Code § 17551(c); Cal. Code Regs., tit. 2, §§ 1183.1(c) and 1187.5.)

Section 5 – Written Narrative*:*

☑ Includes a statement that actual or estimated costs exceed one thousand dollars ($1,000). (Gov. Code § 17564.)

☑ Includes all of the following elements for each statute or executive order alleged **pursuant to Government Code section 17553(b)(1)**:

☑ Identifies all sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate, including a detailed description of the *new* activities and costs that arise from the alleged mandate and the existing activities and costs that are *modified* by the alleged mandate;

☑ Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;

☑ Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

☑ Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

Following FY: 2024 - 2025 Total Costs: $2,680,417

☑ Identifies all dedicated funding sources for this program;

State: None

Federal: None

Local agency's general purpose funds: No dedicated funding source. (General funds to cover costs)

Other nonlocal agency funds: None

Fee authority to offset costs: None

☑ Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: None

☑ Identifies any legislatively determined mandates that are on, or that may be related to, the same statute or executive order: None.

Section 6 – The Written Narrative Shall be Supported with Declarations Under Penalty of Perjury Pursuant to Government Code Section 17553(b)(2) and California Code of Regulations, title 2, section 1187.5, as follows:

☑ Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

☑ Declarations identifying all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

☑ Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program).

☐ If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Government Code section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Government Code section 17574.

☑ The declarations are signed under penalty of perjury, based on the declarant's personal knowledge, information, or belief, by persons who are authorized and competent to do so.

Section 7 – The Written Narrative Shall be Supported with Copies of the Following Documentation Pursuant to Government Code section 17553(b)(3) and California Code of Regulations, title 2, § 1187.5:

☑ The test claim statute that includes the bill number, and/or executive order identified by its effective date and register number (if a regulation), alleged to impose or impact a mandate. Pages 1 to 13.

☑ Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate. Pages 24 to 358.

☑ Administrative decisions and court decisions cited in the narrative. (Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement.) Pages 359 to 468.

☑ Evidence to support any written representation of fact. *Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.* (*Cal. Code Regs., tit. 2, § 1187.5*.) Pages 15 to 22.

Section 8 – TEST CLAIM CERTIFICATION Pursuant to Government Code section 17553

☑ The test claim form is signed and dated at the end of the document, under penalty of perjury by the eligible claimant, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief.

Read, sign, and date this section. Test claims that are not signed by authorized claimant officials pursuant to California Code of Regulations, title 2, section 1183.1(a)(1-5) will be returned as incomplete. In addition, please note that this form also serves to designate a claimant representative for the matter (if desired) and for that reason may only be signed by an authorized local government official as defined in section 1183.1(a)(1-5) of the Commission's regulations, and not by the representative.

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations.
(Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

	Director of Finance
Name of Authorized Local Government Official pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)	**Print or Type Title**

Chad Rinde
Chad Rinde (Apr 21, 2025 15:44 PDT)

Signature of Authorized Local Government Official pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Test Claim Form

Final Audit Report 2025-04-21

Created:	2025-04-11
By:	CSM Sign (csmsign@csm.ca.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAA15fRprP6kb4EUqgv652JinNByJssQLL-

"Test Claim Form" History

Document created by CSM Sign (csmsign@csm.ca.gov)
2025-04-11 - 11:49:05 PM GMT

Document emailed to rindec@saccounty.gov for filling
2025-04-11 - 11:50:21 PM GMT

Email viewed by rindec@saccounty.gov
2025-04-21 - 8:58:38 PM GMT

New document URL requested by rindec@saccounty.gov
2025-04-21 - 8:58:41 PM GMT

Signer rindec@saccounty.gov entered name at signing as Chad Rinde
2025-04-21 - 10:43:19 PM GMT

Form filled by Chad Rinde (rindec@saccounty.gov)
Form filling Date: 2025-04-21 - 10:43:21 PM GMT - Time Source: server

Document emailed to rindec@saccounty.gov for signature
2025-04-21 - 10:43:23 PM GMT

Email viewed by rindec@saccounty.gov
2025-04-21 - 10:43:48 PM GMT

Signer rindec@saccounty.gov entered name at signing as Chad Rinde
2025-04-21 - 10:44:28 PM GMT

Document e-signed by Chad Rinde (rindec@saccounty.gov)
Signature Date: 2025-04-21 - 10:44:30 PM GMT - Time Source: server

Agreement completed.
2025-04-21 - 10:44:30 PM GMT

COUNTY OF SACRAMENTO TEST CLAIM
(REFILED CLAIM ON APR 21, 2025, ORIGINALLY FILED DEC 23, 2024)

ASSEMBLY BILL 781: ACCESSIBILITY TO EMERGENCY INFORMATION AND SERVICES: EMERGENCY SHELTERS: PERSONS WITH PETS

Statutes of 2023, Chapter 344, Section 2: Accessibility to Emergency Information and Services: Emergency Shelters: Persons with Pets.
Assembly Bill No. 781 (2023-24 Regular Session)
Adding Section 8593.10 of the Government Code

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SECTION 5: WRITTEN NARRATIVE

COUNTY OF SACRAMENTO TEST CLAIM
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I. STATEMENT OF THE TEST CLAIM

The County of Sacramento (County or Claimant) submits this Test Claim seeking reimbursement of the costs of implementing the requirements imposed on it by certain sections of California Assembly Bill (AB) 781 (2023-24 Reg. Sess.), which added § 8593.10 to the Government Code (GC).[1] Specifically, this Test Claim addresses the costs to implement the requirements of AB 781 § 2 subds. (b), (c), and (d), and as contained in GC § 8953.10 subds. (b), (c), and (d).

AB 781 was approved October 7, 2023, and became effective on January 1, 2024. AB 781 requires emergency plans for cities and counties to designate shelters able to accommodate pets in their next emergency plan update.[2] AB 781 requires that whenever a city of county designates any number of emergency shelters, emergency cooling shelters, and emergency warming shelters, it shall designate at least one shelter that can accommodate persons with pets.[3]

Additionally, AB 781 requires that the designated shelters be compliant with safety procedures for the sheltering of pets established or referenced in the component of the state and local emergency plan and applicable policies and procedures of the Federal Emergency Management Agency.[4] AB 781 further requires a city or county make information available to the public whenever information is provided on the availability of a cooling or warming center and whether that center accommodates pets. Finally, AB 781 requires information for pet emergency preparedness, including information for creating an evacuation plan and emergency checklist consistent with recommendations from the Department of Food and Agriculture and the Federal Emergency Management Agency, information on local organizations that may provide emergency pet assistance, and information on local emergency shelters, cooling centers and warming centers, when active, that accommodate persons with pets.[5]

AB2232 was approved by the Governor on June 14, 2024 and resulted in one minor amendment to GC 8593.10 subsection (b)(1)(E) where in it amended the team “heating”

[1] AB 781 (2023-24 Reg. Sess.); Stats. 2023, Ch. 344; GC §§ 8953.10.

[2] AB 781, § 2 subds. (b)(1)(A) and (B); GC § 8953.10 subds. (b)(1)(A) and (B).

[3] AB 781, § 2 subds. (b)(1)(C), (D) and (E); GC § 8953.10 subds. (b)(1)(C), (D), (E)

[4] AB 781, § 2 subds. (b)(2)(A) and (B); GC § 8953.10 subds. (b)(2)(A) and (B)

[5] AB 781, § 2 subds. (c) and (d); GC § 8953.10 subds. (c) and (d)

to “warming”. It did not change the underlying mandate created by AB781 as this change was just for conformance throughout the bill and to match terminology used by the Federal Emergency Management Agency.

A. DESCRIPTION OF THE NEW ACTIVITIES

GC § 8953.10 subds. (b), (c), and (d), which was added by AB 781, created new required activities for the County’s Office of Emergency Services (OES). GC § 8953.10 became effective January 1, 2024. It applies to all cities and counties within the State of California responsible for emergency services in their local jurisdiction. As such, this legislation impacts the 58 counties and 482 incorporated cities and towns[6] that perform local emergency response services.

GC § 8593.10 (a) applies definitions that are important for understanding the mandate. It establishes in subsection (a)(1) that a “cooling center” means a facility established to mitigate the public impacts of extreme heat, in subparagraph (a)(2) that an “emergency shelter” means a temporary or provisional space that provides basic shelter for people affected by a disaster, and in subparagraph (a)(4) that a Warming Center means a facility established to mitigate the public health impacts of extreme cold. Most importantly in GC 8593.10(a)(3) it defines a pet as a domesticated animal, such as a dog or cat, that is commonly kept in the home for pleasure rather than for commercial purposes.

The components of the mandate are described below as follows:

GC § 8953.10(b)(1)(A) and (B) requires the following upon the next update of a city or county’s emergency plan:

> *(A) A county shall update its emergency plan to designate emergency shelters able to accommodate persons with pets.*
>
> *(B) A city that has previously adopted an emergency plan designating emergency shelters shall update its emergency plan to designate emergency shelters able to accommodate persons with pets.*

An update to emergency plans is required in order to implement the mandate. County’s To implement the mandate OES updated its Animal Services Annex to the emergency plan in order to ensure it identified shelter locations in its emergency plan that are able to accommodate pets. Disaster events that are emergencies can also include public health impacts of extreme heat and other emergency situations exacerbated by climate change, such as wildfire, poor air quality, power outages, or flooding, on local populations. Given the large jurisdiction and geography of the County, spanning 995 square miles, multiple locations were identified to accommodate pets in order to be able to respond to varied disaster incidents and cooling or warming center needs that may arise in the future.[7] The County would not have undertaken the emergency plan update but for the mandate of AB

[6] Number of Counties and Cities use the California Department of Finance January 1, 2024, data available at https://dof.ca.gov/forecasting/demographics/estimates-e1/

[7] Declaration of Mary Jo Flynn

781 as the plan update was necessitated solely due to the additional requirements created by the mandate.

GC § 8953.10(b)(1)(C), (D), and (E) requires the following:

> *(C) Whenever a city or county designates any number of emergency shelters, it shall designate at least one emergency shelter that can accommodate persons with pets.*
>
> *(D) Whenever a city or county designates any number of emergency cooling centers, it shall, to the extent practicable, designate at least one cooling center that can accommodate persons with pets.*
>
> *(E) Whenever a city or county designates any number of emergency warming centers, it shall, to the extent practicable, designate at least one heating center that can accommodate persons with pets.*

GC § 8953.10(b)(1)(C) mandates the designation of at least one emergency shelter that will accept people with pets during an emergency, cooling, or warming event that requires the activation of shelters.

As part of the implementation of the mandate, the County prepared by updating its emergency plan which was intended to define the full scope of equipment and supply needs to accommodate pets and ensure that it can accommodate the mandate in GC § 8953.10(b)(1)(C). The County also had a cooling center activation from June 4-6, 2024. This included daytime costs during that shelter activation; however, it did not include the full scope of services that are mentioned below as it was not an overnight shelter activation for an emergency shelter.[8] But had AB781 not been effective, the County would not have been required to open an emergency, warming or cooling shelter with the capacity to accept persons with pets.

GC § 8953.10(b)(2) requires the following:

> *(2) An emergency shelter designated as able to accommodate persons with pets shall be in compliance with both of the following:*
> *(A) Safety procedures regarding the sheltering of pets referenced or established in the component of the state and local emergency plan.*
> *(B) Applicable disaster assistance policies and procedures of the Federal Emergency Management Agency.*

Each shelter that is activated and is designated to accommodate pets will be required to follow safety procedures in the emergency plans as well as policies and procedures of the Federal Emergency Management Agency. This requires the sheltering location to have the staff, equipment, and resources needed to implement the higher level of service required by the mandate. Prior to AB 781, these services were not required, however to implement AB781, the County must take on the following activities:

[8] Declarations of Mary Jo Flynn and Jason D'Alessio

Activity	GC Reference	PAPPG Reference
Emergency Plan Updates:		
Update of city/county emergency plans to designate shelters able to accommodate persons with pets	8953.10 (b)(1)(B)	N/A
Evacuation		
Use of equipment, such as buses, trucks, or other vehicles (including accessible vehicles) to provide onetime transportation to evacuate survivors and their **household pets and service and assistance animals to evacuation facilities or emergency shelters** from pre-established pick-up locations. This includes standby time for drivers and contracted equipment while waiting to transport survivors;	8953.10 (b)(2)(B)	Pg. 141, O. 1. Bullet 4
Tracking of evacuees, **household pets,** service animals, luggage, and durable medical equipment. This includes the use of **animal microchips GPS tags, and other electronic means for the purpose of tracking and reunification of evacuated animals**;	8953.10 (b)(2)(B)	Pg. 141, O. 1. Bullet 6
Sheltering Eligible congregate shelter costs include:		
Minor facility modifications if necessary to make the facility: Functional as a household pet shelter	8953.10 (b)(2)(B)	Pg. 142, O. 2. a. Bullet 3
Veterinary and animal care staff;	8953.10 (b)(2)(B)	Pg. 142, O. 2. b. Bullet 3
Food, water, and bowls for household pets and service and assistance animals;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 3
Medication for animal decontamination and parasite control;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 6
Crates, cages, leashes, and animal transport carriers;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 10
Animal cleaning tables and supplies;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 12
Shelter management	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 1
Supervision of paid and volunteer staff;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 2
Cleaning the shelter, linens, and animal crates;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 3
Shelter safety and security;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 4
Emergency medical, crisis intervention/psychological first aid, and **veterinary services for** sheltered survivors, **household pets, and service and assistance animals**	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 8
County shall post information on its website information for pet emergency preparedness:		
Information for creating evacuation plans, emergency checklist for pets, local organizations providing pet assistance, and local shelters when active that can accommodate persons with pets.	8953.10(d)(1-3)	N/A

These activities above are those that are specifically mentioned by the Federal Emergency Management Agency (FEMA) in the Public Assistance and Policy Guide (PAPPG) which pertain to the needs associated with sheltering pets. This is required because of Government Code 8953.10(b)(2)(B) that requires following the applicable disaster assistance policies of FEMA. As a result, each of these activities is required to be performed when needed to further the sheltering of persons with pets. It defines a listing of mandated activities with references specifically to both the Government Code section created by AB781 as well as the specific sections of the PAPPG which summarizes the FEMA Guidelines which are required to be addressed by AB781.

While these needs may vary between specific events and the volume of animals cared for, there are increased costs related to the implementation of this mandate to ensure that pets can be safety housed along with their person and to ensure basic needs are met while they are sheltered. [9]

Finally, GC § 8953.10(c) and (d) require the following:

> *(c) Whenever a city or county provides public information regarding the availability of a cooling center or warming center, that information shall include whether the cooling or warming center can accommodate pets.*
> *(d) A city or county shall make available to the public by posting on its internet website information for pet emergency preparedness, including, but not limited to:*
> *(1) Information for creating an evacuation plan and emergency checklist for pets consistent with recommendations publicly published by the Department of Food and Agriculture and the Federal Emergency Management Agency.*
> *(2) Local organizations that may provide emergency pet assistance.*
> *(3) Local emergency shelters, cooling centers, or warming centers, when active, that can accommodate persons with pets*

Prior to the mandate, this additional public communication was not required. The mandate now requires communicating availability of shelters that accommodate pets, when active. This requires the County to gather necessary information on the locations of shelters and to draft messages for public release. It also requires the public website be modified in order to ensure that an emergency checklist for pets is available as well as a resource list of local organizations is maintained.

These are being posted on the County's OES website; however, these resources will need to be actively maintained and periodically updated for when local resource organizations change or when activations occur to ensure people are directed to the appropriate resources. This will involve specific staff time from County staff either in the office of Emergency Services or in the Public Information Office to ensure that communication is provided on the website consistent with AB781 specifically code sections 8953.1(d)(1), (2), and (3) as mentioned above.

B. DESCRIPTION OF THE EXISTING ACTIVITIES AND COSTS MODIFIED BY THE MANDATE

Claimant was not required to undertake the mandated activities prior to the mandate.

Claimant was not required to designate in its emergency plans emergency, cooling and warming shelters that can accommodate persons with pets[10]. Claimant was also not required to open, equip, staff, and maintain these shelters to accommodate persons with

[9] Declaration of Mary Jo Flynn and Jason D'Alessio.

[10] Declaration of MaryJo Flynn.

pets, communicate those locations publicly, or to maintain a listing of emergency resources for pets prior to the mandate.[11]

Further, Claimant was not required to post information on its website for pet emergency preparedness, including an emergency checklist, local support organizations for emergency pet assistance, and locations of emergency, cooling and warming centers that, when active, accommodate pets.[12]

C. ACTUAL INCREASED COSTS INCURRED BY THE CLAIMANT DURING THE FISCAL YEAR FOR WHICH THE TEST CLAIM WAS FILED TO IMPLEMENT THE ALLEGED MANDATE

OES first incurred costs related to implementing the mandate in AB 781 on February 1, 2024.

In Fiscal Year (FY) 2023-24, OES has incurred $3,199.57 for the plan update. The County of Sacramento under Government Code section 8593.10(b)(1)(a) was required upon the next update of its county emergency plan to incorporate information to designate emergency shelters that were able to accommodate persons with pets. The update of the emergency plan started in February 2024. The costs were for internal staff time to review the plan and to make updates to the plan to be compliant with the requirements of AB 781. The only activity performed included staff time including corresponding staff salary and benefit costs for the hours used to perform the update. The updated plan entitled the Animal Sheltering Annex portion of the County's emergency services plan was taken to the Board of Supervisors for approval on May 21, 2024.[13]

Further, in fiscal year 2023-24, the County of Sacramento opened cooling shelters which were activated for a 3-day period from June 4-6, 2024. In accordance with government code 8953.10(b)(1)(D), when the County opened cooling shelters, it was required to designate a cooling shelter to accommodate pets. The county designated its shelter to open for this event as a shelter which could accommodate pets. As part of the need to address weather conditions at the time, the County followed government code 8953.10(b)(2) which required the County to follow applicable disaster assistance policies of the Federal Emergency Management Agency. As part of following those policies, the County paid for required staffing to operate the shelter at a level that could accommodate animals and applicable supplies including water at the site. The costs for this three day event resulted in $1,060.43 in staff and supply costs to operate the cooling shelter that could accommodate persons with pets as was required to implement AB 781.[14]

These costs cumulatively total $4,260.00 for FY 2023-24 which is the total of both the $3,199.57 in costs for government code 8593.10(b)(1)(a) for the emergency plan update

[11] Declaration of Mary Jo Flynn.

[12] Declaration of Mary Jo Flynn.

[13] Declaration of Jason D'Alessio.

[14] Declaration of Jason D'Alessio.

and the $1,060.43 in costs for government code 8953.10(b)(1)(D) to operate a cooling shelter that could accept pets.

D. ACTUAL OR ESTIMATED ANNUAL COSTS THAT WILL BE INCURRED BY THE CLAIMANT TO IMPLEMENT THE ALLEGED MANDATE DURING THE FISCAL YEAR IMMEDIATELY FOLLOWING THE FISCAL YEAR FOR WHICH THE TEST CLAIM WAS FILED.

Claimant expects to incur additional increased costs to continue implementing the mandated activities. OES estimates incurring $58,186 in costs related to implementing AB 781 for FY 2024-25.[15]

As the Emergency Plan update was completed in fiscal year 2023-24, there is not an expectation that additional costs will be incurred again in fiscal year 2024-25 in order to update the plan. Rather the costs are expected to relate specifically to operate shelters consistent with Government Code 8953.10(B) which requires the operation of shelters that can accommodate pets for three situations which are for emergency shelters (Government Code 8953.10(b)(1)(C)), cooling centers (Government Code 8953.10(b)(1)(D)), and warming centers (Government Code 8953.10(b)(1)(E)). Each of these has a threshold of when those type of shelter would be activated when weather or emergency conditions dictate that a shelter would need to be opened. In estimating the costs, the County of Sacramento in the table below estimated the cost for a full 7 day activation of shelters that can accommodate persons with pets. Incorporating the required activities that the County would need to offer based on Government Code 8953.10(b)(2)(B) which requires the activities to be consistent with the Federal Emergency Management guidelines. In addition, there are estimated costs in association with Government Code 8953.10(d)(1), (2), and (3) related to information requirements that must be on the County website pertaining to resources for persons with pets related to emergency, cooling and warming shelters. The table below further summarizes by government code and the FEMA Public Assistance Program and Policy Guide (PAPPG)[16].

Activity	GC Reference	PAPPG Reference	Cost Estimate (FY2024-25)
Emergency Plan Updates:			
Update of city/county emergency plans to designate shelters able to accommodate persons with pets	8953.10 (b)(1)(B)	N/A	$0
Evacuation			
Use of equipment, such as buses, trucks, or other vehicles (including accessible vehicles) to provide onetime transportation to evacuate survivors and their **household pets and service and assistance animals to evacuation facilities or emergency shelters** from pre-established pick-up locations. This includes standby time for drivers and contracted equipment while waiting to transport survivors;	8953.10 (b)(2)(B)	Pg. 141, O. 1. Bullet 4	$5,250
Tracking of evacuees, **household pets,** service animals, luggage, and durable medical equipment.	8953.10 (b)(2)(B)	Pg. 141, O. 1. Bullet 6	$4,200

[15] Declaration of Jason D'Alessio.

[16] Declaration of Jason D'Alessio.

This includes the use of **animal microchips GPS tags, and other electronic means for the purpose of tracking and reunification of evacuated animals**;			
Sheltering Eligible congregate shelter costs include:			
Minor facility modifications if necessary to make the facility: Functional as a household pet shelter	8953.10 (b)(2)(B)	Pg. 142, O. 2. a. Bullet 3	$0*
Veterinary and animal care staff;	8953.10 (b)(2)(B)	Pg. 142, O. 2. b. Bullet 3	$13,440
Food, water, and bowls for household pets and service and assistance animals;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 3	$200
Medication for animal decontamination and parasite control;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 6	$750
Crates, cages, leashes, and animal transport carriers;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 10	$300
Animal cleaning tables and supplies;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 12	$1,500
Shelter management	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 1	$7,560
Supervision of paid and volunteer staff;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 2	$10,080
Cleaning the shelter, linens, and animal crates;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 3	$500
Shelter safety and security;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 4	$12,600
Emergency medical, crisis intervention/psychological first aid, and **veterinary services for** sheltered survivors, **household pets, and service and assistance animals**	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 8	$1,491
County shall post information on its website information for pet emergency preparedness:			
Information for creating evacuation plans, emergency checklist for pets, local organizations providing pet assistance, and local shelters when active that can accommodate persons with pets.	8953.10(d)(1-3)	N/A	$315
Total Costs			$58,186

*No estimate at this time based on present facilities, however could be needed depending on location of sheltering needs if alternate facilities are used.

E. STATEWIDE COST ESTIMATE OF INCREASED COSTS THAT ALL LOCAL AGENCIES WILL INCUR TO IMPLEMENT THE MANDATE

OES estimates increased statewide costs of $2,680,417 for implementing AB 781 in FY 2024-25.[17] This is comprised of $1,728,000 for Emergency Plan update costs and $952,417 of Sheltering Costs calculated as shown below:

Emergency Plan Update Costs	
Sacramento County – Emergency Plan Update Cost	$3,200
Multiplied by: Number of Cities and Counties in the State	540
Cost Estimate – Emergency Plans	$1,728,000

Sheltering Costs	
Sacramento County – 2024/25 Sheltering Cost per Day	$8,312.28
Estimated Number of Days for Shelter Operations	7

[17] Declaration of Jason D'Alessio. Based on extrapolating Sacramento County's costs to other jurisdictions and method as described in the declaration.

Sacramento County – 2024/25 Costs for Unincorporated Population	$58,186
Divided by: Unincorporated Sacramento County Population	597,614
Cost per Person:	$0.0973638502444722
Multiplied by: State of California Population	39,128,162
Statewide Estimate:	$3,809,668
Assumption: Only 25% of Jurisdictions require sheltering in given year	X 25%
Statewide Estimate	$952,417.13
Rounded to Nearest Dollar: Cost Estimate: 2024/25 Sheltering Costs	$952,417

F. IDENTIFICATION OF ALL DEDICATED FUNDING SOURCES FOR THIS PROGRAM

Claimant is not aware of, nor did it receive, any State, federal, or other non-local agency funds available for this program, and all the increased costs were paid and will be paid from the Claimant's General Fund appropriations.[18]

G. IDENTIFICATION OF PRIOR MANDATED DETERMINATIONS MADE BY THE BOARD OF CONTROL OR COMMISSION ON STATE MANDATES

The Claimant is not aware of any prior determination made by the Board of Control or the Commission on State Mandates related to this matter.

H. IDENTIFICATION OF LEGISLATIVELY-DETERMINED MANDATES THAT ARE ON THE SAME STATUTE OR EXECUTIVE ORDER

The Claimant is not aware of any legislatively-determined mandates related to AB 781, Chapter 344, Statutes of 2023, pursuant to GC § 17573.

II. MANDATE MEETS BOTH SUPREME COURT TESTS

In *County of Los Angeles v. State of California*, (1987) 43 Cal.3d 46, the Supreme Court was called upon to interpret the phrase "new program or higher level of service", language that was approved by the voters when they passed Proposition 4 in 1979, which added Article XIII B to the California Constitution. In reaching its decision, the Court held that:

> ". . . the term 'higher level of service' . . . must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in Article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the

[18] Declaration of Mary Jo Flynn and Jason D'Alessio.

> electorate had in mind the commonly understood meanings of the term programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state."[19]

A program can either carry out the governmental function of providing services to the public or be a law that implements State policy that imposes unique requirements on the local government that does not apply to the entire State. Only one part of this definition has to apply in order for the mandate to qualify as a program. AB 781's mandated activities meet the prong of providing services to the public.[20]

III. MANDATE IS UNIQUE TO LOCAL GOVERNMENT

The sections of the law alleged in this Test Claim are unique to the Claimant and other cities and counties that provide Emergency Services. The activities described in section A are provided only by local government agencies.

IV. MANDATE CARRIES OUT STATE POLICY

The new State statute, the subject of this Test Claim, imposes a higher level of service by requiring local agencies to provide the mandated activities described in section A.

V. STATE MANDATE LAW

Article XIII B § 6 requires the State to provide a subvention of funds to local government agencies any time the legislature or a State agency requires the local government agency to implement a new program or provide a higher level of service under an existing program. Section 6 states in relevant part:

> Whenever the legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service . . .

The purpose of § 6 "is to preclude the state from shifting financial responsibility for carrying our governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[21] The section was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.[22] In order to implement § 6, the Legislature enacted a comprehensive

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[19] *County of Los Angeles v. State of California (1987)* 43 Cal. 3d 46, 56

[20] *Carmel Valley Fire Protection District v. State of California (1987)* 190 Cal.App. 3d 521, 537

[21] *County of San Diego v. State of California (1997)* 15 Cal. 4th 68, 81; *County of Fresno v. State of California (1991)* 53 Cal. 3d 482, 487

[22] *County of Fresno v. State of California (1991)* 53 Cal. 3d 482, 487*; Redevelopment Agency v. Commission on State Mandates (1997)* 55 Cal.App.4th 976-985

administrative scheme to define and pay mandate claims.[23] Under this scheme, the Legislature established the parameters regarding what constitutes a State-mandated cost, defining "costs mandated by the state" to include:

> …any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution.[24]

VI. STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in GC § 17556, which could serve to bar recovery of "costs mandated by the State", as defined in GC § 17556. None of the seven disclaimers apply to this Test Claim:

1. The claim is submitted by a local agency or school district, which requests legislative authority for that local agency or school district to implement the Program specified in the statute, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts, which result in no net costs to the local agencies or school districts or includes additional revenue that was specifically intended to fund costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposes duties, which were expressly included in a ballot measure approved by the voters in Statewide election.

[23] Government Code § 17500, et seq.; *Kinlaw v. State of California (1991)* 54 Cal. 3d 326, 331, 333

[24] Government Code § 17514

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.[25]

None of the disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement apply to this Test Claim.

The enactment of AB 781 imposes new State-mandated activities and costs on the Claimant, and none of the exceptions in Government Code § 17556 excuse the State from reimbursing Claimant for the costs associated with implementing the required activities. AB 781 therefore, represents a State mandate for which the Claimant is entitled to reimbursement pursuant to § 6 of the State Constitution.

VII. CONCLUSION

AB 781 Chapter 344, Statutes of 2023, imposes State-mandated activities and costs on the Claimant. Those State-mandated costs are not exempted from the subvention requirements of § 6 of the State Constitution.

There are no funding sources, and the Claimant lacks authority to develop and impose fees to fund any of these new State-mandated activities. Therefore, Claimant respectfully requests that the Commission on State Mandates find that the mandated activities set forth in the Test Claim are State mandates that require subvention under the California Constitution § 6.

[25] Government Code § 17556

SECTION 6: DECLARATIONS

COUNTY OF SACRAMENTO TEST CLAIM

ASSEMBLY BILL AB781: ACCESSIBILITY TO EMERGENCY INFORMATION AND SERVICES: EMERGENCY SHELTERS: PERSONS WITH PETS

DECLARATION OF MARY JO FLYNN

I, Mary Jo Flynn, declare under penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I am employed by the County of Sacramento (County) Office of Emergency Services (OES) and hold the title of Chief of Emergency Services. I am responsible for the County's Emergency Preparedness and Response programs and capabilities. That includes liaising between agencies responsible for emergency response and recovery activities and the State of California and Federal agencies, such as the Federal Emergency Management Agency (FEMA).

2. Assembly Bill (AB) 781, which added Government Code (GC) § 8593.10, was approved on October 7, 2023. AB 781 added to the requirements of local offices of Emergency Services by requiring that in the next update of a city or county's emergency plan, the plan designate emergency shelters that will accommodate persons with pets. [See GC § 8593.10(b)(1).] GC § 8593.10(c) further requires that, once emergency shelters are activated, at least one emergency shelter be designated that would accommodate pets.

3. GC § 8593.10(E)(2) requires that, as part of the emergency plan and activation, emergency shelters that accommodate pets follow safety procedures in the state and local emergency plan and applicable disaster policies established by FEMA.

   In order to implement this in the County, the emergency shelter must be able to segregate pets within facilities using kennels, crates or other containers. These must be purchased or available for rental and, between emergencies, may be required to be stored or transported to be available for use. In addition, emergency shelters need to provide similar services to pets that must be provided to humans that come and need sheltering. This is documented in Version 5 of the Public Assistance Program and Policy Guide (PAPPG) effective January 6, 2025,[24] which states on pages 140-152 related to Evacuation and Sheltering, "Evacuation and sheltering of survivors are eligible activities. This includes household pets and service and assistance animals, but not exhibition or livestock animals." In that same section, it discusses the needs of survivors of a disaster, including their food, water, medical care, equipment, and transposition needs. OES has incorporated these guidelines from FEMA into its shelter plans as requested by AB 781. This was done specifically in Government Code 8953.10 subsection (b)(2)(B) which requires "an emergency shelter designed to accommodate persons with pets to be in compliance with … applicable disaster assistance policies and procedures of the Federal Emergency Management Agency".

   More specifically to animals, these needs are listed in the PAPPG but include:

[24] PAPPG is available at: https://www.fema.gov/sites/default/files/documents/fema_pa_pappg-v5.0_012025.pdf

- Use of equipment, such as buses, trucks, or other vehicles (including accessible vehicles) to provide onetime transportation to evacuate survivors and their household pets and service and assistance animals to evacuation facilities or emergency shelters from pre-established pick-up locations. This includes standby time for drivers and contracted equipment while waiting to transport survivors;
- Tracking of evacuees, household pets, service animals, luggage, and durable medical equipment. This includes the use of animal microchips GPS tags, and other electronic means for the purpose of tracking and reunification of evacuated animals;
- Minor facility modifications if necessary to make the facility: Functional as a household pet shelter
- Veterinary and animal care staff;
- Food, water, and bowls for household pets and service and assistance animals;
- Medication for animal decontamination and parasite control;
- Crates, cages, leashes, and animal transport carriers;
- Animal cleaning tables and supplies;
- Shelter management;
- Supervision of paid and volunteer staff;
- Cleaning the shelter, linens, and animal crates;
- Shelter safety and security;
- Emergency medical, crisis intervention/psychological first aid, and veterinary services for sheltered survivors, household pets, and service and assistance animals.

  Given the broad geography of the County of Sacramento, which covers over 995 square miles, depending on the disaster, more than one shelter may be needed to accommodate pets based on constraints. This could be due to travel distances, closed roadways, hazardous conditions or other reasons that one, many, or all shelters may need this capability in a disaster.

4. AB 781 added the requirement pertaining to the inclusion of pets within local city and county emergency plans, whereas previously, there were guidelines, but no mandatory legal requirements, in emergency response. This obligation was specifically added in Government Code 8953.10(b)(1)(B)

5. Prior to the passage of AB 781, there was no legal obligation to shelter pets. OES would ask shelters to accommodate pets when possible; however, this was subject to the discretion of each sheltering entity and the abilities of the sheltering site at the time. There was no advertising of this capability, as it was informal and decisions were made on a case-by-case basis. However, in the emergency management field, it is considered a best practice to shelter pets when possible.

   OES would also consider guidance available and contained in the PAPPG mentioned above. The PAPPG provides requirements as it pertains to local response to Federally Declared Disasters in order to seek FEMA reimbursement. The PAPPG is not required to be followed unless the disaster is such that it meets minimum requirements to be federally eligible and reimbursement is sought. Thus,

it also does not require a specific response, such as sheltering animals, as is mandated in AB 781; however, its guidelines do articulate the typical needs of sheltering animals in a significant emergency situation.

6. On October 7, 2023, the California Legislature approved AB 781. Effective January 1, 2024, AB 781 institutes new mandates of local agencies as follows:
    a. As discussed above, GC § 8953.10(b)(1)(A) mandates the County (and cities) to update their Emergency Plans with the next plan update to designate emergency shelters to accommodate pets. This creates additional expense in the plan update process for staff or consultants to perform this identification process.
    b. Further, GC § 8953.10(b)(1)(C) requires a city or county to designate a shelter during emergencies to accommodate pets. GC § 8953.10(b)(1)(D) requires a city or county to designate a shelter during emergency cooling center events to accommodate pets, and GC § 8953.10(b)(1)(E) requires a city or county to designate a shelter during emergency warming center events to accommodate pets.
    c. GC § 8953.10(d)(1) further requires that public information to be made available on its internet website including evacuation plans and checklists for pets consistent with the Department of Food and Agriculture and FEMA, Information on local organizations providing emergency pet assistance, and locations of local emergency shelters, cooling centers, and warming centers that accommodate pets. This requires staff to obtain the appropriate content and do an initial page on the website but also to maintain the information to ensure proper locations during emergency events.

7. I am informed that OES first incurred costs related to implementing the mandate in AB 781 on February 1, 2024. This is consistent with our update of the Emergency Plans related to Animal Sheltering. The specific costs incurred and estimates of future costs are maintained by Jason D'Alessio, Emergency Operations Coordinator.

8. OES is not aware of any prior determinations by the Board of Control or the Commission on State Mandates related to this matter. The County is not aware of any legislatively-determined mandates related to AB781.

I have personal knowledge of the foregoing facts and information presented in this Test Claim and, if so required, I could and would testify to the statements made herein.

Executed this 14 day of Feb 2025 in Sacramento, California.

Mary Jo Flynn
Chief of Emergency Services
Office of Emergency Services
County of Sacramento

DECLARATION OF JASON D'ALESSIO

I, Jason D'Alessio, declare under penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I am employed by the County of Sacramento (County) Office of Emergency Services (OES) and hold the title of Emergency Operations Coordinator. I am responsible for coordinating emergency preparation and response tasks in the office, including certain finance and logistics tasks. At times, this involves administering contracts, certain grants, and supporting emergency services planning activities. This also can include doing purchasing work for the office and following county procedures including obtaining quotes, contracts and sources for necessary supplies. My work is overseen and directed by Mary Jo Flynn-Nevins, Chief of Emergency Services. As part of my coordination role, I supported planning of the implementation of Assembly Bill (AB) 781.

2. AB 781, which added GC § 8953.10, requires the County to have at least one emergency shelter, cooling, or warming shelter, that can accommodate persons with pets, when that respective shelter type is activated. This includes updating the emergency plan for accomplishing that activity and ensuring the shelter location can accommodate pets and that those assigned to manage a shelter in the emergency have the education, knowledge, and supplies necessary to complete that function.

3. Prior to the passage of AB 781, which now requires at least one shelter to house persons with pets, there was not a requirement to accommodate pets, and shelters would decide on their own voluntarily if they could safely perform this function.

4. Effective January 1, 2024, AB 781 requires the accommodation of pets. As a result, we've updated our Animal Services Emergency Services Annex, which is our Emergency Plan,to be compliant with the mandate. We've also worked with the Department of Animal Care Services to determine available kennels and crates to accommodate pets. In an emergency, kennels and crates would need to be transported to a shelter location. In a shelter, at times, pets are stored with their owner; however, the best approach for overall safety is to have the pets crated or kenneled and located separately. The County has updated its emergency plan to ensure all shelter locations can accommodate pets since, in an emergency, it isn't always known which shelter location(s) may need be activated given the broad geography of the County.

5. In order to safely shelter pets, we follow guidelines from FEMA contained in their Version 5 of the Public Assistance Program and Policy Guide (PAPPG) Effective January 6, 2025[27] which states on Page 143-155 related to Evacuation and Sheltering. Prior to this new version, we followed the Version 4 of the Public Assistance and Policy Guide which was effective between June 30, 2020 and

[27] PAPPG is available at: https://www.fema.gov/sites/default/files/documents/fema_pa_pappg-v5.0_012025.pdf

January 5, 2025. Following these FEMA guidelines as it pertains to sheltering of pets is required specifically by Government Code Section 8953.10 subsection (b)(2)(B) which requires "an emergency shelter designated to accommodate persons with pets to be in compliance with … applicable disaster assistance policies and procedures of the Federal Emergency Management Agency". Those policies and procedures are specifically mentioned in the state mandate and captured in the PAPPG specifying those activities that should be undertaken to implement AB781. These discuss the needs of human survivors of disasters as well as household pets. In order to implement these guidelines for safety, we would evaluate if veterinary care at check-in is required to make sure the animal is vaccinated and chipped as required by state law. There may also be the need for medication, or if an animal is in poor condition, veterinary staff may recommend they be euthanized. In addition, there are costs of housing through kennels or crates, as well as providing a separate space for the animals to reside and be secured separately from persons staying. Also, the animals need food, water, and a space to relieve themselves. In addition, there would be costs associated with clean-up. If we don't have a shelter that can accommodate a person with pets near where they are at, the County may need to provide transportation for persons and pets to the nearest available shelter if they are unable to transport pets on their own. So there are several different types of costs that the mandate creates by requiring pets instead of it being voluntary. These costs are mentioned in the PAPPG, which establishes FEMA guidelines for sheltering Animals. The County of Sacramento had a cooling center activation from June 4-6, 2024, which included staff time and certain supplies. However, it did not utilize the full scope of services that may be required in other emergency types.

6. OES first incurred costs related to implementing the mandate in AB 781 on February 1, 2024. The initial costs incurred involved staff time spent to update the Animal Sheltering Annex portion of the Emergency Services Plan. The updated Animal Sheltering Annex was adopted by the Sacramento County Board of Supervisors on May 21, 2024.

   In Fiscal Year (FY) 2023-24, OES has incurred $4,260.00 for work related to the mandates of AB 781. This included $3,199.57 for staff work to update the emergency plan and $1,060.43 for staff time and supplies for cooling centers opened between June 4-6, 2024 that accommodated pets. The staff time related to the emergency plan included identifying shelters that could accommodate pets and to ensure that county contracts had the ability to purchase needed supplies in case of emergency activation. For the costs on the June 4-6 activation, this included staff time as well as supplies including water and food for animals at the shelters. Below is a schedule of the required activities associated with AB781 including the costs incurred in 2024-25 and estimates for 2025-26.

Activity	GC Reference	PAPPG Reference	Costs Incurred (FY 2023-24)	Cost Estimate (FY2024-25)
Emergency Plan Updates:				
Update of city/county emergency plans to designate shelters able to accommodate persons with pets	8953.10 (b)(1)(B)	N/A	$3,199.57	$0
Evacuation				
Use of equipment, such as buses, trucks, or other vehicles (including accessible vehicles) to provide onetime transportation to evacuate survivors and their **household pets and service and assistance animals to evacuation facilities or emergency shelters** from pre-established pick-up locations. This includes standby time for drivers and contracted equipment while waiting to transport survivors;	8953.10 (b)(2)(B)	Pg. 141, O. 1. Bullet 4	$0	$5,250
Tracking of evacuees, **household pets,** service animals, luggage, and durable medical equipment. This includes the use of **animal microchips GPS tags, and other electronic means for the purpose of tracking and reunification of evacuated animals**;	8953.10 (b)(2)(B)	Pg. 141, O. 1. Bullet 6	$0	$4,200
Sheltering Eligible congregate shelter costs include:				
Minor facility modifications if necessary to make the facility: Functional as a household pet shelter	8953.10 (b)(2)(B)	Pg. 142, O. 2. a. Bullet 3	$0	$0*
Veterinary and animal care staff;	8953.10 (b)(2)(B)	Pg. 142, O. 2. b. Bullet 3	$0	$13,440
Food, water, and bowls for household pets and service and assistance animals;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 3	$0	$200
Medication for animal decontamination and parasite control;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 6	$0	$750
Crates, cages, leashes, and animal transport carriers;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 10	$0	$300
Animal cleaning tables and supplies;	8953.10 (b)(2)(B)	Pg. 142, O. 2. c. Bullet 12	$0	$1,500
Shelter management	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 1	$1,060.43	$7,560
Supervision of paid and volunteer staff;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 2	$0	$10,080
Cleaning the shelter, linens, and animal crates;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 3	$0	$500
Shelter safety and security;	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 4	$0	$12,600
Emergency medical, crisis intervention/psychological first aid, and **veterinary services for** sheltered survivors, **household pets, and service and assistance animals**	8953.10 (b)(2)(B)	Pg. 142, O. 2. d. Bullet 8	$0	$1,491
County shall post information on its website information for pet emergency preparedness:				
Information for creating evacuation plans, emergency checklist for pets, local organizations providing pet assistance, and local shelters when active that can accommodate persons with pets.	8953.10(d)(1-3)	N/A	$0	$315
Total Costs			$4,260.00	$58,186

*No estimate at this time based on present facilities, however could be needed depending on location of sheltering needs if alternate facilities are used.

As shown in the table above, OES estimates that costs of $58,186 might be occurred in the coming fiscal year. This assumes that seven sheltering days are provided and that those shelter days require a full service activation of animal shelters with all of the services referenced in the PAPPG. However, the costs may vary substantially based on the number of days that shelters are open, the amount

of animals served, and the specific needs of those utilizing shelter services. The seven estimated days was determined by looking at prior years' activations for emergency, cooling, and warming centers and deriving an estimate of the number of days that are forecast. However, it should be noted that it is difficult to predict weather patterns in advance or other emergency conditions that may drive the need for these facilities. Again, costs may vary significantly depending on the number of sheltering nights, locations, and pets that are admitted to a sheltering location necessitating more supplies.

There are no fees, funding sources or reimbursements for these costs. The County could potentially pursue reimbursement of certain costs however only when the sheltering is performed as part of presidentially declared disaster. AB781 requires this sheltering to be performed whenever a cooling, warming or emergency shelter is opened which expands these services beyond just events rising to that level. Thus, the costs of implementing AB 781 to update the emergency plans, open and operate shelters and to accommodate pets, and to communicate to the public are funded by the County's general fund.

7. OES estimates the increased statewide cost of the mandate at $2,680,417, comprised of $1,728,000 for emergency plan updates and $952,417 of sheltering costs.

   To estimate the cost of emergency plan updates statewide, we applied the $3,200 related to our plan update to the 58 counties and 482 incorporated cities and towns in the State, which resulted in $3,200 x 540 = $1,728,000.

   To estimate sheltering costs, we estimate $8,312 per sheltering night for a full service activation of a shelter that needs all services possible under AB781 and the required sections of the PAPPG ($58,186 divided by 7). We estimate 7 days of sheltering for our unincorporated population of 597,614[28] as discussed further above. The County is only responsible for emergency services in the unincorporated area of the County. The Cities of Sacramento, Citrus Heights, Galt, Elk Grove, Rancho Cordova, Isleton, and Folsom would be responsible for this mandate in their incorporated areas of the County.

   When we extrapolate that to the State Population of 39,128,162 equals $952,417 of sheltering costs statewide. Demonstrated as a formula, we took 7 days x $8,312 or $58,186 needed to serve our population per year. We then took $58,186 x the state population of 39,128,162 divided by our unincorporated population of 597,614, which resulted in $3,809,668. We then multiplied this amount by 25% reflecting that not all jurisdictions within the state may require sheltering each year and that will depend on specific local conditions which resulted in $3,809,668 x 25% or $952,417. This assumes that sheltering is scalable by population and our estimated costs and that our assumption of affected jurisdictions is accurate.

[28] Population figures use the California Department of Finance January 1, 2024, data available at https://dof.ca.gov/forecasting/demographics/estimates-e1/

8. OES is not aware of any prior determinations by the Board of Control or the Commission on State Mandates related to this matter. The County is not aware of any legislatively-determined mandates related to SB AB 781.

I have personal knowledge of the foregoing facts and information presented in this Test Claim and, if so required, I could and would testify to the statements made herein.

Executed this _12_ day of _February_ 2025 in Sacramento, California.

Jason R. D'Alessio

Jason D'Alessio
Emergency Operations Coordinator
Office of Emergency Services
County of Sacramento

SECTION 7: SUPPORTING DOCUMENTS

COUNTY OF SACRAMENTO TEST CLAIM

ASSEMBLY BILL AB781: ACCESSIBILITY TO EMERGENCY INFORMATION AND SERVICES: EMERGENCY SHELTERS: PERSONS WITH PETS

STATE AND SENATE BILL

COMMITTEES AND RULES

CASELAW AND CODES

Assembly Bill No. 781

CHAPTER 344

An act to add Section 8593.10 to the Government Code, relating to emergency services.

[Approved by Governor October 7, 2023. Filed with Secretary of State October 7, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

AB 781, Maienschein. Accessibility to emergency information and services: emergency shelters: persons with pets.

Existing law, the California Emergency Services Act, provides that political subdivisions, as defined, have full power during a local emergency to provide mutual aid to any affected area in accordance with local ordinances, resolutions, emergency plans, or agreements. Existing law defines "emergency plan" for these purposes to mean official and approved documents that describe the principles and methods to be applied in carrying out emergency operations or rendering mutual aid during emergencies. Existing law requires that a county send a copy of its emergency plan to the Office of Emergency Services upon an update to the plan.

Upon the next update to a city or county's emergency plan, this bill would require a county to update its emergency plan to designate emergency shelters able to accommodate persons with pets, and would require a city that has previously adopted an emergency plan designating emergency shelters to update its emergency plan to designate emergency shelters able to accommodate persons with pets. This bill would require, upon the next update to a city or county's emergency plan, whenever a city or county designates any number of emergency shelters that it also designate at least one emergency shelter that can accommodate persons with pets. This bill would also require, upon the next update to a city or county's emergency plan, whenever a city or county designates any number of cooling centers or warming centers, that it also, to the extent practicable, designate at least one cooling center or warming center, as applicable, that can accommodate persons with pets. The bill would require an emergency shelter designated as able to accommodate persons with pets to be in compliance with safety procedures regarding the sheltering of pets referenced or established in the component of the state and local emergency plan and applicable disaster assistance policies and procedures of the Federal Emergency Management Agency.

This bill would also require a city or county to include whether the cooling or warming center can accommodate pets whenever a city or county provides public information regarding the availability of a cooling center or warming center. This bill would require a city or county to make available to the

public by posting on its internet website information for pet emergency preparedness, including, but not limited to, among other things, information for creating an evacuation plan and emergency checklist for pets consistent with recommendations publicly published by the Department of Food and Agriculture and the Federal Emergency Management Agency.

This bill would also make various findings and declarations in this regard. By requiring cities and counties to update their emergency plans, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Natural disasters and extreme weather events, including wildfire, flooding, earthquakes, extreme heat, and extreme cold, present severe risks to public health and safety in California.

(b) Pets are particularly vulnerable to extreme weather conditions, including increased risk of heatstroke-related illness and death.

(c) A majority of Americans consider their pets to be family members. Research has found the most significant risk factor for evacuation failure is pet ownership. Research indicates that pet owners may refuse evacuation, attempt to illegally reenter evacuation sites to rescue their animals, and face grief, depression, and PTSD because of separation from their pet during an emergency (Heath and Linnabary, Challenges of Managing Animals in Disasters in the U.S., Mar. 26, 2015, 5 Animals 173).

(d) Zoonotic disease risks increase when pets are abandoned or left to roam.

(e) Gaps in public preparedness and cosheltering opportunities during a disaster or extreme weather event increase risks to public health and safety.

(f) It is the intent of the Legislature in enacting this legislation to provide guidance in increasing public preparedness and establishing cosheltering standards so that Californians know that when a disaster or extreme weather event occurs, they will not have to choose between seeking safety and staying with their pets.

SEC. 2. Section 8593.10 is added to the Government Code, to read:

8593.10. (a) For the purposes of this section, all of the following definitions apply:

(1) “Cooling center” means a facility established to mitigate the public health impacts of extreme heat.

(2) “Emergency shelter” means a temporary or provisional safe space that provides a basic shelter for people affected by disaster.

(3) “Pet” means a domesticated animal, such as a dog or cat, that is commonly kept in the home for pleasure rather than for commercial purposes.

(4) “Warming center” means a facility established to mitigate the public health impacts of extreme cold.

(b) (1) Upon the next update of a city or county’s emergency plan:

(A) A county shall update its emergency plan to designate emergency shelters able to accommodate persons with pets.

(B) A city that has previously adopted an emergency plan designating emergency shelters shall update its emergency plan to designate emergency shelters able to accommodate persons with pets.

(C) Whenever a city or county designates any number of emergency shelters, it shall designate at least one emergency shelter that can accommodate persons with pets.

(D) Whenever a city or county designates any number of emergency cooling centers, it shall, to the extent practicable, designate at least one cooling center that can accommodate persons with pets.

(E) Whenever a city or county designates any number of emergency warming centers, it shall, to the extent practicable, designate at least one heating center that can accommodate persons with pets.

(2) An emergency shelter designated as able to accommodate persons with pets shall be in compliance with both of the following:

(A) Safety procedures regarding the sheltering of pets referenced or established in the component of the state and local emergency plan.

(B) Applicable disaster assistance policies and procedures of the Federal Emergency Management Agency.

(c) Whenever a city or county provides public information regarding the availability of a cooling center or warming center, that information shall include whether the cooling or warming center can accommodate pets.

(d) A city or county shall make available to the public by posting on its internet website information for pet emergency preparedness, including, but not limited to:

(1) Information for creating an evacuation plan and emergency checklist for pets consistent with recommendations publicly published by the Department of Food and Agriculture and the Federal Emergency Management Agency.

(2) Local organizations that may provide emergency pet assistance.

(3) Local emergency shelters, cooling centers, or warming centers, when active, that can accommodate persons with pets.

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

O

State of California

GOVERNMENT CODE

Section 8593.10

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(1) "Cooling center" means a facility established to mitigate the public health impacts of extreme heat.

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(B) Applicable disaster assistance policies and procedures of the Federal Emergency Management Agency.

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(2) Local organizations that may provide emergency pet assistance.

(3) Local emergency shelters, cooling centers, or warming centers, when active, that can accommodate persons with pets.

(Added by Stats. 2023, Ch. 344, Sec. 2. (AB 781) Effective January 1, 2024.)

Public Assistance Program and Policy Guide

Version 5.0, *Effective January 6, 2025*

(FP 104-009-2)

FEMA

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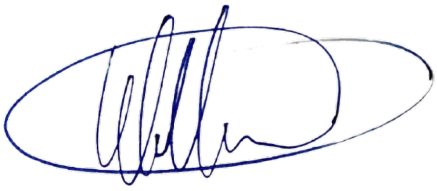
Foreword

On behalf of the Federal Emergency Management Agency (FEMA), I am pleased to issue the fifth edition (Version 5.0) of the "Public Assistance Program and Policy Guide" (PAPPG). This updated version applies to incidents declared on or after January 6, 2025 and supersedes Version 4.[1] As with prior versions, FEMA has archived previous editions for reference, and Version 5.0 serves as the comprehensive, consolidated resource for Public Assistance (PA) Program policies throughout the disaster recovery lifecycle.

The PAPPG provides a robust and streamlined guide for evaluating eligibility under the PA Program. It consolidates relevant policies into a single document, while also referencing external FEMA policies and resources to support stakeholders involved in the implementation of each recovery step. The release of Version 5.0 reflects FEMA's continued commitment to improving access to the PA Program, reducing the documentation burden on our customers, and promoting fair and timely recovery efforts. By integrating cost-effective hazard mitigation measures, Version 5.0 also helps facilitate resilient rebuilding in communities affected by disasters.

Significant updates in this edition include policy changes related to Tribal Nations, resilience and mitigation, and adjustments based on Title 2 Code of Federal Regulations (C.F.R.) updates that took effect on October 1, 2024. Recognizing the urgency of implementing these changes, FEMA has prioritized this publication. Version 5.1 will introduce further updates, including additional wildfire policies, the remaining 2 C.F.R. changes, and expanded appendices, ensuring continued alignment with emerging needs and priorities in disaster recovery.

We are confident that Version 5.0 of the PAPPG will further enhance the effectiveness, accessibility, and resilience of the PA Program as it supports the recovery of communities across the nation. We look forward to your feedback to help inform the next version. All recommendations for the PAPPG can be sent to FEMA-Recovery-PA-Policy@fema.dhs.gov.



William C. Hagmaier
Assistant Administrator
Recovery Directorate

[1] For previous editions of the PAPPG, refer to: Archives: FEMA Public Assistance Policy | FEMA.gov.

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Tables

Figures

Summary of Changes

This PAPPG version incorporates the following changes:

Table 1. List of Changes and Clarifications Grouped by General Topic

Topic	Highlighted V5 Improvements
Tribal Nations	▪ To support the protection of tribal significant artifacts, culturally sensitive landscapes and sites, cultural resources, and human remains; clarified that FEMA will not require photos, site maps, and specific location details (such as GPS coordinates) for locations where these cultural artifacts are located; ▪ Clarified that FEMA will accept a Tribal Nation's certified damage assessment, scope of work for restoration, and estimated costs for traditional tribal residences or tribal ceremonial buildings; ▪ Clarified that for locations where only tribal members are allowed, site inspections by FEMA staff are not permitted; ▪ Clarified that mutual aid agreements or memoranda of understanding are available resources for Tribal Nations and provided guidance on reimbursement when there is no pre-existing written agreement; and, ▪ Clarified that if a Tribal Nation received funding from the Bureau of Indian Affairs or Federal Highway Administration for construction or maintenance of tribal roads, those roads are still eligible for FEMA PA funding under a presidentially declared disaster.
Resilience	▪ Included language about resilience considerations throughout; ▪ Defined and incorporated language throughout regarding nature-based solutions; ▪ Clarified that PA mitigation measures can be implemented for all hazards, not just the hazard that caused the damage; ▪ Added information and reference to the benefit-cost analysis (BCA) Toolkit; ▪ Increased opportunities to mitigate improved projects involving facility replacement or relocation; and, ▪ Expanded Appendix J to include additional measures, with two measures focused on wildfire; and, ▪ Incorporated considerations regarding how policy changes impact disadvantaged communities
Simplification	▪ As a result of stakeholder feedback, removed non-regulatory processes for inclusion in other PA guidance; ▪ Where possible, removed "may" and "should," and replaced with "must" to clarify requirements; and, ▪ Redefined acronyms at the beginning of each chapter and reduced acronym use.

Topic	Highlighted V5 Improvements
Documentation and Requirements	▪ Clarified documentation and information requirements for small projects and large projects; ▪ Reduced documentation and information requirements for small projects; ▪ Incorporated PA's sampling procedures; ▪ Clarified that maintenance records are not always required to substantiate damage; ▪ Included more options for documentation to support legal responsibility; and, ▪ Removed requirement for pre-approval prior to completing private property debris removal.
Added Content	▪ Incorporated Validated as You Go (VAYGo) content and resources; ▪ Added subsection titled "Telecommunications Equipment Purchase;" ▪ Added "self-insurance or self-insured retention" to list of insurance types; and, ▪ Included insurance commitment opportunities which benefit applicants experiencing subsequent disasters.
Clarifications	▪ Clarified road damage from damage caused by submerged and inundated as distinct types of damage; ▪ Clarified that snow assistance is not authorized for emergency declarations; and, ▪ Conveyed FEMA's support to report suspicious activities as well as who and how to report.
Private Non-Profit (PNP)	▪ Consolidated private non-profit information into one section; ▪ Explained for-profit entities' ineligibility; and, ▪ Clarified that Houses of Worship and faith-based organizations are considered private nonprofit organizations.
Sheltering	▪ Removed pre-approval requirement for non-congregate sheltering activities in traditional settings (i.e., hotels/motels, dormitories, etc.); ▪ Removed childcare services as a standalone emergency protective measure and is now only eligible when associated with emergency sheltering; and, ▪ Expanded emergency sheltering eligibility to include survivors' "household pets, service animals, assistance animals" and removed requirement for pet owners to be sheltered for pet sheltering to be eligible.

Topic	Highlighted V5 Improvements
Environmental and Historic Preservation (EHP)	▪ Explained and provided examples of projects that have potential to impact EHP resources; ▪ Provided guidance on navigating the EHP compliance process; ▪ Clarified documentation requirements for streamlined EHP reviews and complex EHP reviews; ▪ Provided EHP considerations by category of work; and, ▪ Provided examples of project types that may have impacts to natural and cultural resources.
Statutory and Regulatory Updates	▪ Incorporated the revision to 2 C.F.R. Part 200 which integrates Office of Management and Budget (OMB)'s policy priorities and strives to reduce agency and recipient burden; and, ▪ Updated guidance from the Payment Integrity Information Act, which supersedes the Improper Payments Elimination and Recovery Improvement Act.

Policy and Guidance Documents Incorporated and Superseded

- *Building Code and Floodplain Management Administration and Enforcement* (FEMA Policy 204-079-01)
- "Combining Wildfires Under a Major Disaster Declaration" Memo (August 21, 2021)
- *Consensus-Based Codes, Specifications, and Standards for Public Assistance* (FEMA Recovery Interim Policy 104-009-11 Version 2)
- "Emergency NCS" Memo (June 28, 2022)
- *Federal Flood Risk Management Standard (FFRMS)* (FEMA Policy 206-24-005)
- *Mission Assignments* (FEMA Policy 104-010-3)
- *Public Assistance Appeals and Arbitration* (FEMA Policy 104-22-0001)
- *Public Assistance Guidance on Inundated and Submerged Roads* (FEMA Policy 104-009-13)
- *Public Assistance Simplified Procedures* (FEMA Policy 104-23-001)
- "Recovery Program Enhancements to Support Tribal Nations" Memo (November 22, 2023)
- "Simplifying the PA Management Costs" Memo (March 01, 2023)
- "Simplifying the PA Program 1" Memo (March 28, 2022)
- "Simplifying the PA Program 2" Memo (September 6, 2022)
- "Wildfire Policy Guidance" Memo (October 17, 2022)
- *Tribal Declarations Interim Guidance* (FP 104-009025-001)

(For a list of guidance documents summarized and referenced, please see the Appendix A: References and Resources list.)

Introduction

I. Document Scope, Purpose, and Use

The Federal Emergency Management Agency's (FEMA's) "Public Assistance Program Policy Guide" (PAPPG) contains consolidated Public Assistance (PA) Program policies and procedural requirements for the entire program delivery life cycle. The PAPPG provides comprehensive PA policy to use when evaluating eligibility. The PAPPG references and provides links to other FEMA policies and documents such as standard operating procedures and fact sheets that provide guidance for those involved with implementing each of the various steps.

Based on extensive feedback from internal and external stakeholders, this version of the PAPPG no longer includes content focused on FEMA's internal processes. Instead, a new companion document for FEMA staff known as the "Public Assistance Program Delivery Guide"[2] provides an overview of how FEMA implements the PA Program.

II. Applicability

FEMA applies Version 5 of the PAPPG to incidents declared on or after January 6, 2025. Individuals who have responsibilities managing, implementing, or relating to the PA Program should refer to the PAPPG for PA policy and regulatory procedural requirements.

III. Document Management and Maintenance

FEMA generally publishes proposed PA policy language for public comment prior to publishing in the PAPPG.[3] When the policy is deemed economically significant,[4] FEMA generally publishes it in the Federal Register. Additionally, FEMA is committed to strengthening its nation-to-nation relationship and will consult with tribal officials on actions that have tribal implications.[5] FEMA conducts a comprehensive review of this publication no less than every three years. All recommendations for the PAPPG should be sent to FEMA-Recovery-PA-Policy@fema.dhs.gov.

IV. Public Assistance Program Overview

The mission of FEMA's PA Program is to provide assistance to state, local, Tribal Nation, and territorial (SLTT) governments and certain types of private nonprofit (PNP) organizations so that communities can quickly respond to and recover from major disasters or emergencies. Through the PA Program, FEMA provides supplemental federal grant assistance for debris removal, emergency protective measures, and the restoration of disaster-damaged, publicly owned facilities, and specific facilities of certain PNP organizations. The PA Program also encourages protection of these damaged facilities from future incidents by providing

[2] For more information, refer to: *Public Assistance Program Delivery Guide*.
[3] Stafford Act § 325; 42 United States Code (U.S.C.) § 5165c.
[4] EO 12866, Regulatory Planning and Review.
[5] FEMA Tribal Consultation Policy FEMA Policy #101-002-02.

assistance for hazard mitigation measures and code compliance. FEMA provides this assistance based on the authority granted in statutes, executive orders (EOs), regulations, and policies.

Along with the PAPPG, there are many resources that help navigate the PA Program. References, including EOs, policies, regulations, and laws are available in the Appendix A: References and Resources. The Public Assistance Resource Library[6] contains general program guidance that focuses on restoring communities affected by major disasters or emergencies. The "Public Assistance Program Delivery Guide"[7] also contains additional process information and context for the PA Program; while its primary audience is FEMA staff, SLTT partners may find it a useful resource. Lastly, definitions for terms used throughout this document can be found in Appendix C. Terms and Definitions.

V. Authorities

FEMA provides assistance based on authorities defined in statutes and regulations. These authorities specify requirements that must be met by both FEMA and the communities it serves.

A. Statutes

Statutes are federal laws passed by the U.S. Congress and signed by the president. All PA Program assistance must comply with all applicable statutes. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (Stafford Act), Title 42 of the United States Code (U.S.C.) § 5121 et seq. authorizes FEMA to provide assistance under the PA Program.

1. STAFFORD ACT

Stafford Act sections that apply to the assistance FEMA provides under the PA Program include:

- Title I – Findings, Declarations and Definitions
- Title III – Major Disaster and Emergency Assistance Administration
  - Sec. 308. Nondiscrimination in Disaster Assistance
  - Sec. 311. Insurance
  - Sec. 312. Duplication of Benefits
  - Sec. 316. Protection of Environment
  - Sec. 323. Minimum Standards for Public and Private Structures
  - Sec. 324. Management Costs
- Title IV – Major Disaster Assistance Programs (applies to Major Disaster Declarations)
  - Sec. 403. Essential Assistance
  - Sec. 406. Repair, Restoration, and Replacement of Damaged Facilities
  - Sec. 407. Debris Removal

[6] For more information, refer to: Public Assistance Resource Library | FEMA.gov.
[7] For more information, refer to: *Public Assistance Program Delivery Guide*.

- Sec. 422. Simplified Procedures
- Sec. 428. Public Assistance Program Alternative Procedures

- Title V – Emergency Assistance Programs (applies to Emergency Declarations)
  - Sec. 502. Federal Emergency Assistance
- Title VII – Miscellaneous
  - Sec. 705. Disaster Grant Closeout Procedures

2. OTHER STATUTES

- Americans with Disabilities Act of 1990
- Sections 504 and 508 of the Rehabilitation Act of 1973
- Civil Rights Act of 1964
- Federally Recognized Tribe List Act of 1994
- Environmental and Historic Preservation Acts
- Payment Integrity Information Act of 2019
- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments
- Executive Order 14112, Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination
- Presidential Memorandum of November 5, 2009, Tribal Consultation
- Federally Recognized Tribe List Act of 1994
- Fair Labor Standards Act

B. Regulations

Regulations[8] are federal rules with the force and effect of law that implement a statute based on a federal agency's interpretation of that statute.[9] FEMA and any entity receiving PA assistance must comply with all applicable federal regulations.[10]

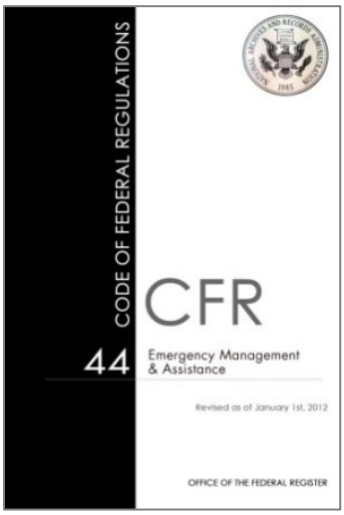

Figure 1. 44 C.F.R.

1. TITLE 44 OF THE CODE OF FEDERAL REGULATIONS

FEMA published PA Program rules in the following parts of Title 44 of the Code of Federal Regulations (C.F.R.), Emergency Management and Assistance:[11]

- Part 206 Subpart G, Public Assistance Project Administration;
- Part 206 Subpart H, Public Assistance Eligibility; and

[8] For the electronic version for the C.F.R., refer to: eCFR.
[9] Stafford Act § 321; 42 U.S.C. § 5164.
[10] 44 C.F.R. § 206.200(b).
[11] Stafford Act § 325; 42 U.S.C. § 5165c; 44 C.F.R. § 1.4.

- Part 206 Subpart I, Public Assistance Insurance Requirements.

Additional regulations that must be adhered to when receiving funding through the PA Program:

- Part 7 Subpart A, Nondiscrimination in FEMA-Assisted Programs – General
- Part 7 Subpart E, Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from FEMA
- Part 9, Floodplain Management and Protection of Wetlands
- Part 201, Mitigation Planning
- Part 204, Fire Management Assistance Grant (FMAG) Program
- Part 206, Federal Disaster Assistance

2. TITLE 2 OF THE CODE OF FEDERAL REGULATIONS

The Office of Management and Budget published 2 C.F.R. Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards to establish uniform rules for federal awards, including but not limited to:

- Subpart C – Pre-Federal Award Requirements and Contents of Federal Awards
- Subpart E – Cost Principles
- Subpart F – Audit requirements
- Subpart D – Post Federal Award Requirements
- Appendix II - Contract provisions for non-federal entity contract under federal awards, and
- Appendix VI - PA Cost Allocation Plans

3. OTHER C.F.R.

- 7 C.F.R. § 1730.25, Corrective action (Rural Utilities Service [RUS] borrowers only)
- 15 C.F.R. Part 774, The Commerce Control List
- 22 C.F.R. Part 121, The United States Munitions List
- 40 C.F.R. Part 261, Identification and Listing of Hazardous Waste
- 40 C.F.R. Parts 1500–1508, NEPA Regulations
- 48 C.F.R. Subpart 2.1, Federal Acquisition Regulation

C. Policy

FEMA issues policy to articulate the Agency's intent and direction in applying statutory and regulatory authority to achieve desired outcomes. The purpose of the PAPPG is to define FEMA's PA Program policy and procedural requirements. Separate FEMA policies and guidance documents that apply to the PA Program are referenced in the PAPPG where applicable and listed in the Appendix A: References and Resources section. PA funding must comply with these requirements. Only the Associate Administrator of Recovery at FEMA Headquarters has the authority to modify or waive PA policy.

D. Public Assistance Web-Based Grants System

FEMA uses web-based systems to promote transparency and manage project information. Recipients and applicants use PA Grants Portal[12] to submit documentation and information, review all aspects of Public PA project applications, and track the progress of their applications. FEMA uses PA Grants Manager[13] to review Requests for Public Assistance (RPA), oversee the development and review of project applications, track application progress, and receive necessary information from recipients and applicants.

[12] For more information, refer to: Grants Portal.
[13] For more information, refer to: Grants Manager.

Chapter 1: Declarations and Planning

The Stafford Act authorizes the president to provide federal assistance when the magnitude of an incident or threatened incident exceeds the affected state,[14] local,[15] Tribal Nation,[16] and territorial (SLTT) government capabilities to respond and recover. This chapter explains requirements for damage assessments, declaration requests and FEMA's evaluation criteria, the contents of the declaration, and the initial administrative requirements for a state, Tribal Nation, and territorial (STT) government to receive assistance.

I. Damage Assessments

After an incident causes widespread damage, the STT government conducts an initial damage assessment before requesting a joint Preliminary Damage Assessment (PDA) to confirm the need for federal assistance.[17] When the STT government determines that the incident exceeds its ability to respond, it requests a joint PDA with FEMA. This initial damage assessment should identify affected jurisdictions, damaged infrastructure, and provide preliminary cost estimates for response and recovery efforts. Additionally, the STT collects data to assess the need for federal assistance, including evaluating local resource capacity to support ongoing response and recovery.

During a joint PDA, FEMA, SLTT governments, and certain private nonprofit (PNP) organization officials work together to estimate and document the impact and magnitude of the incident.[18] Accurate and comprehensive PDAs are critical to enabling efficient response and recovery. FEMA's "Preliminary Damage Assessment Guide"[19] provides detailed information to assist staff involved with damage assessments and describes how FEMA utilizes the information when preparing requests for major disaster declarations. For example, applicants must provide insurance policies when requested during a PDA as FEMA only considers costs that would be eligible for reimbursement through the PA Program in its declaration determination. The Regional Administrator consults with the STT to determine if the requirement for a joint PDA may be waived based on the severity and magnitude of the incident.[20]

Terminology

When an entity applies for PA funding, it is an **applicant**. Once an applicant receives funding, it is a **subrecipient**. For simplicity, FEMA uses the term "applicant" throughout this document when referring to the responsible entity for a project rather than making distinctions between an entity as the

[14] Stafford Act § 102(4); 42 U.S.C. § 5122; 44 Code of Federal Regulations (C.F.R.) § 206.2(a)(22).
[15] Stafford Act § 102(8); 42 U.S.C. § 5122; 44 C.F.R. § 206.2(a)(16).
[16] Stafford Act § 102(6); 42 U.S.C. § 5122; 44 C.F.R. § 206.201(h),
[17] 44 C.F.R. § 206.33(a).
[18] 44 C.F.R. § 206.33(b).
[19] For more information, refer to: *Preliminary Damage Assessment Guide*.
[20] 44 C.F.R. § 206.33(d).

applicant, recipient or subrecipient. FEMA uses the terms "recipient" and "subrecipient" when necessary to differentiate between the two entities.

II. Declaration Request

The governor[21] or tribal chief executive[22] requests a declaration from the president through FEMA.[23] A Tribal Nation may elect to be a recipient[24] or a subrecipient[25] under a state or territorial declaration or request its own declaration as a recipient. A Tribal Nation may seek different types of assistance through Tribal Nation and state declarations; for example, a Tribal Nation may seek PA and the Hazard Mitigation Grant Program (HMGP) through the state, while seeking Individual Assistance (IA) through a tribal declaration. The Tribal Nation, however, cannot receive the same type of assistance (e.g., PA, IA, and HMGP) through both tribal and state declarations for the same incident. This is necessary to ensure that FEMA does not provide duplicative benefits.[26]

For state and territorial declaration requests, the governor must submit the request no later than 30 days after the incident occurs. FEMA extends the deadline if the governor submits a written time extension request within 30 days of the incident, providing reasonable justification for the delay.[27] If the Tribal Nation wishes to be its own recipient, additional guidance for this process is detailed in the Tribal Declarations Interim Guidance.[28] When a severe or catastrophic incident occurs, the governor or tribal chief executive may submit a declaration request prior to completion of the PDA.[29] This process is referred to as an expedited declaration request. In such circumstances, assistance is limited to that which would address immediate needs (lifesaving or life-sustaining items) based on rapid assessments until the PDA is completed.

III. Declaration Evaluation

Generally, FEMA uses PDA information to evaluate the need for assistance under the PA Program as follows:

- For emergency declarations, FEMA evaluates whether available resources and authorities are adequate and whether federal assistance under Section 502 of the Stafford Act is necessary to supplement SLTT efforts to save lives, protect property, and public health and safety, or to lessen or avert the threat of a catastrophe.[30]
- For major disaster declarations, FEMA reviews facility impacts and cost information to ensure the estimated amounts do not include costs for ineligible items, costs covered by insurance, or costs above and beyond what is necessary to restore the facility to pre-disaster design and capacity (e.g.,

[21] Stafford Act § 102(5); 42 U.S.C. § 5122; 44 C.F.R. § 206.2(12). For more information, refer to: Request For Presidential Disaster Declaration | fema.gov.
[22] Stafford Act § 102(12); 42 U.S.C. § 5122. For more information, refer to: How to Request a Federal Disaster Declaration for Tribal Nations | fema.gov.
[23] Stafford Act §§ 401 and 501; 42 U.S.C. §§ 5170 and 5191; 44 C.F.R. §§ 206.35 and 206.36.
[24] 44 C.F.R. § 200.201.
[25] 44 C.F.R. § 200.201.
[26] Stafford Act § 312; 42 U.S.C. § 5155.
[27] 44 C.F.R. §§ 206.35(a) and 206.36(a).
[28] Stafford Act § 312; 42 U.S.C. § 5155.
[29] 44 C.F.R. § 206.33(d).
[30] 44 C.F.R. § 206.37(c)2.

resiliency/mitigation measures), or facilities under authority of another federal agency. FEMA evaluates the estimated cost of assistance and other factors when making a recommendation to the president for whether assistance is warranted.[31] The factors for state and territorial governments differ from Tribal Nation factors. FEMA will only provide authorization for snow assistance under a major disaster declaration when specifically requested. Requests for snow assistance are only eligible for major disaster declarations and must be submitted with a winter storm or snowstorm declaration request. Additional information is available in Appendix K: Snow Declarations.

A. State and Territorial Governments

For state and territorial governments, FEMA's evaluation for a major disaster declaration is based on six primary factors:

- Estimated cost of assistance;
- Localized impacts;
- Existing insurance coverage;
- Previous mitigation efforts;
- Recent multiple disasters; and,
- Other federal agency programs.

FEMA compares the estimated eligible amounts to the established annual per capita indicators. To account for localized impacts when the statewide per capita impact is low, FEMA evaluates whether there are extraordinary concentrations of damage resulting in significantly high per capita impacts at the local government level.

To encourage hazard mitigation, FEMA considers whether SLTT government mitigation measures taken prior to the incident likely reduced the damage impacts, especially if such mitigation averted damage that would have increased the estimated eligible cost above the per capita indicator.

Understanding that the effects of multiple disasters in a confined period of time can affect response and recovery capabilities, FEMA also evaluates the overall impacts of federal and STT declarations that have occurred within the past 12 months and the extent to which the STT government has expended their funds. If there were disasters prior to the 12-month period that still have substantial impacts on SLTT governments, FEMA also considers impacts from these disasters.

B. Tribal Nations

FEMA will consider a declaration request from a federally recognized Tribal Nation if the estimated PA-eligible damage or costs meet or exceed the threshold for the minimum damage amount[32] per the Tribal Declarations Interim Guidance. FEMA evaluates Tribal Nation requests for a major disaster declaration based on the following factors:

- Types and amounts of damage;

[31] 44 C.F.R. § 206.48(a).
[32] For more information, refer to: Tribal Declarations Interim Guidance | fema.gov.

- Economic impact of the incident;
- Tribal Nation resources;
- Demographics;
- 24-month disaster history;
- Previous mitigation efforts;
- Other federal agency programs.
- Insurance;
- Unique conditions that affect Tribal Nations; and,
- Other relevant information.

The Tribal Declarations Interim Guidance[33] is a comprehensive resource for Tribal Nations on Stafford Act declarations, disaster assistance, and related requirements, including the criteria FEMA will use to evaluate declaration requests. Tribal Nations may request—at no cost—technical assistance. At any time prior to, during, and after a Tribal Declaration request, Tribal Nations may request from the FEMA the deployment of a Tribal Liaison Officer (TLNO), when available, to provide direct, onsite technical assistance. See Tribal Declarations Interim Guidance[34] for available resources and guidance on requesting technical assistance.

IV. Declaration Determinations

For FEMA to provide assistance, the president must declare that an emergency or major disaster exists.[35] The declaration establishes the:

- Type of incident;
- Incident period;
- Designated areas;
- Types of assistance;
- Federal cost share; and,
- Federal coordinating officer (FCO).

A. Incident Type

The declaration designates the type of incident (e.g., hurricane, wildfire, or earthquake). For emergency declarations, an incident is any instance determined by the president that warrants supplemental emergency assistance to save lives, protect property, and public health and safety, or to lessen or avert the threat of a catastrophe.[36] For major disaster declarations, an incident is any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) or, regardless of cause, any fire, flood, or explosion.[37]

[33] *Ibid.*
[34] Ibid.
[35] For more information, refer to: Disaster Information | fema.gov.
[36] Stafford Act § 102(1); 42 U.S.C. § 5122; 44 C.F.R. §§ 206.2(a)(9) and 206.35.
[37] Stafford Act § 102(2); 42 U.S.C. § 5122; 44 C.F.R. § 206.2(a)(17).

Major disaster declarations may include a combination of incident types, such as severe storms and landslides.

B. Incident Period

The declaration designates the incident period. The incident period is the span of time during which the federally declared incident occurred.[38] This period varies in duration, depending on the incident. The declaration includes an incident start date and typically includes an end date to the incident period. In some cases, the end date may be designated as "continuing."

C. Designated Areas

The declaration specifies which areas (e.g., county, parish, city, or tribe) are eligible to receive federal assistance, referred to as the "declared area."[39] FEMA may add additional areas after the initial designation. To request an addition, the governor or the governor's authorized representative (GAR)[40], or for Tribal Nation declarations, the tribal chief executive or tribal authorized representative (TAR), must submit the request within 30 days of the declaration date or the end of the incident period, whichever is later. FEMA will extend the deadline if the governor or GAR or, for tribal declarations, the tribal chief executive or TAR submits a written extension request within the 30-day window, providing justification for the delay.[41]

D. Types of Assistance

The declaration designates the types of federal assistance authorized.[42] The types of assistance authorized differs between emergency and major disaster declarations and may vary among declared areas. For emergency declarations, the president may authorize limited immediate and short-term assistance essential to save lives, protect property, and public health and safety, or to lessen or avert the threat of catastrophe.[43] For major disaster declarations, the president may authorize Individual Assistance (IA), Hazard Mitigation Programs, and PA. Through IA's Individuals and Households Program (IHP), FEMA provides assistance to eligible individuals and households. FEMA provides risk management resources to identify, assess, and prioritize possible risk reduction and minimize potential loss of life and property from future disasters through its Hazard Mitigation Grant Program (HMGP).

FEMA Regional Administrators[44] have the authority to issue Fire Management Assistance Grant (FMAG) declarations for wildfires that threaten to cause such destruction that would constitute a major disaster.[45] The FMAG Program is separate and distinct from the PA Program. The "Fire Management Assistance Grant

[38] 44 C.F.R. § 206.32(f).
[39] 44 C.F.R. §§ 206.2(a)(6) and 206.40(b).
[40] 44 C.F.R. §§ 206.2(a)(13) and 206.41(d).
[41] 44 C.F.R. § 206.40(c-d).
[42] 44 C.F.R. § 206.40(a).
[43] 44 C.F.R. § 206.63.
[44] 44 C.F.R. § 206.2(a)(21).
[45] Stafford Act § 420; 42 U.S.C. § 5187; 44 C.F.R. § 204.

Program and Policy Guide"[46] describes the declaration criteria, eligibility, and procedures of the FMAG program.

E. Federal Cost Share

The assistance FEMA provides through its PA Program is subject to a federal cost share, which means that FEMA provides funding for a portion of the project and the recipient or applicant is responsible for the remaining portion.[47] The federal cost share ensures local interest and involvement through financial participation. The federal cost share is not less than 75 percent of the eligible costs.[48] FEMA recommends an increase up to 90 percent if actual federal obligations, excluding administrative costs, meet or exceed a qualifying threshold.[49] For debris removal and emergency protective measures specifically, the federal cost share may be increased in certain circumstances, and for limited periods of time, if warranted.[50] See Increased Federal Cost Share for a Limited Timeframe in Chapter 6 for details on how FEMA applies the increased federal cost share.

Applicants may only apply other federal award funds toward the PA non-federal cost share if the other federal agency has specific statutory authority allowing its funds to be used to meet cost-share requirements.[51] For example, the U.S. Department of Housing and Urban Development's (HUD's) Community Development Block Grant (CDBG) Program may be used toward the non-federal cost share on PA projects if certain requirements are met.[52] FEMA applies the federal cost share at the project level. Therefore, any other agency's federal funds must be applied at the project level and cannot be used across multiple projects (except for permanent work alternative procedure projects as described in Appendix G: Alternative Procedures for Permanent Work). Further, if an applicant uses funds from another federal agency to meet the non-federal cost share, it must meet all requirements of the other agency as well as all PA Program requirements. Applicants cannot apply PA funds toward the non-federal cost share of other federal agency awards.

F. Declaration-Related Appeals

For states and territories, if FEMA denies a declaration, types of assistance, or areas, the governor may submit an appeal through the Regional Administrator. The appeal and any justification or additional information must be submitted within 30 days of the denial letter date. If additional time is needed to submit a declaration-related appeal, a time extension request citing the reason for delay must be submitted within 30 days of the denial letter.

[46] For more information, refer to: Fire Management Assistance Grants | fema.gov.
[47] 44 C.F.R. § 206.203(b).
[48] Stafford Act §§ 403(b), 406(b), 407(d), and 503(a); 42 U.S.C. §§ 5170b, 5172, 5173, 5193; 44 C.F.R. §§ 206.47(a) and 206.65.
[49] 44 C.F.R. § 206.47(b).
[50] 44 C.F.R. § 206.47(d).
[51] Stafford Act § 312; 42 U.S.C. § 5155; 2 C.F.R. § 200.306(b)(5).
[52] For more information, refer to: *FEMA-HUD CDBG-DR Flexible Match Implementation Guide*.

For Tribal Nations, if certain types of assistance or certain areas requested to be authorized in the declaration are denied, the tribal chief executive may submit an appeal per the Tribal Declarations Interim Guidance.

The governor or tribal chief executive, GAR, or TAR may appeal, or request time extensions to appeal, a denial of the types of assistance or areas. However, only the governor or tribal chief executive may appeal, or request a time extension to appeal, a declaration denial. FEMA's Assistant Administrator for the Recovery Directorate at FEMA Headquarters approves time extensions when there is a justified reason for the delay.[53]

G. Recipient Administrative Requirements

There are several administrative requirements recipients must fulfill before FEMA obligates funds, detailed in the following sections.

FEMA provides funding to cover administrative costs related to managing grants and offers technical assistance at no extra cost to support recipients' success. For new recipients, the "FEMA New Recipients of Disaster Grants Guide"[54] provides additional information.

H. Application for Federal Assistance

The declared state, Tribal Nation, or territory must complete and submit the following Standard Forms (SFs)[55] before FEMA provides assistance:

- "Application for Federal Assistance" (SF-424);
- "Budget Information for Non-Construction Programs" (SF-424A);
- "Assurances for Non-Construction Programs" (SF-424B);
- "Budget Information for Construction Programs" (SF-424C); and,
- "Assurances for Construction Programs" (SF-424D).

The SF-424 includes the period of performance (POP) for the PA award (referred to as the prime award). The prime award POP begins on the first day of the incident period and initially extends four years from the declaration date.

I. FEMA-State/Tribal Nation Agreement

After every declaration, FEMA and the applicable STT government enter into a FEMA-state agreement (FSA) or FEMA-Tribal Nation agreement (FTA) that defines the understanding, commitments, and conditions under which FEMA provides assistance. FEMA and the governor or tribal chief executive must sign this agreement before FEMA provides assistance. If necessary, because of exigent circumstances, FEMA may authorize essential emergency services or housing assistance under the Individuals and Households Program while the agreement is in process for signature.[56]

[53] 44 C.F.R. § 206.46.
[54] For more information, refer to: *FEMA New Recipients of Disaster Grants Guide*.
[55] 44 C.F.R. § 206.202(e). The SF-424 forms are available at: SF-424 Forms.
[56] 44 C.F.R. § 206.44(a).

J. Payment Management System

FEMA provides PA funding to recipients via the U.S. Department of Health and Human Services (HHS) Payment Management System. Therefore, if an entity is a recipient for the first time, it must request access to the Payment Management System and complete the "Direct Deposit Form" (SF-1199A) to obtain a FEMA-specific account before FEMA can provide funding.[57]

K. Public Assistance Administrative Plan

Recipients must have a FEMA-approved administrative plan[58] that describes how it intends to administer the PA Program before FEMA provides PA funding for any project. At a minimum, the administrative plan must include: [59]

- The agencies responsible for program administration;
- Identification of staffing functions, the source of staff to fill the functions, the management and oversight responsibilities of each function; and
- Procedures for:
  - Notifying potential applicants of the availability of the PA Program;
  - Conducting applicant briefings;
  - Assisting FEMA in determining applicant eligibility;
  - Participating with FEMA in conducting preliminary damage assessments;
  - Participating with FEMA in establishing PA mitigation and insurance requirements;
  - Processing appeals, time extension requests, and other project-related correspondence;
  - Complying with administrative requirements of 2 Code of Federal Regulations (C.F.R.) § 200 and 3002 and 44 C.F.R. § 206;
  - Complying with audit requirements of 2 C.F.R. § 200 and 3002;
  - Processing requests for advances of funds and reimbursement;
  - Determining staffing and budgeting requirements; and,
  - Determining the pass-through funds for management costs provided under 44 C.F.R. § 207.

State and territorial recipients must submit their administrative plan to FEMA annually. Additionally, an amendment is required for each disaster declaration to address the specifics of the new incident. The recipient must incorporate the approved administrative plan into its emergency plan. Tribal Nations submit their PA administrative plan for each declared disaster in which they are a recipient. For further guidance see Tribal Declarations Interim Guidance. [60] Subrecipients do not require PA administrative plans.

[57] The *Payment Management System Access Form* and the SF-1199A are available at: Payment Management Services | psc.gov.
[58] Templates for administrative plans are available at: Public Assistance Project Templates and Forms.
[59] 44 C.F.R. § 206.207(b).
[60] For more information, refer to: Tribal Declarations Interim Guidance | fema.gov.

L. Hazard Mitigation Plan

Hazard mitigation is most effective when implemented under a comprehensive, long-term mitigation plan that considers future conditions. Communities engage in mitigation planning to identify risks and vulnerabilities to develop long-term strategies for protecting people and property from future incidents. Recipients must have a FEMA-approved hazard mitigation plan[61] before FEMA can provide PA funding for any permanent work.[62] A recipient must show in its plan how it intends to reduce risks from natural hazards. Recipients are required to update the plan every 5 years.

M. Recipient-Led Public Assistance

FEMA has found that recovery efforts are most successful when locally executed, state or Tribal Nation managed, and federally supported. Local county or parish officials are best equipped to understand the unique needs of their communities, while Tribal Nations know what is most important to their people and how to effectively guide their recovery. Disaster recovery progresses at different rates for each locality and involving the right mix of local subject matter experts early in the process ensures that environmental, historic, sustainability, and resilience factors are considered from project formulation through implementation.

This approach forms the basis of recipient-led PA operations. While it may not be suitable for widespread disasters that could overwhelm local, state, or Tribal Nation resources, recipient-led PA events offer opportunities to build local capacity and capability while addressing the specific needs of the recovering community.

In recipient-led PA events, recipients can lead any of the following key PA functions in lieu of FEMA:

- Customer service;
- Site inspections; and,
- Scoping and costing.

In addition to any support requested by recipients, FEMA maintains the following responsibilities:

- Oversight of the PA operation;
- Quality control reviews;
- Law, regulation, and EO compliance reviews; and,
- Final eligibility determination and obligation authority.

FEMA and the recipient discuss whether a recipient-led PA operation is appropriate given the recipient's current capacity. These discussions may begin before an incident when the recipient is assessing its capability to lead a future PA operation or after a declaration request. FEMA and the recipient examine the recipient's capacity at the time of the disaster and incident-specific characteristics to determine the feasibility of recipient-led PA. Typically, the best candidates for recipient-led PA are recipients with the following factors:

[61] For more information, refer to: Hazard Mitigation Planning | fema.gov.
[62] 44 C.F.R. § 201.3(c)(1) and (e)(1).

- Recent disaster experience;
- Adequate recipient staff or staff augmentation mechanisms;
- A fiscal accounting system tracks specific projects, withstands audit, and may be used to evaluate appeals; and,
- Established record of meeting deadlines for PA grant management activities.

To opt in to recipient-led PA, the Regional Administrator and the governor or the GAR[63], or for Tribal Nation declarations, the tribal chief executive or TAR must enter into an operational agreement, as an addendum to the FEMA-state agreement (FSA) or FEMA-Tribal Nation agreement (FTA), that delineates roles and responsibilities. After signing, recipients have 72 hours to sign the operational agreement. The Regional Administrator may approve requests to participate in recipient-led PA after the 72 hours at its discretion. The "State-Led Public Assistance Guide"[64] provides additional guidance on the processes, resources, and capabilities required.

[63] 44 C.F.R. §§ 206.2(a)(13) and 206.41(d).
[64] For more information, refer to: *State-led Public Assistance Guide*.

Chapter 2: Coordination and Appeal Rights

FEMA and recipients work in partnership to administer the PA Program and provide customer service to each applicant. This chapter defines how FEMA documents its eligibility determinations and explains applicants' rights to appeal decisions by FEMA.

I. PA Eligibility

The four basic components of PA eligibility are:

- Applicant;
- Facility;
- Work; and,
- Cost.

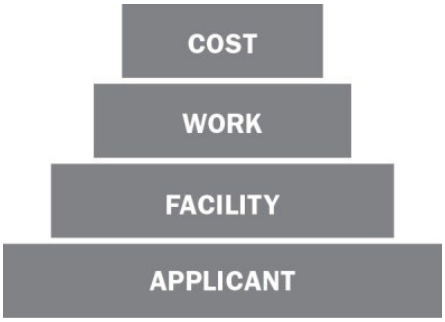

Figure 2. PA Eligibility Pyramid

FEMA refers to these components as the building blocks of the eligibility pyramid. FEMA evaluates each building block to determine eligibility, starting at the foundation (applicant) and working up to cost at the top of the pyramid (see Figure 2. PA Eligibility Pyramid).

There are two exceptions to the standard eligibility pyramid review process:

- For state, local, Tribal Nation, and territorial (SLTT) government applicants, evaluating facility eligibility is not a necessary step for debris removal or most emergency protective measures, as described in Chapter 7: Emergency Work Eligibility.
- For private nonprofit (PNP) organizations, FEMA must determine whether the PNP owns or operates a facility that provides an eligible service to determine whether the applicant is eligible. See Applicant Eligibility: Private Nonprofit Organizations in Chapter 3 for additional information and a pyramid specific to PNP eligibility.

FEMA understands the importance of providing timely and effective support for recovery efforts. To ensure eligibility for assistance, FEMA follows a comprehensive process based on specific information and documentation submitted by applicants, as outlined in the PAPPG. FEMA works closely with recipients and applicants, reviewing the details carefully to verify eligibility. This includes the "who, what, when, where, why, and how much" needed to support each claim.

While FEMA is committed to assisting applicants through this process, it's important to note that providing adequate documentation is essential. If an applicant cannot demonstrate eligibility for any of the components—whether the applicant, facility, work, or cost—FEMA will not be able to approve PA funding. To make the process smoother, documentation and information requirements have been simplified. Simplified Procedures[65] streamlines the application process for small projects and reduces the administrative burden of providing all documentation prior to FEMA obligating funds. Tables have been incorporated throughout the PAPPG to provide clear guidance on documentation and information requirements.

[65] For more information, refer to: Simplified Procedures in Chapter 2.I.A.

FEMA's ability to reimburse assistance is governed by legal authorities set forth in statutes and regulations, which outline certain criteria that must be followed. The PAPPG highlights the mandatory nature of these requirements by using terms like "must" or "required," emphasizing their legally binding status. Non-compliance with these requirements could jeopardize an applicant's PA funding, so adhering to these guidelines is crucial to ensure successful outcomes. FEMA is here to support applicants every step of the way, but meeting these requirements is necessary to move forward.

A. Simplified Procedures

Section 422 of the Robert T. Stafford Act allows simplified procedures for small projects. Through this provision FEMA can support the fair delivery of assistance to communities and enable faster recovery for all communities by reducing the administrative burden associated with providing supporting documentation. This is achieved by allowing applicants to submit summary documentation and self-certify rather than providing a burdensome amount of documentation to support eligibility. Applicants must continue to retain all source documentation, including project eligibility records and financial records, for 3 years after the date the recipient submits the certification of completion for the applicant's last small project to FEMA. Throughout the document, the PAPPG lists both documentation and information required for submission to FEMA and records that must be retained by the applicant.

B. Sampling Procedures

FEMA adopted the Government Accountability Office (GAO) approach to sampling as an initiative to increase the efficiency of the PA Program. Sampling is the process of selecting and evaluating a few items in a group to learn something about the whole group or similar, unobserved items, such as when 20 line items are selected from a group of 100 line items. When applicants have a significant number of documents to support claims for assistance, applicants may submit a summary of the documentation, and FEMA will select a representative sample to review. Additionally, if an applicant submits a significant number of damaged sites, in lieu of FEMA inspections at all sites, the applicant may submit damage information and documentation for FEMA to validate using this sampling methodology.[66] The sampling procedure is meant to be flexible in situations where a significant amount of information is submitted (e.g. PDAs, site inspections, documentation review, or closeout).

C. Facilitated Discussions

Most PA projects are free of eligibility disputes; if eligibility issues arise, the intent is that they are quickly resolved. In some cases, eligibility issues may arise from a lack of mutual understanding. Clear, open lines of communication can often resolve misconceptions and provide a path forward. When such discussions reach an impasse, PA staff may offer the opportunity to participate in a facilitated discussion led by a FEMA alternative dispute resolution specialist. These types of informal discussions, led by a trained facilitator, can provide clarity to participants with different perspectives, as well as possible avenues for resolution.

[66] For more information, refer to: *Public Assistance Sampling Procedure*.

D. Requests for Information

During the PA process, if FEMA needs additional information to understand information provided by the applicant, FEMA requests the information or documentation by submitting a request for information (RFI). Responses to RFIs are due by the deadline specified in the RFI. FEMA establishes the deadline based on the nature of the request and in consideration of the type and volume of information or documentation requested, with a minimum of 15 days to respond to the RFI. Therefore, the amount of time allowed may vary. If an applicant fails to meet the deadline and does not request and receive FEMA approval for a time extension to submit the required information, FEMA will deny assistance for the applicant, facility, work, or costs that cannot be verified due to the missing information. Applicants should coordinate with the Recipient and FEMA if there are any questions about the RFI.

E. Notification of an Ineligibility Determination

If, after facilitated discussions and RFIs, FEMA determines that the applicant, facility, work, or cost is ineligible, FEMA provides electronic notice through a determination memorandum or letter that includes:

- An explanation of what assistance FEMA denied and, as applicable, the amount of assistance denied for each item;
- The basis for FEMA's denial, including the provisions of law, regulation, or policy that support the determination; and,
- Information regarding the applicant's rights and procedures to appeal.

FEMA sends the letter or determination memo electronically to both the recipient and applicant. This serves as the formal notification of FEMA's determination and explains the applicant's appeal rights.

A determination could result from any portion of the project application including a Validate as You Go (VAYGo) audit finding. For more information about the VAYGo process, see Recovery of Improper Payments in Chapter 11.

F. Appeal Rights and Requirements

Applicants may appeal any FEMA determination related to an application for the provision of assistance under the PA Program.[67] This includes, but is not limited to, eligibility denials pertaining to an applicant, facility, work, or costs, or time extension denials.

FEMA provides applicants with opportunities to appeal a determination:

- Applicants must submit the first appeal through the recipient to the Regional Administrator.[68]
- If the Regional Administrator partially or fully denies the first appeal, applicants may submit a second appeal through the recipient to the Assistant Administrator for the Recovery Directorate at FEMA Headquarters.[69]

[67] Stafford Act § 423; 42 United States Code (U.S.C.) § 5189a; 44 Code of Federal Regulations (C.F.R.) § 206.206.
[68] 44 C.F.R. § 206.206(b)(1).
[69] 44 C.F.R. § 206.206(b)(2).

All appeals must be in writing and submitted electronically. Recipients must submit all appeals to FEMA via Grants Portal. In an appeal, the applicant must include:

- Documented justification supporting its position;
- The specific funding amount (or amounts if there are multiple issues on appeal) in dispute, as applicable; and,
- Specify the provisions of law, regulation, or policy (applicable to the respective disaster) with which the applicant believes FEMA's determination was inconsistent.[70]

At any point in the appeal process, the applicant may withdraw its appeal by submitting a written request simultaneously to the recipient and FEMA. FEMA sends a written acknowledgment of the withdrawal request simultaneously to the recipient and applicant.

G. Appeal Deadlines

Applicants must submit an appeal to the recipient within 60 days from the date FEMA transmits an eligibility determination or first appeal decision to the applicant and recipient.[71] The recipient must forward the appeal with its written recommendation to FEMA within 120 days from the date FEMA transmits its eligibility determination or first appeal decision.[72] If the respective 60th or 120th day is a Saturday, Sunday, or federal holiday, FEMA accepts it as timely if received by the first business day after the deadline.[73] If either the applicant or recipient does not meet the respective deadline, FEMA denies the appeal as untimely.

H. Appeal Review and Decisions

Upon receipt of the appeal, FEMA reviews the appeal content and uses the administrative record and the laws, regulations, and policies applicable to the respective incident to analyze the appeal. FEMA may request additional information via an RFI, submit the appeal to an independent expert or experts for technical review and recommendations, or make its decision based on the documentation and information provided at the time of appeal submission.[74] FEMA may identify and review new eligibility issues that were not previously raised or addressed in the prior determination.

Terminology

The **administrative record** may include, but is not limited to, project application (all versions); supporting documentation, including photographs and technical reports; and all written correspondence, including eligibility determinations.

[70] 44 C.F.R. § 206.206(b)(1)(i) and (b)(2)(i).
[71] 44 C.F.R. § 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A).
[72] 44 C.F.R. § 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A).
[73] Federal holidays are defined by the Office of Personnel Management and listed at: Federal Holidays | opm.gov.
[74] 44 C.F.R. § 206.206(b)(1)(ii) and (iii) and (b)(2)(ii) and (iii).

Within 90 days of receiving the appeal, FEMA provides its appeal decision simultaneously to the recipient and applicant.[75] In cases where FEMA has requested information or technical review, it will issue the response within 90 days of receiving the information (or within 90 days of the expiration of the deadline to respond) or the technical review recommendations.[76]

For second appeals, all decisions represent the Agency's final administrative decision on the matter.[77] Additionally, if an applicant does not appeal an eligibility determination or first appeal decision by the deadline, the respective decision represents the Agency's final administrative decision.[78]

I. Arbitration

Applicants also have the option to submit a request for arbitration if all the following apply:[79]

- The amount in dispute[80] is greater than $500,000, or greater than $100,000 for an applicant requesting assistance in a rural area[81];
- The applicant and recipient submitted a first appeal to FEMA by the first appeal deadline;[82] and
- FEMA denied the first appeal or did not issue a decision within 180 days of receiving the appeal.

Applicants request arbitration by emailing the recipient, Civilian Board of Contract Appeals (CBCA), and FEMA simultaneously.[83] Applicants must file a request for arbitration within 60 calendar days from the date FEMA transmits its first appeal decision. If FEMA has not rendered a first appeal decision within 180 calendar days of receiving the appeal, applicants can request arbitration instead. Applicants must withdraw their first appeal and then submit a request for arbitration to the recipient, CBCA, and FEMA within 30 days of the withdrawal.

Applicants may submit a second appeal or a request for arbitration, but not both.[84] When applicants request arbitration in lieu of appeal, the CBCA decision constitutes the final decision.

The CBCA arbitrates at no cost to the parties. However, each party is directly responsible for all other expenses it incurs in the arbitration process.[85] This includes, but is not limited to, attorney's fees, representative fees, copying costs, and costs associated with attending hearings. These costs are not eligible for FEMA funding.

[75] 44 C.F.R. § 206.206(b)(1)(ii)(C) and (b)(2)(ii)(C).
[76] 44 C.F.R. § 206.206(b)(1)(ii) and (iii) and (b)(2)(ii) and (iii).
[77] 44 C.F.R. § 206.206(c).
[78] 44 C.F.R. § 206.206(a).
[79] 44 C.F.R. § 206.206(b)(3).
[80] 44 C.F.R. § 206.206(a).
[81] 44 C.F.R. § 206.206(a).
[82] 44 C.F.R. § 206.206(b)(1)(ii).
[83] 44 C.F.R. § 206.206(b)(3)(iii)(A).
[84] 44 C.F.R. § 206.206(b)(3)(ii).
[85] For more information, refer to: *Public Assistance Appeals and Arbitration* (FP 104-22-0001) and *PA Arbitration Fact Sheet*.

Chapter 3: Applying for Public Assistance and Applicant Eligibility

This chapter defines the process to request assistance for PA, starting with the request for public assistance (RPA). It provides information relating to organizations that can benefit from the Public Assistance (PA) Program, requirements to substantiate eligibility, and important steps that take place following a presidential declaration. The "Public Assistance Program Delivery Guide"[86] provides an overview of these process steps.

I. Applicant Eligibility

FEMA provides assistance to eligible applicants, which are defined below. As shown in Figure 3. Applicant Eligibility, FEMA must first determine whether an applicant is eligible before evaluating the applicant's claim. FEMA and the recipient review the RPA to determine whether an applicant is eligible for assistance.[87] This section provides FEMA's policy on applicant eligibility.

There are two types of applicants that may apply for the PA Program:

- State, local, Tribal Nation, and territorial (SLTT) entities;[88] and,
- Private nonprofit (PNP) organizations, including houses of worship and other faith-based organizations.[89]

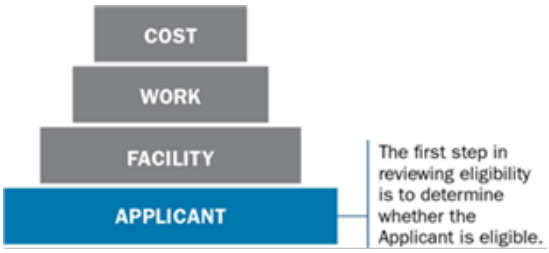

Figure 3. Applicant Eligibility

II. Applicant Briefing

As soon as possible following the president's declaration, a recipient conducts briefings for all potential applicants. Recipients are responsible for notifying potential applicants of the date, time, and location of the applicant briefing.[90]

III. Request for Public Assistance

The RPA[91] is an application for the PA Program. If an SLTT government entity or PNP wishes to request reimbursement for costs related to damage and impacts from a presidential declaration, it must submit an RPA to FEMA via PA Grants Portal within 30 days after the respective area is designated.[92] Recipients must also submit an RPA to be eligible to request funding through the PA Program. Once an RPA is approved, the SLTT government entity or PNP becomes an applicant and is eligible to submit projects to request funding.

[86] For more information, refer to: *Public Assistance Program Delivery Guide*.
[87] 44 Code of Federal Regulations (C.F.R.) § 206.207(b)(1)(iii)(C).
[88] See Applicant Eligibility: State, Local, Tribal, and Territorial Government Entities in this chapter for additional information on eligibility criteria.
[89] See Applicant Eligibility: Private Nonprofit Organizations in this chapter for additional information on eligibility criteria.
[90] 44 C.F.R.§ 206.207(b)(1)(iii)(B).
[91] For more information, refer to: How to Apply for Public Assistance | fema.gov.
[92] 44 C.F.R. § 206.202(c).

FEMA extends the deadline for submitting an RPA if a recipient submits a request in writing with justification based on extenuating circumstances beyond an applicant's or recipient's control. The following are examples of extenuating circumstances that FEMA considers to be beyond an applicant's or recipient's control:[93]

- The applicant is only claiming categories of work that were not authorized for the respective area in the initial declaration.
- Delays were due to slow responses or other issues caused by FEMA.
- FEMA's Grants Portal was offline or otherwise unavailable on the date the applicant tried to submit the RPA and it was the same day as the deadline.
- Communication systems were down for such an extended time period that applicants in the area were unable to receive or send information.

The recipient reviews each RPA to determine if the entity meets the criteria of an eligible applicant, provides an assessment of the applicant's risk of noncompliance as required by 2 C.F.R. § 200.332(c), and recommends whether FEMA should approve the RPA.

IV. Applicant Eligibility: State, Local, Tribal Nation, and Territorial Government Entities

A. State and Territorial Governments

State and territorial governments, including the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands, are eligible applicants. This includes any agency or instrumentality thereof, exclusive of local governments.[94] The state or territorial government designates one of its agencies (usually the emergency management agency) as the recipient. The recipient serves as the pass-through entity to the other agencies, which are subrecipients.

Terminology

Pass-through entity - A non-federal entity that provides a subaward to a subrecipient to carry out part of a federal program.

Subaward - An award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a federal program.

B. Tribal Nations

Federally recognized Indian Tribal Nations, including Alaska Native villages and organizations, are eligible applicants. A searchable list of federally recognized Tribal Nations is available through the Bureau of Indian

[93] 44 C.F.R. § 206.202(f)(2).
[94] Stafford Act § 102(4); 42 United States Code (U.S.C.) § 5122; 44 C.F.R. §§ 206.2(a)(22) and 206.222(a); 2 C.F.R. § 200.1.

Affairs (BIA).[95] Alaska Native Corporations are ineligible to apply for assistance as they are privately owned.[96] When a federally recognized Tribal Nation receives a presidential emergency or major disaster declaration, they do not need to designate a separate department or agency to act as the recipient.

While state recognized Tribal Nations that are not federally recognized cannot request a presidential declaration, they are eligible to receive PA, as are heritage groups.

C. Local Governments

The following types of local governments are eligible applicants:[97]

- Counties and parishes;
- Municipalities, cities, towns, boroughs, and townships;
- Local public authorities;
- School districts;
- Intrastate districts;
- Councils of governments (regardless of whether incorporated as nonprofit corporations under state law);
- Regional and interstate government entities;
- Agencies or instrumentalities of local governments;
- State recognized Tribal Nations; and,
- Special districts established under state law.
    - Community development districts are special districts that finance, plan, establish, acquire, construct, or reconstruct, operate, and maintain systems, facilities, and basic infrastructure within their community development. The district must own and be legally responsible for maintenance, and operation of an eligible facility that is open to and serves the general public.[98] Community development districts generally meet the requirement of serving the public based on the same criteria used for PNPs under Applicant Eligibility: Private Nonprofit Organizations in this chapter.

The state or a political subdivision of the state may submit applications on behalf of rural communities, unincorporated towns or villages, and other public entities not listed above.[99]

V. Applicant Eligibility: Private Nonprofit Organizations

FEMA evaluates a PNP's organization status, and the services provided in each facility owned or operated by the PNP to determine whether it is eligible.

[95] For more information, refer to: Tribal Leader Directory | geoplatform.gov.
[96] Stafford Act § 102(6); 42 U.S.C. § 5122; 44 C.F.R. §§ 206.201(i) and 206.222(c); 2 C.F.R. § 200.1.
[97] Stafford Act § 102(8); 42 U.S.C. § 5122; 44 C.F.R. §§ 206.2(a)(16) and 206.222(a); 2 C.F.R. § 200.1(h).
[98] Community Development Districts generally meet the requirement of serving the public based on the same criteria used for PNPs in Chapter 3.V: Applicant Eligibility: Private Nonprofit Organizations.
[99] Stafford Act § 102(8)(c); 42 U.S.C. § 5122; 44 C.F.R. § 206.2(a)(16)(iii).

To be eligible, a PNP must have been an established PNP organization,[100] have owned or operated an eligible PNP facility at the time of the incident period, and ensured that the facility is one that provides an eligible service, which is categorized as either (1) critical services, or (2) noncritical, but essential social services (see Figure 4. PNP Eligibility).[101] All three criteria must be met to be an eligible applicant.

Figure 4. PNP Eligibility

A. Organization Eligibility

For an organization to demonstrate its qualifications as a PNP, it must provide a ruling letter from the U.S. Internal Revenue Service that was in effect as of the declaration date and granted tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code; or documentation from the state substantiating it is a non-revenue producing, nonprofit entity organized or doing business under state law.[102] For a list of documentation needed to demonstrate these requirements, see Table 6. Required Documentation and Information for PNP RPA.

If the organization is not required to obtain 501(c)(3) status or tax-exempt status under applicable state law, it must provide articles of association, bylaws, or other documents indicating that it is an organized entity, and a certification that it is compliant with Internal Revenue Code section 501(c)(3) and state law requirements.

B. For-Profit Entities

For-profit entities are not eligible applicants for assistance from FEMA under the PA Program. However, SLTT government entities may contract with private entities, including for-profit entities, to carry out eligible emergency protective measures. In these cases, FEMA will reimburse the eligible applicant for the cost of eligible work, and the applicant may then compensate the private entity for the provision of goods or services.

C. Facility Eligibility

Prior to determining whether a PNP is an eligible applicant, FEMA must first determine whether the PNP owns or operates an eligible facility that provides an eligible service.

A facility owned or operated by a PNP that provides a critical service defined as education, utility, emergency, or emergency medical care is eligible (see Table 3. PNP Eligible Critical Services). Administrative and support facilities essential to the provision of a PNP critical service are also eligible facilities. Administrative and support facilities may include, but are not limited to laundry facilities, kitchens, dining areas, dormitories,

[100] 44 C.F.R. § 206.221(f).
[101] 44 C.F.R. § 206.222(b).
[102] 44 C.F.R. § 206.221(f).

storage, record keeping areas, parking lots, access roads or bridges, administrative offices, school gyms, and school playgrounds.

A facility owned or operated by a PNP that provides a noncritical, but essential social service and provides those services to the general public is eligible (see Table 4. PNP Eligible Noncritical, Essential Social Services). PNP facilities meet the requirement of serving the general public if all the following conditions are met:

- Facility use is not limited to any of the following:
  - A certain number of individuals;
  - A defined group of individuals who have a financial interest in the facility, such as a condominium association;
  - Certain classes of individuals; or
  - An unreasonably restrictive geographical area, such as a neighborhood within a community.
- Facility access is not limited to a specific population (such as facilities with gates or other security systems intended to restrict public access); and,
- Any membership fees meet all of the following criteria:
  - Are nominal;
  - Are waived when an individual can show inability to pay the fee;
  - Are not of such magnitude to preclude use by a significant portion of the community; and,
  - Do not exceed what is appropriate based on other facilities used for similar services.

In cases where a PNP is leasing a facility to another entity that is providing eligible PNP services, FEMA reviews any fees the lessee charges individuals for the services. FEMA does not review the cost of the lease to determine if the facility is serving the general public.

Certain types of facilities that restrict access in a manner clearly related to the nature of the facility, such as senior centers, center-based childcare, custodial care, rehabilitation, or educational facilities; or houses of worship (HOW) that limit membership in the organization to individuals who share a religious faith or practice, are still considered to provide essential social services to the general public.

Terminology

The Stafford Act references both rehabilitational facilities and rehabilitation facilities.

- **Rehabilitational facilities** are those that provide social services or counseling support for drug or alcohol dependency treatments.
- **Rehabilitation facilities** are those that provide rehabilitation services after physical injury.

Facilities established or primarily used for political, athletic, or recreational activities, vocational, conferences, retreats, or similar activities are ineligible for PA funding (see Table 5. PNP Ineligible Services).

PNPs that own or operate facilities that only provide noncritical services must also apply for a disaster loan for facility restoration from the U.S. Small Business Administration (SBA) (see Small Business Administration Loan Requirement in this chapter).

D. Multiple Facilities

If a PNP operates multiple facilities, or a single facility composed of more than one building, FEMA must evaluate each building independently, even if all are located on the same grounds. Structures that are part of a complex that includes outdoor facilities (e.g., swimming pools, athletic fields, or tennis courts) are not evaluated separately from the rest of the complex when determining eligibility of the building. Support facilities are evaluated based on the purpose of the facility they support. See Appendix E: Private Nonprofit Facility Eligibility Examples for examples of PNP facilities and corresponding eligibility determinations.

E. Mixed-Use Facility

Eligibility for PNP facilities that provide multiple services (mixed-use facilities) is dependent on the primary use of the facility. Primary use is determined by the amount of physical space dedicated to eligible versus ineligible services. Primary use is the use for which more than 50 percent of the physical space in the facility is dedicated. FEMA evaluates the entire structure when determining primary use; it does not separately address individual areas, such as floors, basements, or wings. Common space, such as bathrooms, hallways, lobbies, closets, stairways, and elevators are not included when calculating mixed-use space.

If FEMA determines that 50 percent or more of physical space is dedicated to ineligible services, the entire facility is ineligible. If the facility is eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services. Depending on the specifics of the scenario, FEMA either prorates funding for debris removal and emergency protective measures or limits such funding to what is eligible, necessary, and reasonable. The applicant is responsible for the balance of restoration costs and must restore the entire facility to receive funding for repairs to the eligible-use portions of the facility.

Eligible PNP irrigation and PNP public broadcasting facilities are exempt from primary use requirements. For PNP irrigation facilities, FEMA will evaluate whether the facility was designed to provide eligible irrigation and whether it has ever been used for that purpose. If the facility was not designed for an eligible irrigation purpose, and has never been utilized for that purpose, it is not eligible.

F. Mixed-Use Space

In cases where a single PNP facility provides both critical and eligible non-critical services, FEMA does not perform a calculation to determine whether the primary use is for critical or non-critical services. FEMA only performs this calculation to determine whether a facility is primarily used for eligible services.

See Appendix E: Private Nonprofit Facility Eligibility Examples for examples of PNP facilities and corresponding eligibility determinations.

In cases where the same physical space is used for both eligible and ineligible services, the primary use is the use for which more than 50 percent of the operating time is dedicated in that shared physical space. If

space is available for use, but the applicant cannot support that it is used for eligible services for more than 50 of the percent of the operating time, this criterion is not met.

If FEMA determines that 50 percent or more of the operating time in the shared physical space is dedicated to ineligible services, then FEMA does not include that physical space when evaluating primary use.

G. Multiple Services

In cases where the facility provides multiple services, such as a community center, FEMA reviews additional items to determine the primary service that facility provides, such as:

- U.S. Internal Revenue Service documentation;
- Pre-disaster charter, bylaws, and amendments; and,
- Evidence of longstanding, routine (day-to-day) use (e.g., a calendar of activities).

H. Use by Multiple Entities

In cases where a PNP shares use of a facility, the facility is only eligible if it is primarily owned by the PNP applicant. FEMA prorates funding for these facilities based on the percentage of physical space that the applicant owns and dedicates to eligible services. The following guidelines are used to determine the eligibility of such facilities:

- If the eligible PNP owns the entire facility and leases a portion of it to another entity, the facility is eligible provided that the PNP dedicates more than 50 percent of the facility for eligible services. If the PNP leases 50 percent or more of the facility to an ineligible applicant, or for ineligible services, then the facility is ineligible.
- If the eligible PNP only owns a portion of the facility, it is eligible provided that the PNP owns more than 50 percent of the facility and dedicates more than 50 percent of physical space for eligible services.

I. Leased Facilities

If an eligible PNP leases a facility to another eligible PNP that provides an eligible service in that facility, the facility is eligible. Even though the lessee does not own the facility, it may be the eligible applicant because it operates the facility. Whichever PNP (the owner or the lessee) has the legal responsibility to maintain the facility is the eligible applicant.

J. Small Business Administration Loan Requirement

Following a major disaster declaration, the SBA provides loans to individuals and businesses for facility restoration.[103] For PNPs with facilities that provide noncritical, essential social services, FEMA provides PA funding for eligible debris removal and emergency protective measures associated with the eligible facilities. However, FEMA only provides funding for permanent work costs that an SBA loan will not cover. Therefore, PNPs that do not provide any critical services must also apply for a disaster loan from the SBA[104] and receive a determination for permanent work on facilities that:

[103] For more information, refer to: Small Business Administration | sba.gov. For additional assistance with the application process, applicants should contact the SBA Disaster Customer Service Center at 1-800-659-2955.
[104] Stafford Act § 406(a)(3)(A)(ii); 44 C.F.R. § 206.226(c)(2).

- Provide noncritical services; or
- Are mixed-use facilities and the damaged portion of the facility provides services that are entirely noncritical.

PNPs do not need to apply for an SBA loan for any facilities that provide critical services (even if the facility also provides non-critical services).

Table 2. SBA Loan Requirements

Type of Services Provided	Emergency Work	Permanent Work
Critical Services	SBA loan application **not** required	SBA loan application **not** required
Non-critical but Essential Social Services	SBA loan application **not** required	SBA loan application **is** required

FEMA and SBA cannot provide disaster assistance funding that duplicates insurance proceeds. Applicants must pursue claims to recover insurance proceeds that they are entitled to receive from their insurer(s).

1. SMALL BUSINESS LOAN ELIGIBILITY

SBA disaster loans are available up to $2 million to qualified businesses and most private nonprofit organizations. SBA loans cover disaster losses not fully covered by insurance or other sources. If an applicant is required to apply insurance proceeds to an outstanding mortgage on the damaged property, that amount can be included in the disaster loan application. Any proceeds from insurance coverage on business property may be deducted from the eligible loan amount.

SBA disaster loan funds may not be used to upgrade or expand a business, except as required by building codes. Mitigation assistance to make improvements that help reduce the risk of future property damage caused by a disaster is available up to a 20 percent loan amount increase above the facilities damage, if approved by the SBA.

Both FEMA and the SBA have application deadlines. Applying to both agencies as soon as possible ensures meeting both application deadlines. If the PNP misses the SBA application deadline, including any SBA approved extension, permanent work is ineligible for PA funding. If the PNP declines an SBA loan, PA funding is limited to the costs that the loan would not have otherwise covered. This applies even when the PNP cannot accept the terms of the loan by, for example not meeting a collateral requirement, and the SBA therefore denies the loan. Possible outcomes are shown in Figure 5. SBA Loan Outcomes.

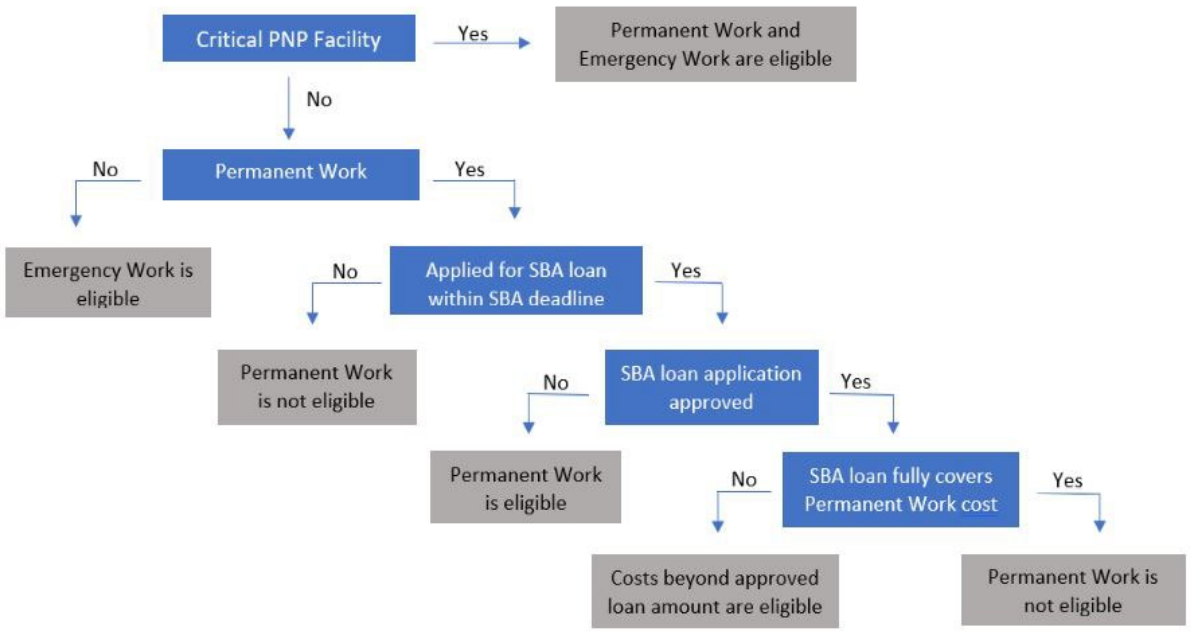

Figure 5. SBA Loan Outcomes

K. Private Nonprofit Services

Facilities that provide critical services or noncritical but essential social services that are provided to the general public are eligible for assistance. Please see Table 3. PNP Eligible Critical Services, Table 4. PNP Eligible Noncritical, Essential Social Services, Table 5. PNP Ineligible Services, and Table 6. Required Documentation and Information for PNP RPA.

Table 3. PNP Eligible Critical Services

Type	Critical Services - Activities and Establishments
Education	▪ Primary or secondary education as determined under state law; OR ▪ Higher-education institutions that meet all of the following criteria: ○ Admit students or persons having a high school diploma or equivalent; ○ Are legally authorized to provide education beyond a secondary level; ○ Award a bachelor's degree or 2-year degree that is acceptable as full credit toward a bachelor's degree or provides at least a 1-year training program to prepare students for gainful employment in a recognized occupation; and, ○ Are accredited by a nationally recognized agency or association (as determined by the Secretary of Education). ▪ Educational facilities that meet the above criteria are eligible without regard to religious character or use for religious instruction.

Type	Critical Services - Activities and Establishments
Emergency Medical	▪ Medical care (diagnosis or treatment of mental or physical injury or disease). These types of services are often provided in: ○ Clinics; ○ Dialysis facilities; ○ Facilities that provide in-patient care for convalescent or chronic disease patients; ○ Hospices and nursing homes; ○ Hospitals and related facilities, including: - Central service facilities operated in connection with hospitals; - Extended-care facilities; - Facilities related to programs for home-health services; - Laboratories; - Self-care units; and, - Storage, administration, and record areas ○ Long-term care facilities; ○ Outpatient facilities; and, ○ Rehabilitation centers.
Utility	▪ Communications transmission and switching, and distribution of telecommunications traffic; ▪ Electric power generation, transmission, and distribution;[105] ▪ Irrigation to provide water for drinking water supply, fire suppression, or electricity generation; ▪ Sewer and wastewater collection, transmission, and treatment; and, ▪ Water treatment, transmission, and distribution by a water company supplying municipal water.
Emergency Services	▪ Ambulance; ▪ Fire protection; ▪ Rescue; and, ▪ Public broadcasting that monitors, receives, and distributes communication from the Emergency Alert System to the public.

[105] FEMA encourages restoration of these facilities with the use of low-carbon power generation sources.

Table 4. PNP Eligible Noncritical, Essential Social Services[106]

Type	Noncritical, Essential Social Services – Activities and Establishments
Community centers or other facilities established and primarily used for similar services	▪ Art services authorized by a SLTT government, including, but not limited to: arts administration, art classes, management of public arts festivals, and performing arts classes; ▪ Educational enrichment activities; ▪ Multi-purpose arts programming; ▪ Senior citizen projects, rehabilitation programs, community clean-up projects, blood drives, local government meetings, and similar activities; ▪ Services and activities intended to provide support for vulnerable communities, provided the facility is otherwise available to the public on a non-discriminatory basis; ▪ Social activities to pursue items of mutual interest or concern, such as: community board meetings, neighborhood barbecues, various social functions of community groups, and youth and senior citizen group meetings; and, ▪ Performing arts centers with a primary purpose of producing, facilitating, or presenting live performances, including: construction of production materials, creation of artistic works or productions, design, professional training, public education, and rehearsals.
Facilities that do not provide medical care, but provide related services	▪ Alcohol and drug treatment and other rehabilitation services; ▪ Assisted living; ▪ Custodial care, even if the service is not provided to the general public (including essential administration and support facilities); ▪ Center-based childcare, even if not provided to the public; ▪ Day care for individuals with disabilities or access and functional needs (for example, those with Alzheimer's disease, autism, muscular dystrophy); ▪ Food assistance programs, including food banks and storage of food for food programs; ▪ Health and safety services, including animal control services; ▪ Low-income housing (as defined by federal or SLTT law or regulation); ▪ Religious instruction; ▪ Residential and other services for families of domestic abuse; ▪ Residential services for individuals with disabilities; and, ▪ Shelter workshops that create products using the skills of individuals with disabilities.

[106] With exception of custodial care facilities and museums, administrative and support facilities essential to the provision of PNP noncritical service are ineligible facilities.

Type	Noncritical, Essential Social Services – Activities and Establishments
Facilities providing other noncritical, essential social services	▪ Homeless shelters; ▪ Houses of worship and faith-based organizations (e.g., churches, synagogues, mosques, and temples); ▪ Libraries; ▪ Museums; ○ Constructed, manufactured, or converted with a primary purpose of preserving and exhibiting a documented collection of artistic, historic, scientific, or other objects; ○ Buildings, associated facilities, fixed facilities, and equipment primarily used for the preservation or exhibition of the collection, including: ○ Permanent infrastructure, such as walkways and driveways of outdoor museum-type exhibition areas; ○ Historic buildings, such as barns and other outbuildings, intended for the preservation and exhibition of historical artifacts within a defined area; ○ Permanent facilities and equipment that are part of arboretums and botanical gardens; ○ Infrastructure, such as utilities, and administrative facilities necessary for support; ○ Senior citizen centers; and, ○ Zoos.

Table 5. PNP Ineligible Services

Private Nonprofit Ineligible Services
▪ Community meetings or activities for only a brief period, or at irregular intervals; ▪ Athletic training; ▪ Political education and activities; ▪ Advocacy or lobbying groups not directly providing health services; ▪ Conferences; ▪ Flood control (e.g., levees, berms, dunes) not under the legal responsibility of a PNP; ▪ Land reclamation; ▪ Irrigation solely for agricultural purposes;[107] ▪ Day care services not included in previous table of eligible services; ▪ Job counseling; ▪ Public housing, other than low-income housing; ▪ Recreation; ▪ Residential services not included in previous table of eligible services (e.g., cabins or other overnight accommodations); ▪ Cemeteries; ▪ Docks, piers; ▪ Camps; ▪ Retreats; ▪ Grounds at museums and historic sites; and, ▪ Open natural areas or features, or facilities that promote the preservation or conservation of such areas.

Table 6. Required Documentation and Information for PNP RPA

Type	Required Documentation and Information for PNP RPA
All PNP Applicants	▪ A ruling letter from the Internal Revenue Service that was in effect on the declaration date and granted tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code; or ▪ Documentation from the state substantiating it is a non-revenue producing, nonprofit entity organized or doing business under state law; or ▪ If exempt from both the requirement to apply for 501(c)(3) status and tax-exempt status under state law, the organization must provide articles of association, bylaws, or other documents indicating that it is an organized entity and a certification that it is compliant with Internal Revenue Code section 501(c)(3) and state law requirements.

[107] 44 C.F.R. § 206.221(e)(3).

Type	Required Documentation and Information for PNP RPA
Legal Responsibility	▪ If the applicant owns the damaged facility, proof of ownership (e.g., deed, title, bill of sale or land contract, reoccurring mortgage payments or booklet, property tax receipt or property tax bill, or a real property structure insurance policy). ▪ If the applicant leases the damaged facility, proof of legal responsibility to repair the incident-related damage (e.g., lease contract/agreement).
Services	▪ List of services provided in the damaged facility, when, and to whom.
Membership Organization	▪ Who is allowed membership; ▪ Fee policy or description of fees charged; and, ▪ Policy regarding waiving memberships.
Child Care Facility	▪ Proof that the State Department of Children and Family Services, Department of Human Services, or similar agency, recognizes it as a licensed childcare facility.
Education	▪ Proof that the school is accredited or recognized by the State Department of Education. State regulations for private schools vary and some states do not require accreditation. A PNP school must demonstrate that it is recognized by the state as providing elementary or secondary education. Depending on state requirements, documentation may include, but is not limited to, the following: ▪ Accreditation documents; ▪ Certification from the State Department of Education that the applicant operated the facility as a PNP school at the time of the incident; ▪ Documentation demonstrating compliance with the state's compulsory attendance laws; ▪ School-year calendar; ▪ School budget; ▪ Number of students and faculty; ▪ Complete list of educational instruction property and equipment owned by the PNP; ▪ Tax records; ▪ Documents reflecting school curriculum, transcripts, health and safety, or code of conduct; ▪ Tuition receipts; ▪ Financial statements; ▪ Commencement documents; ▪ Inclusion in the U.S. Department of Education's National Center for Education Statistics Private School Universe Survey data;[108] and, ▪ State Department of Education electronic and paper homeschool declaration or registration forms.

[108] For more information, refer to: The Private School Universe Survey electronic search tool.

Type	Required Documentation and Information for PNP RPA
Mixed-Use Facility	▪ Proof of the established purpose of the facility with documentation, such as: ○ U.S. Internal Revenue Service documentation; ○ Pre-incident charter, bylaws, and amendments; or ○ Evidence of longstanding, routine (day-to-day) use (e.g., a calendar of activities).

Chapter 4: General Facility and Work Eligibility

FEMA processes PA grant funding according to the type of work an applicant undertakes. For work to be eligible, it must be required as a result of the declared incident, be located in the designated area, be the legal responsibility of the applicant, and be undertaken at a reasonable cost. This chapter provides important information relating to PA facility eligibility and general requirements for work to be eligible.

I. Facility Eligibility

In general, a facility must be determined eligible for work to be eligible. There are exceptions for some emergency protective measures as shown in Figure 6. Facility Eligibility and discussed in Chapter 7: Emergency Work Eligibility.

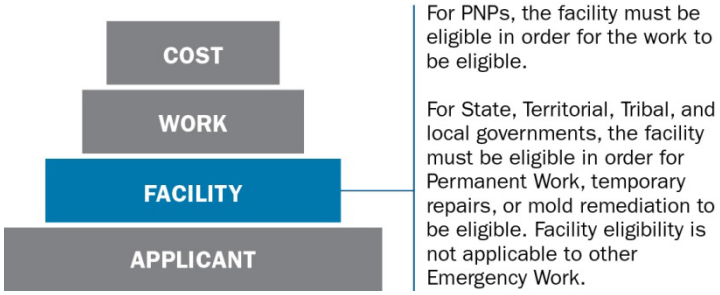

Figure 6. Facility Eligibility

A. Public Facility

An eligible public facility is one that a state, local, Tribal Nation, or territorial (SLTT) government owns or has legal responsibility for maintaining. A facility includes any:

- System including flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, or watershed development;[109]
- Building, such as maintenance and storage sheds, restroom facilities, bath houses, or outbuildings including ancillary facilities;
- Non-federal-aid street, road, or highway;[110] ramps, or access roads[111];
- Public buildings, structure, or system, including those used for educational, recreational, or cultural purposes;
- Airport facility[112] including runways;
- Park[113] including piers, docks, trails, benches, picnic tables, swimming pools, golf courses, or ball fields; or
- Other public facilities including pumping stations, communication towers and antennas, contents, supplies, equipment, vehicles, fences, parking lots, stairs, signage, lighting, sidewalks, gutters, ditches, guard rails, integral ground, catch basins, or outfall structures.

A natural feature is improved and maintained if it meets all of the following conditions:

[109] Stafford Act § 102(10); 42 United States Code (U.S.C.) 5122; 44 Code of Federal Regulations (C.F.R.) § 206.221(h).
[110] Ibid.
[111] BIA roads are an exception but must meet certain criteria.
[112] Stafford Act § 102(10); 42 U.S.C. 5122; 44 C.F.R. § 206.221(h).
[113] Ibid.

- The natural feature has a designed and constructed improvement to its natural characteristics, such as a terraced slope or realigned channel;
- The constructed improvement enhances the function of the unimproved natural feature; and,
- The applicant maintains the improvement on a regular schedule to ensure that the improvement performs as designed.

Only the section of a natural feature that meets the criteria above is eligible. For example, if only 150 linear feet of a natural channel bank is armored with rip rap and maintained, the eligible facility would be limited to that 150-linear-foot section. Nature-based solutions that incorporate sustainable planning, design, environmental management, or engineering practices that meet the criteria for natural features and promote adaptation and resilience are eligible.

The following are ineligible facilities:

- Unimproved property that is not enhanced or maintained (e.g., a hillside or slope, forest, or natural channel bank); and,
- Land used for agricultural purposes.[114]

When a facility maintained by a community development district is not open to the general public or does not provide a service to the general public, the facility is ineligible.

B. Inactive or Partially Inactive Facility

To be eligible, a facility must have been in active use at the start of the incident period. Inactive or partially inactive facilities are ineligible, unless one of the following conditions is met:

- The facility was only temporarily inactive for repairs or remodeling (provided a contractor is not responsible for the repair of disaster-related damage);
- The applicant established future active use in an approved budget or plans; or
- The applicant can clearly demonstrate its intent to begin use within a reasonable amount of time.[115]

For facilities that are partially occupied and therefore partially inactive at the start of the incident, the inactive portions would not be eligible unless one of the above stated conditions apply. In all cases, the facility in question must have been eligible for assistance during the time it was in use. When the eligible repairs would benefit a non-active area, the assistance will be prorated according to the percentage of the facility that was in active use. For example, if the roof of a partially used building is destroyed, FEMA limits the eligible cost to a prorated amount of the total cost to replace the roof based on the percentage of the building that was in active use.

For private nonprofit (PNP) mixed-use facilities to be eligible, more than 50 percent of the facility had to be in active use for an eligible purpose at the time of the incident.

[114] 44 C.F.R. § 206.221(d).
[115] 44 C.F.R. § 206.226(k)(2).

C. Facility Scheduled for Repair or Replacement

Facilities that are not yet under contract but are scheduled for repair or replacement using non-federal funds are eligible provided that the claimed damage did not exist prior to the incident (FEMA reviews procurement and contract documents to validate). If damage existed prior to the incident, only the repair of damage caused by the incident is eligible.

II. General Work Eligibility

Through the PA Program, FEMA provides grant funding for:

- Debris removal (emergency work);
- Emergency protective measures (emergency work);
- Permanent restoration of damaged facilities, including cost-effective hazard mitigation to protect the facilities from future damage (permanent work); and,
- Building code and floodplain management administration and enforcement activities (permanent work).

If an entity does not comply with all applicable statutes, executive orders (EOs), regulations, and policies, FEMA may take one of several actions including disallowing all or part of the cost of the project not in compliance.[116]

A. Emergency Work vs. Permanent Work

Emergency work addresses an immediate threat. Permanent work includes the restoration of a damaged facility or building code and floodplain management administration and enforcement activities. To facilitate the processing of PA funding, FEMA further separates both emergency work and permanent work into categories. These categories are shown in Figure 7. Categories of Work.

B. Minimum Work Eligibility Criteria

At a minimum, work must meet each of the following three general criteria to be eligible:

- Be required as a result of the declared incident;
- Be located within the declared area; and,

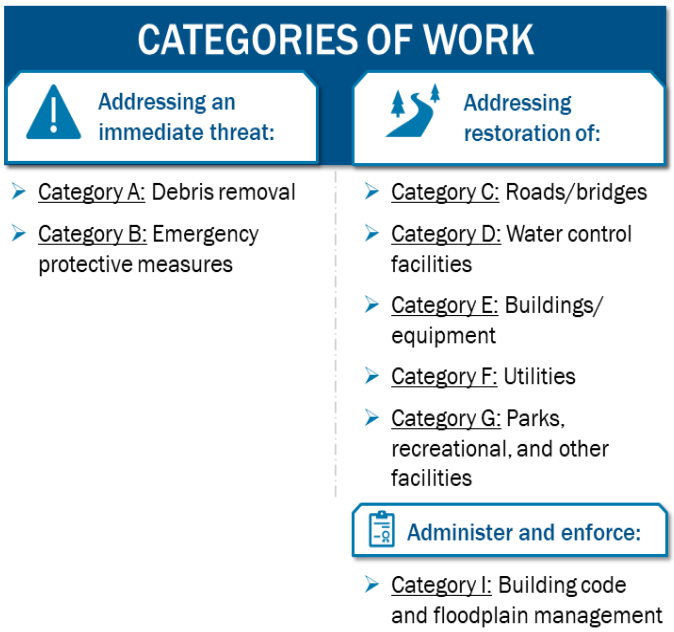

Figure 7. Categories of Work

[116] 2 C.F.R. § 200.339.

- Be the legal responsibility of an eligible applicant.[117]

Work eligibility is discussed in detail in Chapter 7: Emergency Work Eligibility and Chapter 8: Permanent Work Eligibility (Categories C-G).

1. RESULT OF DECLARED INCIDENT

Applicants must be able to demonstrate that any claimed impacts and damage occurred during the declared incident period, were caused directly by the declared incident, and that the work claimed is required to address the incident-related impacts and damage as follows:

- For debris removal, applicants must be able to demonstrate that the debris claimed was generated by the declared incident, during the declared incident period, and that removal of the debris addresses an immediate threat resulting from the declared incident.
- For emergency protective measures, applicants must be able to demonstrate that the work addresses an immediate threat resulting from the declared incident.
- For permanent work, temporary repairs, and mold remediation, applicants must demonstrate that the work addresses damage caused by the declared incident.

Applicants must clearly define impacts and damage caused by the declared incident and separate them from any impacts or damage not caused by the declared incident. Applicants must also separate any work or costs associated with addressing impacts or damage not caused by the declared incident.

Examples: Impacts or Damage Not Caused by the Declared Incident

Examples of impacts or damage not caused by the declared incident include:

- Previously existing damage or debris;
- Impacts or damage resulting from a different incident even if it occurred during the incident period of the declared incident;
- Impacts or damage that occur after the incident period and prior to conducting incident-related repairs;
- Deterioration (wear and tear);
- Deferred maintenance;
- Impacts or damage due to failure to take measures to protect a facility from further damage in a timely manner; or
- Impacts or damage due to negligence.[118]

[117] 44 C.F.R. § 206.223(a).
[118] 44 C.F.R. § 206.223(e).

i. Documentation and Information to Support Cause of Impacts and Damage

Table 7. Documentation and Information to Support Cause of Impacts and Damage

For Small Projects	For Large Projects
▪ Applicants must certify, in lieu of providing documentation, to the following: ○ Debris removal: The debris was generated by the declared incident, during the declared incident period, and that removal of the debris addresses an immediate threat resulting from the declared incident; ○ Emergency protective measures: The immediate threat resulted from the declared incident; and, ○ Permanent work: The damage was caused directly by the declared incident and did not result from a lack of maintenance.	▪ If necessary to validate that the impacts or damage was caused by the declared event, applicants will be required to provide: ○ Pre-incident photographs and/or video of the impacted site or facility; and/or, ○ Documentation supporting pre-disaster condition of the facility (e.g., facility maintenance records or inspection/safety reports).

Not every large project requires documentation to substantiate the impacts and damage caused by the event. Frequently, during site inspections, it is evident that the claimed damage, as explained by the applicant, is a direct result of the specific event, as indicated by the effects of the event in the vicinity of the damage. In such instances, the applicant is not required to furnish pre-incident images, records of maintenance, or reports on inspections and safety measures. For instance, in scenarios where an entire bridge or section of road is washed away during flooding or a building is consumed by fire, there is no requirement for maintenance records to validate that the incident caused the damage. This applies even if there are signs that the bridge or road surface had not been consistently maintained (e.g., visible fatigue cracks on the road surface in nearby sections). In these cases, maintenance records are not needed to support the overall failure caused by the event when it is evident that the disaster caused the damage due to the structure being completely destroyed as a result of the incident.

Certain project types (e.g., the restoration of well-maintained natural features and beaches) do mandate the submission of maintenance records and/or photographs. These requirements are elaborated upon in subsequent sections of this document.

If a facility was functioning prior to the disaster and the disaster caused damage that rendered the facility non-functional, the facility may be eligible, provided the pre-disaster condition was not a significant contributing factor in the cause of failure.

ii. Protecting Tribal Sensitive Locations

Each Tribal Nation is unique, with cultures and governments deeply rooted in their history, customs, and sacred sites. FEMA recognizes the importance of protecting these locations for several reasons. First, many sensitive tribal locations are sacred. Non-tribal members sharing information about or accessing these locations may be seen as disrespectful or a violation of tribal and/or federal law. Protecting the sanctity of

these sites is essential to maintaining the religious, cultural, and governmental integrity of the Tribal Nation.[119] Some Tribal Nations utilize sensitive tribal locations not only for ceremonial activities, but also as vital locations to execute governmental functions, such as selecting their next leaders or making final decisions on complex matters that will impact their Nation for generations to come.

Second, pottery, jewelry, regalia, clothing, weapons, sacred objects, and even human remains found on tribal lands have been historically (and continue to be) targeted by individuals looking to collect or sell them.[120] These items must be protected before, during, and after disasters. They are integral to the identity, spirituality, and governing bodies of tribal communities. Protecting these resources is about preserving the sanctity and reverence of the Tribal Nation's culture and their sovereignty as a government. Despite the efforts of federal agencies to protect these invaluable resources, there are individuals who continue to engage in illegal activities, such as theft and damage, with devastating effects on Tribal Nations and their communities.

Finally, protecting tribal sensitive locations is a fundamental responsibility. It is an affirmation of the respect and recognition of the unique cultures, traditions, practices, and government autonomy of Tribal Nations. These locations are the living repositories of Tribal Nations and Alaska Native heritage and vital to supporting tribal government functions. Safeguarding them is a collective duty that FEMA must uphold.[121]

For locations that are sacred to a Tribal Nation[122] where non-tribal members are not allowed, site inspections by FEMA staff are not permitted. Instead, FEMA will accept a Tribal Nation's certified damage assessment as a valid alternative to requiring FEMA staff to document and validate damage at these sacred sites. Additionally, to support the protection of tribally significant artifacts and human remains, FEMA will not require photos, site maps, and specific location details (such as GPS coordinates) for locations where tribal artifacts are located. This ensures that culturally sensitive data remains protected, that the Tribal Nation's cultural heritage is safeguarded, and its governmental sovereignty is strengthened.

2. WITHIN DESIGNATED AREA

To be eligible, the facility must be located, and work must be performed, in a designated area defined by the incident (except for sheltering, evacuation, and Emergency Operations Center (EOC) activities). Sheltering, evacuation, and EOC activities may occur outside of a designated area but must be used for activities resulting from the designated area.[123] Work performed on a facility located outside of a designated area is ineligible. This is true even if an eligible applicant is legally responsible for the work, including work performed outside the designated area to protect a facility within the designated area.

Tribal Nations do not always have geographical boundaries (e.g., counties, parishes or other) and some have boundaries that cross state lines. Therefore, tribal declarations do not usually define specific declared

[119] For more information, refer to: Executive Order 13007: Indian Sacred Sites.
[120] For more information, refer to: Native American Graves Protection and Repatriation Act | nps.gov.
[121] Federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (Seminole Nation v. United States, 1942).
[122] American Indian Religious Freedom Act (1978).
[123] 44 C.F.R. § 206.223(a)(2).

geographical areas for Tribal Nations. For Tribal Nations, FEMA determines eligibility based on legal responsibility and whether the work is required due to the declared incident.

i. Documentation and Information to Support Within Declared Area

Table 8. Required Documentation and Information to Support Within Declared Area

For Small and Large Projects
▪ Facility location (e.g. address or global positioning system (GPS) coordinates; or ▪ Certification that the facility and subsequent work is located within the designated areas.

3. LEGAL RESPONSIBILITY

To be eligible, work must be the legal responsibility of the applicant requesting assistance.[124] To determine legal responsibility for debris removal and emergency protective measures, FEMA evaluates whether the applicant requesting the assistance either had jurisdiction over the area or the legal authority to conduct the work related to the request at the time of the incident.

To determine legal responsibility for permanent work, FEMA evaluates whether the applicant claiming the costs had legal responsibility for disaster-related restoration of the facility at the time of the incident based on ownership and the terms of any written agreements (such as for facilities under construction, leased facilities, and facilities owned by a federal agency). Ownership of a facility is usually sufficient to establish the applicant's legal responsibility to restore the facility, provided it is not under construction by a contractor or leased to another entity at the time of the incident.

[124] 44 C.F.R. § 206.223(a)(3).

i. Documentation and Information to Support Legal Responsibility

Table 9. Required Documentation and Information to Support Legal Responsibility

For Small Projects	For Large Projects
▪ Certification that the facility and work are the applicant's legal responsibility.	▪ If necessary to validate legal responsibility, applicants must provide one or more of the following documents: ○ Deed; ○ Title; ○ Lease agreement (required for leased facilities); ○ Bill of sale; ○ Land contract; ○ Mortgage booklet or reoccurring mortgage payments; ○ Property tax receipt or property tax bill; ○ Real property structured insurance policy; and/or, ○ Contract (required for facilities under construction at the time of the incident).

ii. Facilities Under Contract for Construction

If a construction contract was in place for the facility at the time of the incident, FEMA reviews the contract to determine whether the applicant is legally responsible for the repair of the damage caused by the incident.[125] At a minimum, FEMA evaluates the contract to determine if it:

- Identifies the contractor or owner as being responsible for disaster-related repairs;
- Requires a builder's risk policy for losses that occur while the contractor has control of the facility;
- Has a *force majeure* provision, which is a clause that relieves the contractor from responsibility for damage beyond its reasonable control, such as natural disasters (often referred to as "acts of God") or acts of war; or,
- Has a provision that identifies the point at which the contractor transfers legal responsibility for the facility, or portions of the facility, back to the owner.

iii. Leased Facilities

An applicant may own a facility and lease it to a tenant, or an applicant may lease a facility owned by another party. In either case, FEMA reviews the lease agreement to determine legal responsibility for repair of

[125] Stafford Act § 406(e)(2); 42 U.S.C. § 5172.

damage caused by the incident. If the lease does not specify either party as responsible, FEMA considers the owner of the facility legally responsible for the costs to restore the facility.

If the lease is between two eligible applicants, FEMA provides PA funding to the applicant legally responsible for the restoration.

iv. Federal Facilities

Facilities owned and maintained by federal agencies are ineligible. There are instances when a federal agency constructed a facility and formally designated the applicant as the legally responsible entity for facility operation, maintenance, and repairs. FEMA reviews the other federal agency's authority and agreement between the federal agency and the applicant to confirm the legally responsible entity.

v. Jurisdiction Over an Area

In general, an applicant only has legal responsibility to conduct activities within its jurisdiction. If an applicant conducts activities outside its jurisdiction, it must demonstrate and document its legal basis and responsibility to conduct those activities.

vi. Conducting Activities on Private Property

Work on private property is the legal responsibility of the property owner and generally ineligible for PA funding. In rare cases, FEMA may provide PA funding for specific limited activities. In such cases, at a minimum, the applicant must have legal authority to conduct the activity. To determine whether a SLTT government has legal authority to conduct activities on private property, FEMA reviews the applicant's legal basis and specific authority to conduct the activities. See Private Property Debris Removal (PPDR) and Emergency Protective Measures on Private Property in Chapter 7 for additional eligibility requirements.

vii. Work Under the Authority of Other Federal Agencies

Other federal agencies (OFAs) have authority to conduct work that may overlap with FEMA's authority. FEMA's authority is broad, and most OFA authorities are more specific than FEMA's authorities. FEMA evaluates its authorities against OFA authorities.

Some of the factors that FEMA considers when evaluating whether an OFA has more specific authority are whether the OFA's authority is specifically and exclusively:

- Available for a particular type of facility, work, or activity;
- Applicable to a presidential declaration under the Stafford Act;
- Specific to an incident or type of incident; or,
- Delineated under direction by Congress.

In such cases, FEMA does not provide assistance for the facilities or work even if that OFA does not provide funding for the facility or work.[126] This restriction includes any activities or costs related to the work that falls

[126] 44 C.F.R. § 206.226(a).

under OFA authorities as the costs are not related to eligible work. Applicants should apply to the respective agency for assistance with a facility or work under that agency's authority.

viii. Environmental and Historic Preservation Requirements

Several laws, executive orders (EOs), and regulations establish requirements to protect the environment and preserve the Nation's historic and archaeological resources. FEMA reviews each PA project to ensure the work complies with applicable federal EHP laws and implementing regulations, and applicable EOs.[127] The applicant is responsible for complying with applicable federal, state, Tribal Nation, or territorial EHP laws even if FEMA is not providing PA funding for all the work. See Chapter 10: Environmental and Historic Preservation for more information on EHP review and considerations. See Appendix D: Environmental and Historic Preservation Compliance for a description of common EHP laws, regulations, and EOs.

FEMA provides technical support to applicants throughout the recovery process to help ensure compliance with all EHP laws, regulations, and EOs, as well as to identify opportunities to incorporate conservation and/or mitigation measures in the project area for the protection and preservation of environmental or historic resources.

ix. Policy Implementation Considerations

Disaster impacts can vary for communities, which are often influenced by a complex interplay of geographical, demographic, political, historical, and cultural factors. Unfortunately, vulnerable communities often bear a disproportionate brunt of disaster consequences, exacerbating pre-existing societal inequalities. This damaging cycle further compounds the challenges these communities face, intensifying their vulnerability to future disasters.

To disrupt this detrimental pattern and foster a more resilient nation, FEMA is focused on ensuring our core values of compassion, fairness, integrity, and respect are present as fundamental principles during recovery operations. Recognizing and addressing the distinct requirements of disproportionately impacted communities is crucial. This principle aligns with the Stafford Act intent which mandates that FEMA assistance be administered impartially, devoid of discrimination based on race, color, religion, nationality, sex, age, disability, language accessibility, or economic status.

In this endeavor, FEMA commits to integrating our core values throughout our mission and transformative changes across our workforce, programs, and the broader emergency management community. This objective emphasizes the necessity of viewing compassion, fairness, integrity, and respect not as isolated notions, but as integral components woven into the fabric of PA. Through these objectives, PA aims to forge a path towards a more resilient nation, where all communities can effectively withstand and recover from the impact of disasters.

x. Resilience Considerations

As our nation continues to witness devastating disaster activity year after year, it is imperative that FEMA invest in building a more resilient nation. The PA Program and policies must protect communities and the

[127] 2 C.F.R. § 200.300.

economy from the worst impacts of natural disasters before they occur. PA continues to develop new initiatives through its existing authorities and responsibilities, including implementing the Federal Flood Risk Management Standard, advancing efforts to encourage the adoption of building codes, wildland fire management mitigation opportunities in Appendix J: Cost-Effective Public Assistance Hazard Mitigation Measures, and providing cost share incentives for mitigation considerations.

Chapter 5: Damage and Impact Information

The Public Assistance (PA) Program provides reimbursement to address damage, debris impacts, and emergency protective measures necessary as a direct result of the declared incident. This chapter provides information on determining what damage and impacts are eligible, identifying damage and impacts, finalizing the list of impacts, and logically grouping into project applications.[128] The "Public Assistance Program Delivery Guide"[129] provides an overview of these process steps.

I. Impact List

Applicants must submit a list that includes each facility damaged, each debris impacted site, and each overarching emergency protective measure taken to address immediate threats to the general public. Applicants must also identify whether they are claiming management costs or work and costs for building code, floodplain management administration, or enforcement activities. An applicant lists the information by location with a rough estimate of the associated cost. The list does not include detailed descriptions of impacts, damaged components within a facility, or a final estimate of costs. FEMA does not use this information to determine the monetary assistance available for the applicant.

Each activity and impacted site in the impact list must include the following:

- Facility name or unique identifier (e.g., campus name or site);
- Facility type (e.g., building, road, or system);
- Specific location (e.g., address or global positioning system (GPS) coordinates) of debris impacts or facility damage (required);
- General description of damage, emergency protective measures, or approximate type and quantities of debris;
- Approximate cost;
- Status of work;
- Date of original facility construction;
- Whether the impact affects any vulnerable communities; and,
- Project priority level.

A. Impact List Submission Deadline

Applicants are required to identify and report all incident-related impacts and damage to FEMA within 60 days of attending a recovery scoping meeting.[130] FEMA may extend the deadline to identify and report the

[128] 44 Code of Federal Regulations (C.F.R.) § 206.201(l).
[129] For more information, refer to: *Public Assistance Program Delivery Guide*.
[130] 44 C.F.R. § 206.202 (d)(1)(ii).

impacts if an applicant submits a request with justification based on extenuating circumstances beyond the recipient's or applicant's control.[131] For example, FEMA extends the deadline for an inaccessible site or when an applicant is in an area where FEMA approved additional categories of work after the recovery scoping meeting.

B. Inundated and Submerged Roads

Inundated and submerged roads should not be assessed until flood waters have receded to ensure safety and allow time for saturated soil to dry out. Allowing adequate time for saturated soil to dry out is necessary to effectively determine if eligible surface damage has occurred. If the waters have not receded prior to the deadline, FEMA may approve a time extension for those sites if it is feasible to wait until flood waters recede to assess potential damage safely and effectively. Applicants must inform FEMA if there are roadways that experience inundation from closed basin flooding that may be submerged indefinitely due to water not being able to drain (see Closed Basin Flooding in Chapter 8 for additional information).

II. Grouping Impacts into Projects

This section defines logical grouping of work and damage.[132] FEMA and the recipient work with the applicant to identify impacts, facilities, and sites that can be combined into one project. This is a two-step process: 1) create groups based on categories of work and facility types and 2) identify sites or facilities that should be formulated into separate projects.

Facilities under the authority of other federal agencies or those that are ineligible for PA (e.g., facilities not in use at the time of the incident in accordance with Inactive or Partially Inactive Facility in Chapter 4) must not be formulated in a project. Applicants can either withdraw these sites and facilities from its impact list or FEMA will issue an ineligibility determination. Logical grouping should never be based on project size or grant administration considerations.

A. Initial Debris Removal Grouping (Category A)

The bullets below identify debris removal that FEMA initially groups together (each bullet stands for one initial grouping):

- All debris removal from public property;
- All debris removal from waterways;
- All debris removal from private non-commercial property;
- All debris removal from commercial property; and,
- All debris removal from private roads.

[131] 44 C.F.R. § 206.202 (f)(2).
[132] 44 C.F.R. § 206.201(k).

B. Initial Emergency Protective Measures Grouping (Category B)

The bullets below identify emergency protective measures that FEMA initially groups together. Each bullet stands for one initial grouping:

- All private property demolition;
- All emergency response activities (except those conducted on private property);
- Any emergency protective measures performed on private property;
- All emergency protective measures that involve facility construction or repairs; and,
- Each individual temporary facility.

C. Initial Permanent Work Grouping (Categories C-G)

The bullets below identify damaged facilities that FEMA initially groups together. Each bullet stands for one initial grouping. The list is based on infrastructure categories.

1. TRANSPORTATION

- All roads, bridges, low water crossings, and culverts;
- All mass transit facilities, such as subways and railways;
- All airports; and,
- All ports and harbors.

2. WATER CONTROL

- All dams and reservoirs;
- All canals, drainage channels, ditches, acequias and aqueducts;
- All stormwater retention and detention basins; and,
- All shoreline protection facilities (levees, berms, seawalls, sand revetments, etc.).

3. EDUCATION

- All school campuses.

4. HOUSING

- All public housing campuses.

5. HEALTH

- All hospital campuses and medical facilities.

6. EMERGENCY SERVICE FACILITIES

- All police, fire, emergency operations centers, etc.

7. OTHER GOVERNMENT FACILITIES

- All courthouses, prisons, administrative buildings, and other non-emergency buildings.

8. ENERGY

- All power generation facilities and plants, including all wind turbines, generators, substations, and other facilities within the confines of the plant;

- Entire power transmission and distribution system; and,
- Entire natural gas transmission and distribution system.

9. WATER/WASTEWATER

- All water and wastewater treatment plants;
- Entire water distribution system;
- Entire wastewater collection system; and,
- Entire irrigation system.

10. COMMUNICATIONS/INFORMATION TECHNOLOGY

- All communication systems.

11. NATURAL AND CULTURAL RESOURCES

- All parks, golf courses, and fish hatcheries;
- All beaches;
- All cemeteries, tribal burial grounds, and sacred sites; and,
- All libraries, museums, and art galleries.

FEMA includes administrative and support facilities at a site in the same project as the primary facility. Applicants must provide each damaged facility as a separate impact, whether ancillary or primary. FEMA groups administrative and support facilities with the primary facility using the site identifier and other information provided by the applicant in the impact list. Administrative and support facilities may include but are not limited to: buildings, outside structures (e.g., maintenance and storage sheds, restroom facilities, bath houses, pumping stations), communication towers and antennas, contents, supplies, equipment, vehicles, fences, parking lots, stairs, ramps, access roads, runways, signage, lighting, sidewalks, gutters, ditches, guard rails, integral ground, catch basins, outfall structures, piers, docks, trails, benches, picnic tables, swimming pools, golf courses, ball fields, etc. Note that for private nonprofits (PNPs), not all support facilities are eligible. See Facility Eligibility in Chapter 3 for additional information on evaluating PNP facility eligibility.

D. Final Grouping

After initially grouping sites and facilities into one project, FEMA identifies sites or facilities that need to be separated from the initial grouping and formulated into separate projects. Sites or facilities that need to be separated include those that:

- Are anticipated to require complex Environmental and Historic Preservation (EHP) reviews (see Chapter 10: Environmental and Historic Preservation for more information on EHP review and considerations);
- Are in a special flood hazard area (SFHA);
- Need funding for architectural/engineering design or studies to determine the method of restoration for the facility. In these cases, FEMA amends the project with the facility scope of work (SOW) and cost once the repair is determined so the facility is not captured on a separate project; and.
- Have 100 percent of all the work completed. Work items on the same facility may not be separated even if some of the work is complete and other work is not complete. Only a facility for which all work is complete should be separated from a facility that does not have all work complete;

- Are complex and require specialized technical support for project formulation, such as significantly damaged wastewater treatment plants, dams, hospitals, or schools;
- Potentially have ineligible work;
- Would make a project too burdensome to review due to the number of sites and facilities combined (consider separating into two projects or creating separate projects based on geographical locations); and/or,
- The applicant and FEMA agree there are specific circumstances that make it illogical to combine a site or facility with other sites or facilities.

PNP applicants should also separate critical service facilities into separate projects from noncritical service facilities so that projects with critical service facilities are not delayed pending the U.S. Small Business Administration (SBA) determination described under Small Business Administration Loan Requirement in Chapter 3.

E. Building Code and Floodplain Management Administration and Enforcement Activities Grouping (Category I)

All activities eligible under the Disaster Recovery Reform Act (DRRA) Section 1206, building code and floodplain management ordinance administration and enforcement should be grouped within a project.

F. Grant Management Activities Grouping (Category Z)

All activities eligible under the Disaster Recovery Reform Act (DRRA) Section 1215[133] and FEMA's Public Assistance Management Costs (Interim) policy,[134] should be grouped within a project.

[133] For more information, refer to: Section 1215 | Management Costs.
[134] For more information, refer to: Public Assistance Management Costs (Interim) (FEMA Recovery Policy FP 104-11-2).

Chapter 6: Cost Eligibility

This chapter provides information relating to PA cost eligibility. Not all costs arising from the incident are eligible for reimbursement through the PA Program. To be eligible, costs must meet the criteria described in this chapter. Additionally, applicants must retain cost, financial, procurement information, real property and equipment records, programmatic records, supporting documents, and all other records that are considered pertinent to the grant, for a period of three years from the date the final expenditure of funds is documented. In the case of litigation, an audit, or any other claim that would cause action is started before the 3-year period expires, the records must be retained until a resolution is reached and final action taken.

I. Eligibility Requirements

Costs are the final component evaluated for eligibility, as shown in Figure 8. Cost Eligibility, this criteria applies to all costs claimed. Not all costs incurred as a result of the incident are eligible. To be eligible, costs must be:

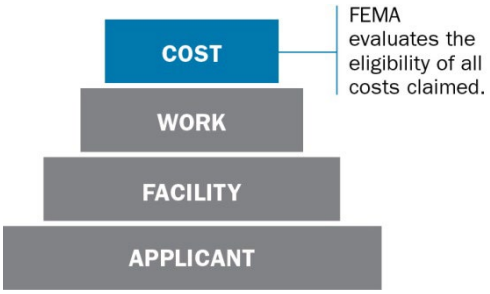

Figure 8. Cost Eligibility

- Directly tied to the performance of eligible work;
- Adequately documented, substantiated, or certified;[135]
- Reduced by all applicable credits, such as insurance proceeds and salvage values;[136]
- Authorized and not prohibited under federal or state, local, Tribal Nation, and territorial (SLTT) government laws or regulations;
- Consistent with the applicant's internal policies, regulations, and procedures that apply uniformly to both federal awards and other activities of the applicant; and,
- Necessary and reasonable to accomplish the work properly and efficiently.[137]

II. Reasonable Costs

A cost is 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 an applicant makes the decision to incur the cost.[138]

For projects completed with contracted resources, FEMA conducts a reasonable cost analysis as described below if applicants submit cost claims based on non-competitive bids or contracts, time-and-materials contracts, or cost-plus-percentage-of-cost or percentage-of-construction contracts. For large projects, FEMA also conducts a reasonable cost analysis when the contract selection was noncompliant with the applicable procurement requirements, even though there may have been price competition. For projects completed

[135] 2 Code of Federal Regulations (C.F.R.) § 200.403(g).
[136] Stafford Act § 312; 42 United States Code (U.S.C.) § 5155; 2 C.F.R. § 200.406.
[137] 2 C.F.R. § 200.403.
[138] 2 C.F.R. § 200.404.

with an applicant's own resources (force account), FEMA only conducts a reasonable cost analysis for large projects.

A. Reasonable Cost Analysis

FEMA performs a preliminary review of an applicant's information and documentation to assess the complexity of the project and expertise required to complete a reasonable cost analysis. If specialized expertise is required, a subject matter expert with the appropriate specialized skills, knowledge, experience, or capability in the appropriate field, such as engineering, architecture, or cost estimating conducts the analysis.

FEMA determines reasonableness by evaluating whether:

- The cost is of a type generally recognized as ordinary and necessary for the type of facility or work.[139]
  - FEMA evaluates the skill level and level of effort necessary to complete the required activity. If the type of employee or skill level is not appropriate for the specific task, FEMA limits PA funding to a rate based on the appropriate employee type or skill level.
  - For complex projects that require staff with a higher level of technical proficiency and experience, FEMA determines PA funding appropriately. If the level of effort exceeds that necessary to complete a specific task, FEMA limits PA funding based on an appropriate level of effort.
- The cost is reasonable and necessary for the type of work being performed. FEMA determines whether the number of hours claimed are reasonable and necessary by evaluating:
  - The severity of the incident;
  - Whether the work was performed at a time when it was necessary to work extraordinary hours based on the circumstances of the incident;
  - The function of the employee for which the hours are claimed; and,
  - The number of consecutive hours the employee worked.
- The applicant participated in sound business practices and arm's length bargaining, ensuring parties to a transaction are independent of each other, without familial ties or shared interests and on equal footing without one party having control over the other.[140]
- The individuals concerned acted with prudence under the circumstances considering its responsibility to the applicant, its employees, its students or membership, the public, and the federal government.[141] If exigent or emergency circumstances existed, FEMA evaluates the period costs were incurred relative to the reasonable duration of the special circumstances.
- The applicant deviated from its established practices and policies.[142]
  - FEMA generally considers the applicant's own labor, equipment, and supply costs reasonable provided the costs are consistent with the entity's policies including, but not limited to, pay rates, labor policies, and cost schedules utilized during its normal operations.
- The applicant complied with procurement requirements (see Procurement and Contracting Requirements in this chapter). FEMA considers contract costs reasonable when the applicant adheres to

[139] 2 C.F.R. § 200.404(a).
[140] 2 C.F.R. § 200.404(b).
[141] 2 C.F.R. § 200.404(d).
[142] 2 C.F.R. § 200.404(e).

full and open competition under applicable federal procurement requirements, and the scope of services or work in the contract and level of effort is consistent with respect to the eligible scope of work (SOW).

- Cost or price analysis: The cost or price analysis is one component of documentation that FEMA reviews as part of its evaluation of reasonable costs. If the applicant does not submit a cost or price analysis, FEMA evaluates the elements that would have been part of such analysis.[143]
- Selection criteria: FEMA also evaluates whether the applicant selected the lowest responsible bidder based on the selection criteria to determine reasonableness. If the applicant selected a contractor with a higher bid than others, it must substantiate its selection based on the selection criteria set forth in its request for proposal (RFP).

- The cost is comparable to the current market price for similar goods or services in the same geographical area.[144]
  - FEMA makes its determination based on one or more of the following:
    - Historical documentation (previous contracts, invoices, or other documentation);
      - FEMA may compare costs to the applicant's historical costs for similar SOW or items. FEMA considers inflation and other factors, such as code or standard changes, availability of in-kind construction material, quantity, delivery schedules, and the economy. FEMA's Cost Estimating Format (CEF) employs a nationally recognized economic inflation factor;
    - Average costs in the area;
      - Weighted average unit pricing: FEMA may determine the average costs in the area using weighted average unit prices. These are comprised of the average costs of historical bid tabulations and related specifications from competitive bid pricing solicitations respective to the area and usually includes all factors required to bid public works projects, such as performance bonds, bid bonds, overhead and profit, and general conditions. The applicant or respective state, territorial, or regional agency, such as the state's department of transportation, may provide weighted average unit pricing and related specifications for FEMA's review.
      - Other applicants' project costs: FEMA may compare the costs with other applicants' projects, of similar SOW and similar circumstances, such as event impacts, magnitude, comparable shortages, market factors, and any other unique circumstances that may impact either of the costs.
    - Published unit costs from national cost estimating databases. When using this method, FEMA confirms that the cost publication is current and prepares the estimate using its CEF and the appropriate locality adjustment factor.
      - Industry cost estimating resources: When appropriate local data cannot be developed or obtained, FEMA uses industry standard construction cost estimating resources to prepare an estimate against which to evaluate reasonableness of the applicant's actual costs. These costing methods include, but may not be limited to, RS Means, BNi Costbooks, Marshall and Swift, and "Sweet's Unit Cost Guide", which are widely accepted in the industry and available for nationwide use.
      - Federal, state, or territorial unit costs: When industry standard construction cost estimating resources do not provide work items that are appropriate or applicable to the construction

[143] For more information, refer to: *FEMA's Procurement Disaster Assistance Team (PDAT) Field Manual*. Chapter 9: Scoping, Costing, and Final Reviews also provides information on how to conduct a cost or price analysis.
[144] 2 C.F.R. § 200.404(c).

activities required to complete the project, FEMA considers local cost data from other federal agencies (OFA) or state or territorial agencies responsible for construction of similar facilities in or near the locality.

- FEMA cost codes: FEMA maintains regional and national unit prices (cost codes). FEMA cost codes may be used when a cost is not found in other published unit costs or if the cost codes are otherwise more applicable than other published costs, such as for force account equipment.

- If FEMA finds the costs claimed are not reasonable, FEMA may disallow all or part of the costs associated with the project by adjusting eligible funding based on what costs (if any) are deemed reasonable.[145] When determining the reasonable amount, FEMA may use the least-cost alternative, the lowest bid received by the applicant, the pricing of another applicant's properly procured and selected contractor, or a FEMA-developed cost estimate based on industry standard cost estimating resources.

- The following factors or other extenuating circumstances existed and caused escalation in costs:
  - Shortages in equipment, materials, supplies, labor, or contractors: When escalating costs are due to shortages, FEMA considers whether the applicant's work continued beyond the period of shortages and whether there was an opportunity for the applicant to obtain more reasonable pricing.
  - Project-specific complexities: Complexities may include environmental or historic preservation compliance requirements, remote access or location, provision of a unique service with few providers, or elements requiring an extraordinary level of effort.
  - Economy of scale: FEMA considers the amount of work that may impact the unit price (for example, smaller projects may have higher rates and larger projects may have lower rates due to various efficiencies that are realized with larger projects. Additionally, when hauling is involved, such as with debris projects, some projects may have longer haul routes due to disposal site locations or detours for obstacles like road blockages).
  - Extraordinary labor costs: FEMA evaluates whether increased labor costs were required under the circumstances of the incident. FEMA looks at the severity of the incident, the magnitude and the difficulty of the work, the labor hours claimed for the employees performing the work, and the function of the employees performing the labor, against the circumstances of the incident to determine if all labor costs were necessary to complete the work and if the costs charged for the labor were reasonable.
  - Applicant's justification: When a reasonable cost analysis has been conducted and costs appear high for a project, FEMA reviews the applicant's justification to determine whether there are any additional factors that justify the higher cost as a reasonable amount.

III. Applicant (Force Account) Labor

FEMA refers to an applicant's personnel as "force account." FEMA reimburses force account labor based on actual hourly rates plus the cost of the employee's actual fringe benefits. FEMA calculates the fringe benefit cost based on a percentage of the hourly pay rate. Because certain items in a benefit package are not dependent on hours worked (e.g., health insurance), the percentage for overtime is usually different than the percentage for straight-time pay. Fringe benefits provided under established written policies may include:

- Holiday leave;

[145] 2 C.F.R. § 200.339.

- Accrued sick and vacation leave;
- Social security matching;
- Medicare matching;
- Unemployment insurance;
- Workers' compensation;
- Retirement;
- Health, life, and disability insurance; and,
- Administrative leave.

Terminology

Fringe benefits - A percentage of the actual wages that pays for employee benefits.

Applicants must submit the following to support claims for labor costs:

Table 10. Required Documentation and Information for Labor Costs

For Small Projects	For Large Projects[146]
▪ Itemized cost summary including actual or estimated costs: ○ Number of employees;[147] ○ Total budgeted hours; ○ Total unbudgeted hours; ○ Average straight-time pay rate with fringe benefits;[148] and, ○ Average overtime pay rates with fringe benefits.[149]	▪ Pay policy; ▪ Itemized cost summary including estimated costs, or actual costs for completed work, for each employee: ○ Name ○ Job title and function; ○ Type of employee (e.g., full-time exempt, full-time non-exempt, part-time, temporary); ○ Date and hours worked; ○ Pay rate and fringe benefit rate; ○ Description of work performed with daily logs/activity reports; ○ Timesheets; and, ○ Fringe benefit calculations.[150]

[146] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[147] Estimates may be calculated based on actual or estimated total number of staff and total hours with average pay rates. Average rates may only be used for employees at similar pay grades and same category of employee (e.g., permanent full-time vs. part-time vs. temporary hire).
[148] Fringe benefits are calculated based on a percentage of the hourly pay rate.
[149] Fringe benefits are calculated based on a percentage of the hourly pay rate.
[150] Fringe benefits are calculated based on a percentage of the hourly pay rate.

A. Labor Policies

FEMA determines the eligibility of employee labor costs based on the applicant's pre-disaster written labor policy, provided the policy:

- Does not include a contingency clause that payment is subject to federal funding;
- Is applied uniformly regardless of a presidential declaration; and,
- Has set non-discretionary criteria for when the applicant activates various pay types.

If these requirements are not met, FEMA limits PA funding to the applicant's non-discretionary, uniformly applied pay rates. Labor cost eligibility is tied to the labor policy in effect prior to the start date of the incident period. "Pre-disaster" means "prior to the incident start date identified in the approved presidential disaster declaration" in the context of all PA Program authorities and guidance, not just labor policies.

B. Eligibility Criteria for Reimbursement of Employee Labor Costs

FEMA's criteria for reimbursing employee labor costs differ based on the category of work the employee performed, whether the employee's pay rate is straight time or overtime, and whether an applicant's employee labor costs are budgeted or unbudgeted. Note that costs associated with the salary and benefits of an employee on leave, regardless of the nature of the leave (e.g., sick leave) and regardless of whether the employee has leave to use, are ineligible. Administrative leave or similar labor costs incurred for employees sent home or told not to report due to emergency conditions are ineligible.

Terminology

Permanent (labor) - A full-time or part-time employee working on a permanent and ongoing basis, as set by an applicant's written labor or pay policy.

Full-time and **part-time** refer to the normal number of hours worked by an employee per pay period, as set by an applicant's [1] eligible pre-disaster written labor policy or [2] non-discretionary, uniformly applied pay rates.

Pay rates are set by an applicant's [1] eligible pre-disaster written labor policy or [2] non-discretionary, uniformly applied pay rates. **Exempt** employees are not subject to the overtime pay requirements set forth in the Fair Labor Standards Act. **Non-exempt** employees are subject to the overtime pay requirements set forth in the Fair Labor Standards Act.

For permanent work, categories C-G, straight-time and overtime pay are eligible for budgeted and unbudgeted employee labor costs.[151] For category I, straight-time pay is limited to extra hires, while overtime is eligible.[152]

[151] Stafford Act § 406(a)(2)(C); 42 U.S.C. § 5172; 44 C.F.R. § 206.228(a)(2)(i).
[152] Stafford Act § 406(a)(2)(c); 42 U.S.C. § 5172.

For emergency work, categories A-B, straight-time labor costs for budgeted employees are generally ineligible, while overtime labor costs are eligible.[153] However, straight time labor costs for budgeted employees are eligible pursuant to alternative procedures for debris removal, where the employee is performing eligible category A debris removal work.[154] For unbudgeted employees performing emergency work, costs for both straight-time and overtime labor hours are eligible.

Table 11. Emergency Work Labor Eligibility

Labor Classification	Type of Employee Hours	Eligible Overtime?	Eligible Straight-Time?
Budgeted Employee Hours (Debris Removal)	Permanent employee	Yes	Yes
Budgeted Employee Hours (Debris Removal)	Part-time or seasonal employee working during normal hours or season of employment	Yes	Yes
Budgeted Employee Hours (Emergency Protective Measures)	Permanent employee	Yes	No
Budgeted Employee Hours (Emergency Protective Measures)	Part-time or seasonal employee working during normal hours or season of employment	Yes	No
Unbudgeted Employee Hours (Debris & Emergency Protective Measures)	Reassigned employee funded from external source	Yes	Yes
Unbudgeted Employee Hours (Debris & Emergency Protective Measures)	Essential employee called back from furlough	Yes	Yes
Unbudgeted Employee Hours (Debris & Emergency Protective Measures)	Temporary employee hired to perform eligible work	Yes	Yes
Unbudgeted Employee Hours (Debris & Emergency Protective Measures)	Part-time or seasonal employee working outside normal hours or season of employment	Yes	Yes

1. REASSIGNED EMPLOYEES

Costs for employees reassigned to perform work that is not part of the employee's normal job functions are eligible. For example, a police officer may clear debris which FEMA provides PA funding based on the

[153] 44 C.F.R. § 206.228(a)(2)(iii)
[154] Stafford Act § 428(e)(2)(D); 42 U.S.C. § 5189f.

reassigned employee's normal pay rate, not the pay level appropriate to the work, because the applicant's incurred cost is the employee's normal pay rate.

2. REASSIGNED EMPLOYEES FUNDED FROM AN EXTERNAL SOURCE

Costs for straight-time hours of an employee funded from an external source (such as a grant from a federal agency or statutorily dedicated funds) are eligible if the employee is reassigned to perform eligible emergency work that the external source does not fund. FEMA must confirm that no duplication of benefits exists prior to approval.

3. BACKFILL EMPLOYEES

The applicant may need to temporarily replace an employee who is responding to the incident. If an employee is unable to perform normal duties due to performing eligible emergency work, certain costs associated with backfilling the employee are eligible, even though the backfilling employee is not performing eligible work. The eligibility of labor costs for a backfill employee is tied to an employee unable to perform normal duties because they are performing eligible emergency work, not because they are unable to work (e.g., on leave, furloughed).

Only costs for overtime hours worked by the backfill employee are eligible in the following scenarios:

- Backfill employee is budgeted; or
- Backfill employee is called in from scheduled leave.

Costs for straight-time hours worked by the backfill employee in the scenarios above are not eligible, even as a short-term increased operating expense.

If the backfill employee is not a budgeted employee, costs for straight-time hours worked by the backfill employee are eligible if the employee is a:

- Contracted or temporary employee; or
- Permanent employee called in on a normally scheduled day off (weekend or other off day).

Costs from backfilling labor are only eligible if:

- Costs are for a limited period of time based on the exigency of the circumstances; and,
- The applicant tracks and documents the additional costs.

4. ESSENTIAL EMPLOYEES CALLED BACK FROM FURLOUGH

Costs for straight-time hours of essential employees called back to work from a budget-related furlough due to the declared incident is eligible if the costs are not budgeted.

5. SUPERVISORS

Second-level supervisors and above (e.g., commissioners, mayors, department directors, police, and fire chiefs) are usually exempt from the overtime pay requirements set forth in the Fair Labor Standards Act.[155] Therefore, overtime costs related to these types of employees are ineligible, unless the applicant:

- Demonstrates that the employee was directly involved with a specific project;
- Normally charges that individual's time to specific projects regardless of federal funding; and,
- Incurs overtime costs for the employee in accordance with a labor policy that meets the criteria under Labor Policies in this chapter.

6. OTHER

FEMA may provide PA funding for extraordinary costs paid on an hourly basis (such as call-back pay, night-time and weekend differential pay, and hazardous duty pay) for essential employees to perform eligible emergency work if costs are paid in accordance with a pre-disaster written labor policy that meets the criteria above. All other PA Program eligibility requirements must be met.

FEMA considers bonuses and incentive pay to be discretionary rewards for an employee's performance rather than premium pay associated with and required for the actual hours worked. Bonuses and incentive pay are not eligible even when related to hazardous situations caused by the declared incident as those payments are not directly tied to and necessary for the performance of eligible work.

7. STANDBY TIME

FEMA provides PA funding for labor costs related to intermittent standby time for staff conducting eligible evacuation or sheltering, search and rescue, or emergency medical care. All of the following criteria must be met:

- Standby use and pay are consistent with the applicant's labor policy (or contractual obligation based on a labor agreement) and consistent with its practice in non-federally declared incidents OR a contract or union agreement that requires payment for standby time;
- The standby time occurred when it was necessary to have resources available to conduct the respective life-saving action;
- The number of hours and individuals were reasonable and necessary based on the number of resources required;
- The employee was conducting the respective life-saving action; and,
- All other labor cost eligibility criteria were met.

Examples of when FEMA may reimburse labor costs for standby time include, but are not limited to:

- When bus drivers are deployed to transport evacuees;
- When first responders are deployed for the purpose of evacuating or providing emergency medical care to survivors in order to save lives; and,

[155] For more information, refer to: U.S. Department of Labor Overtime Pay | dol.gov.

- When a contract or union agreement requires payment for standby time.

Additionally, the applicant may be required to pay firefighter costs from portal-to-portal, which may result in paying for 24-hour shifts with periods of rest. FEMA will reimburse costs based on such requirements. In these instances, FEMA limits its reimbursement to costs and timeframes that are reasonable and necessary, not to exceed 14 calendar days from the start of the incident period. The applicant must provide documentation to support the need for, and provision of, continuous support.

Standby time is separate and distinct from pre-positioning resources, which is addressed under Pre-Positioning Resources in Chapter 7.

IV. Applicant-Owned and Purchased Equipment

FEMA provides PA funding for the use of applicant-owned (force account) equipment, including permanently mounted generators, based on hourly equipment rates.[156] FEMA may provide PA funding based on mileage for vehicles, if the mileage is documented and less costly than hourly rates.

There are instances when applicants do not have sufficient equipment to effectively respond to an incident. If an applicant purchases equipment that it justifiably needs to respond effectively to the incident, FEMA provides PA funding for both the purchase price (subject to disposition requirements as specified under Disposition of Equipment and Supplies in this chapter) and either:

- The use of the equipment based on equipment rates; or
- The actual fuel and maintenance costs.

FEMA only applies equipment rates to the time an applicant is operating the equipment. Although costs associated with transporting equipment (e.g., labor and equipment costs used to transport equipment) to an eligible site are eligible, costs for standby time (time spent on hold or in reserve) are ineligible unless the equipment operator uses the equipment intermittently for more than half of the working hours for a given day. In this case the intermittent standby time is eligible.

Applicants must submit the following to support claims for applicant-owned or purchased equipment costs:

[156] 44 C.F.R. § 206.228(a)(1).

Table 12. Required Documentation and Information for Applicant-Owned or Purchased Equipment Costs

Equipment Type	For Small Projects	For Large Projects[157]
Applicant-owned equipment	▪ Itemized cost summary of actual or estimated costs broken out by type of equipment: ○ Total usage hours; and, ○ Total cost.	▪ Itemized cost summary including actual costs, or estimated costs for completed work, broken out by type of equipment: ○ Type of equipment and attachments used, including year, make, model, size, capacity, horsepower, and wattage (as applicable); ○ Location(s) or site(s) used; ○ Equipment code (if using FEMA rates); ○ Schedule of rates, including rate components (if not using FEMA rates); and, ○ Operator name with date and hours used each day.
Purchased equipment	▪ Itemized cost summary including actual or estimated costs broken out by type of equipment: ○ Total cost.	▪ Itemized cost summary including actual or estimated costs broken out by type of equipment: ○ Invoices or receipts.

FEMA provides PA funding for force account equipment usage based on FEMA or SLTT equipment rates in accordance with the specific criteria noted below.

A. FEMA Rates

FEMA publishes equipment rates applicable on a national basis.[158] FEMA's rate schedule includes any item powered by fuel or attached to any item powered by fuel. FEMA develops equipment rates based on all costs associated with ownership and operation of equipment (except for operator labor). FEMA equipment rate components include depreciation, overhead, equipment overhaul (labor, parts, and supplies), maintenance (labor, parts, and supplies), lubrication, tires, ground engaging component (if applicable), and fuel. Because the rates include maintenance costs, a mechanic's labor costs to maintain applicant-owned equipment are ineligible. Similarly, because the rates include fuel costs, an applicant cannot claim fuel costs in addition to FEMA equipment rates.

B. State, Tribal Nation, or Territorial Rates

State, Tribal Nation, and territorial (STT) rates are established under STT guidelines for use in normal day-to-day operations. FEMA provides PA funding based on STT rates up to $75 per hour.[159] FEMA only provides PA

[157] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[158] For more information, refer to: Schedule of Equipment Rates | fema.gov.
[159] 44 C.F.R. § 206.228(a)(1)(i).

funding for a rate above $75 per hour if the applicant demonstrates that each of the components of the rate is comparable to current market prices.[160]

C. Local Rates

Local rates are those developed under local government guidelines for use in normal day-to-day operations. FEMA generally provides PA funding for equipment usage based on the lower of either the local rate or the FEMA rate. However, if the local rate is lower, and the applicant certifies that the rate does not reflect all actual costs associated with operating the equipment, FEMA may provide PA funding based on the higher FEMA rate. FEMA may request that applicants provide documentation for the basis of its rate. Additionally, if the local rate is higher, applicants must document the basis for that rate and obtain approval from FEMA for the higher rate.[161]

If determining the lowest rate for each piece of equipment is overly burdensome because of the number of different types of equipment used, or if the applicant prefers, FEMA will reimburse all equipment use based on the lower of the two rate schedules, rather than based on a comparison of each individual rate. In these cases, the PA Division at FEMA Headquarters determines which schedule of rates is lower.

D. Equipment with No Established Rate

If applicants use equipment that has no established SLTT rate, FEMA reimburses that equipment based on the FEMA rate.[162] If FEMA does not have a rate established for the equipment, applicants may either submit a rate for approval or request that FEMA provide a rate. If an applicant submits a rate, it must include documentation demonstrating that each component of the rate is comparable to current market prices. The rate cannot be based on rental rates as such rates may include cost components, such as profit, that are above and beyond what is necessary to operate and maintain force account equipment.

E. Telecommunications Equipment Purchase

Applicants may not obligate or expend any FEMA awards, including any new, renewed, or extended purchase orders, contracts, subcontracts, or similar acquisitions on prohibited systems identified in the National Defense Authorization Act[163] to:

- Procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services[164] as a substantial or essential component of any system, or as critical technology of any system;
- Enter into, extend, or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system; or

[160] Ibid.
[161] 44 C.F.R. § 206.228(a)(1)(ii).
[162] 44 C.F.R. § 206.228(a)(1)(iii).
[163] 2 C.F.R. § 200.216.
[164] Entities added to this list will be incorporated into the excluded parties list in the System for Award Management | sam.gov. When a user conducts a search of the excluded parties list, a record will appear describing the nature of the exclusion for any entity identified as covered by this prohibition.

- Enter into, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.[165]

Applicants may use PA funding to purchase replacement equipment, systems, or services.

Terminology

Covered telecommunications equipment includes telecom or video surveillance equipment or services produced or provided by an entity reasonably believed to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

V. Rented or Leased Equipment

When applicants rent or lease equipment, FEMA provides PA funding based on the terms of the agreement. Rental and leasing costs are eligible if:

- The applicant performed an analysis of the cost of rented or leasing versus purchasing the equipment;[166] and,
- The total rental or leasing costs do not exceed the cost of purchasing and maintaining equipment during the life of the eligible project.

If the rental or leasing costs exceed the cost of purchasing and maintaining the equipment, FEMA determines the amount of eligible costs based on an evaluation of the reasonableness of the costs claimed, including whether the applicant acted with prudence under the circumstances at the time it rented or leased the equipment.

If an applicant has a rent-to-own or lease-purchase agreement and obtains ownership during completion of eligible work, FEMA provides PA funding for the equipment use based on the hourly equipment rate, as described under Applicant-Owned and Purchased Equipment in this chapter. If the applicant completes the eligible work prior to obtaining ownership, FEMA provides PA funding based on the cost to rent or lease the equipment.

Applicants must submit the following to support claims for rented or leased equipment costs:

[165] Entities added to this list will be incorporated into the excluded parties list in the System for Award Management | sam.gov. When a user conducts a search of the excluded parties list, a record will appear describing the nature of the exclusion for any entity identified as covered by this prohibition.
[166] 2 C.F.R. § 200.318(d).

Table 13. Required Documentation and Information for Rented or Leased Equipment Costs

For Small Projects	For Large Projects[167]
▪ Itemized cost summary of actual or estimated costs for leased equipment: ○ Total usage days or hours; and, ○ Total cost.	▪ Itemized cost summary including actual costs, or estimated costs for completed work, broken out by type of equipment or each piece of leased equipment: ○ Type of equipment, including make, model, size, capacity, horsepower, and wattage (as applicable); ○ Location or site used; ○ Dates and hours used (required if lease agreement charges hourly rates); ○ Rates and total cost; ○ Vendor and invoice number; ○ Amount of fuel used (if not included in rental cost); ○ Lease agreement; and, ○ Invoices or receipts.

VI. Supplies

The cost of supplies, including materials, is eligible if:

- Purchased and justifiably needed to effectively respond to and/or recover from the incident; or
- Taken from the applicant's stock and used for the incident.

Applicants must track items taken from stock with inventory withdrawal and usage records.

FEMA provides PA funding for these items based on invoices, if available. If invoices are not available for items used from stock, FEMA provides PA funding based on the applicant's established method of pricing inventory.[168] If an applicant does not have an established method, FEMA provides PA funding based on historical data or prices from area vendors.

FEMA consults with the U.S. Department of Homeland Security Office of Inspector General Emergency Management Oversight Team in cases where it has difficulty determining a reasonable value.

Applicants must submit the following to support claims for materials and supplies costs:

[167] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[168] 2 C.F.R. § 200.453(b).

Table 14. Required Documentation and Information for Materials and Supplies Costs

For Small Projects	For Large Projects[169]
▪ Itemized cost summary including actual or estimated costs for materials and supplies: ○ Type and quantity; and, ○ Total cost.	▪ Itemized cost summary including estimated costs, or actual costs for completed work, for materials and supplies: ○ From stock: – Cost documentation, such as original invoices or other historical cost records; – Inventory records; – Type of supplies and quantities used; and – Location used. ○ Purchased: – Receipts or invoices; – Quantities used; and, – Justification (required if supplies were not used).

VII. Disposition of Equipment and Supplies

This section describes disposition requirements when purchased equipment or supplies (including materials) are no longer needed for federally funded projects.

In the context of disposition, equipment is any tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization level established by an applicant for financial statement purposes, or $10,000.[170] Tangible personal property that does not fall under this definition of equipment is a supply.[171]

Terminology

Acquisition cost - The net invoice price of equipment including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose it was acquired. Other charges such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with a recipient's regular accounting practices.

Personal property means property other than real property.

[169] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[170] 2 C.F.R. § 200.1.
[171] Ibid.

A. Disposition of Purchased Equipment

In accordance with federal regulations, state and territorial government applicants dispose of equipment in accordance with state and territorial laws and procedures. Tribal Nations must use, manage, and dispose of equipment acquired under a federal award in accordance with tribal laws and procedures. If such laws and procedures do not exist, Tribal Nations must follow the guidance in 2 C.F.R. 200.313(c)-(e).[172] When allowable pursuant to its own laws and procedures, state, Tribal Nation, and territorial applicants may not be required to compensate FEMA for its share of the original purchase.

When equipment purchased with PA funding is no longer needed for response to or recovery from the incident, local governments, and private nonprofit (PNP) applicants may use the items for other federally funded programs or projects, provided the applicant informs FEMA.[173]

When an individual item of equipment is no longer needed for federally funded programs or projects, local governments, and PNP applicants must calculate the current fair market value of the individual item of equipment. Applicants must provide the current fair market value for items that have a current fair market value of $10,000 or more and compensate FEMA for its share of the original purchase, based on the cost share. FEMA applies the requirement by reducing funding by the applicable amount.[174] If the individual item of equipment has a current fair market value less than $10,000, FEMA does not reduce the eligible funding.[175]

B. Disposition of Purchased Supplies

When supplies are no longer needed for federally funded programs or projects, all applicants, including state and territorial government and Tribal Nation applicants, must calculate the current fair market value of any unused residual supplies (including materials) that FEMA funded for any of its projects and determine the aggregate total.

Applicants must provide the current fair market value if the aggregate total of unused residual supplies is greater than $10,000 and compensate FEMA for its share of the original purchase, based on the cost share. FEMA applies this requirement by reducing funding by the applicable amount.[176] If the aggregate total of unused residual supplies is less than $10,000, FEMA does not reduce the eligible funding.

Examples: Equipment vs. Supplies

- Examples of **equipment** include: durable medical equipment, hospital beds, ventilators, refrigerator trucks, coolers, freezers, and information technology systems (which are different than iPads/laptops).

[172] 2 C.F.R. § 200.313(b).
[173] 2 C.F.R. § 200.313(c).
[174] 2 C.F.R. § 200.313(e)(2).
[175] 2 C.F.R. § 200.313(e)(1).
[176] 2 C.F.R. § 200.314(a).

- Examples of **supplies** include: iPads/laptops, personal protective equipment (PPE), such as N95 and other filtering respirators, surgical masks, gloves, protective eyewear, face shields, protective clothing, sharps containers, and dry ice.

VIII. Disposition for Small Projects

For small projects, fair market value and the associated reduction are addressed during project formulation. To calculate depreciation of fair market value for equipment, the date used to determine when equipment is no longer needed is based on the work completion deadline. No reduction is taken for disposition of supplies for small projects because the quantity of supplies for which funding is eligible is an amount that is necessary and reasonable, and the estimate is based on the aggregate unused supplies not exceeding $10,000.

IX. Disposition of Real Property

If an applicant acquires or improves real property with PA funds, disposition and reporting requirements apply when acquired or improved real property is no longer needed for the originally authorized purpose.[177] Recipients and applicants must obtain specific disposition instructions from FEMA.[178]

X. Procurement and Contracting Requirements

FEMA provides PA funding for contract costs based on the terms of the contract or purchase agreement if an applicant meets federal procurement and contracting requirements. Federal procurement and contracting requirements for state and territorial government agencies and Tribal Nations are different than those for local government agencies and PNPs.

If an applicant does not comply with federal procurement requirements, FEMA applies an appropriate remedy in accordance with its authorities.[179] FEMA has determined an appropriate remedy under these circumstances is to either deny all costs associated with the contract or, if sufficient information is provided to substantiate a reasonable amount for the eligible work completed, FEMA only reimburses the portion of the costs it determines are reasonable and allowable based on all available information and documentation provided. For more information, please refer to Reasonable Cost Analysis in this chapter. In addition to monetary remedies, FEMA may also take non-monetary actions against the applicant as authorized by 2 C.F.R. §§ 200.208 and 200.339.

FEMA's Procurement Guidance for Recipients and Subrecipients Under 2 C.F.R. Part 200 (Uniform Rules)[180] provides additional details regarding federal procurement and contracting requirements.

[177] 2 C.F.R. §§ 200.311 and 200.330.
[178] 2 C.F.R. § 200.311(d).
[179] 2 C.F.R. § 200.339.
[180] For more information, refer to: Procurement Guidance for Recipients and Subrecipients Under 2 C.F.R. Part 200 (Uniform Rules).

A. Procurement and Contracting Requirements for State and Territorial Government and Tribal Nation Entities

Applicants must comply with federal procurement requirements as a condition of receiving PA funding for contract costs for eligible work.

1. PROCUREMENT

State and territorial government applicants,[181] as well as Tribal Nations, must comply with federal procurement procedures at 2 C.F.R. § 200.317, which include:

- Following the same policies and procedures they would use for procurements with non-federal funds; and,
- Complying with the Environmental Protection Agency (EPA) guidelines in 2 C.F.R. § 200.322, Procurement of recovered materials.

FEMA reviews state, Tribal Nation, or territorial procurement policies or procedures or requests that a state, Tribal Nation, or territorial attorney certify in writing whether the applicant complied with the state's, Tribal Nation's, or territory's procurement policies and procedures.

2. CONTRACTING

State and territorial government applicants, as well as Tribal Nations, must include required provisions detailed in 2 C.F.R. § 200.327 in all contracts awarded.[182] Some provisions are based on sound contracting practices while others are required by federal law, EOs, and regulations. Some provisions do not apply under the PA Program (e.g., Davis Bacon Act[183] and Rights to Inventions Clause) while others require verbatim language.

Required contract provisions include:

- Remedies Clause;
- Termination for Cause and Convenience;
- Equal Employment Opportunity;
- Contract Work Hours and Safety Standards Act;
- The Clean Air Act (CAA) and the Federal Water Pollution Control Act;
- Debarment and Suspension;
- Byrd Anti-Lobbying Amendment Clause;
- Byrd Anti-Lobbying Amendment Certification;
- Procurement of Recovered Materials;
- Prohibition on Contracting for Covered Telecommunications Equipment or Services; and,

[181] See Applicant Eligibility: State, Local, Tribal Nation, and Territorial Government Entities for a description of each type of applicant.
[182] 2 C.F.R. § 200.327.
[183] The Davis Bacon Act requires "prevailing wage" payment to contracted workers based on the local union wage scale defined by the U.S. Department of Labors. If the applicant incorporates prevailing wage rates as part of its normal practice for all contracts regardless of the funding source, then those rates are eligible.

- Domestic Preference for Procurements.

In addition to the required provisions, FEMA also recommends the following contract provisions be included in all contract awards:

- Changes Clause;
- Access to Records;
- Department of Homeland Security Seal, Logo, and Flags;
- Compliance with Federal Law, Regulations, and EOs Clauses;
- No Obligation by Federal Government;
- Program Fraud and False or Fraudulent Statements or Related Acts;
- Socioeconomic Contracting;
- Copyright; and,
- Providing Good, Safe Jobs to Workers.

The FEMA "Contract Provisions Guide"[184] provides the exact language for the provisions that require verbatim language and provides sample language for some of the other provisions.

Although time-and-material (T&M) contracts without a ceiling price and cost-plus-percentage-of-cost or percentage-of-construction contracts may be allowed by a state, Tribal Nation, or territorial government, their use carries high risk of noncompliance with the requirement that all costs be reasonable.[185]

B. Procurement and Contracting Requirements for Local Government Agencies and Private Nonprofit Organizations

Local governments and PNPs[186] must comply with:

- Their own documented procurement procedures;
- Applicable SLTT government laws and regulations; and,
- Applicable federal laws and regulations.[187]

If there is a conflict among these procurement rules and procedures, the local government or PNP must use the more restrictive requirement. Additionally, territorial governments should consult their legal counsel when a project involves a public building or public works facility as the Buy American Act may apply to the procurement process.

1. PRE-PROCUREMENT CONSIDERATIONS

FEMA encourages local governments and PNPs to:

[184] For more information, refer to: *FEMA Contract Provisions Guide*.
[185] 2 C.F.R. § 200.403(a).
[186] See Applicant Eligibility: State, Local, Tribal Nation, and Territorial Government Entities and Applicant Eligibility: Private Nonprofit Organizations in Chapter 3 for a description of which applicants are local governments or PNPs.
[187] 2 C.F.R. § 200.318(a).

- Establish or update written procurement procedures that reflect applicable SLTT laws and regulations;[188] and,
- Maintain required written standards of conduct covering conflicts of interest and governing the performance of employees who engage in the selection, award, and administration of contracts.[189]

Local governments and PNPs should also create a prequalified list of responsible contractors identified to possess the qualifications and technical abilities to satisfy the applicant's potential requirement.[190] Although not a contract, many entities have prequalified lists that serve as contract research.

A prequalified contractor is one that an applicant evaluated and determined to be qualified to perform the work based on capabilities, such as technical and management skills, prior experience, past performance, and availability. A prequalified contractor is not entitled to a "standby" contract. Applicants must still conduct full and open competition. The applicant cannot exclude potential bidders or offerors from qualifying during the solicitation period, even if they were not on the prequalified list.[191]

2. GENERAL FEDERAL PROCUREMENT REQUIREMENTS

Federal procurement requirements for local governments and PNPs are found at 2 C.F.R. § 200.318 through 200.327. The requirements include, but are not limited to:

- Providing full and open competition;[192]
  - Tribal Nation applicants may provide preference to Indian organizations or Indian-owned economic enterprises[193] if the applicant substantiates that it met the Indian Self-Determination and Education Act requirements.
- Conducting the following steps to ensure the use of small and minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms when possible:[194]
  - Place such organizations that are qualified on solicitation lists;
  - Ensure such organizations are solicited whenever they are potential sources;
  - Divide total requirements, when economically feasible, into smaller tasks or quantities;
  - Establish delivery schedules, where the requirement permits, encouraging its participation;
  - Use the services and assistance, as appropriate, of the U.S. Small Business Administration (SBA) and the Minority Business Development Agency of the Department of Commerce; and,
  - Require prime contractor to conduct the above steps if subcontracting.

[188] Ibid.
[189] 2 C.F.R. § 200.318(c)(1).
[190] 2 C.F.R. § 200.319(e).
[191] Ibid.
[192] 2 C.F.R. § 200.319(a).
[193] Per the Indian Financing Act of 1974, Pub. L. No. 93-262, § 2(e), 88 Stat 77 (codified as amended at 25 U.S.C. § 1452(f)), an Indian organization is the governing body of any federally-recognized Tribal Nation, or an entity established or recognized by the governing body. An Indian-owned economic enterprise is any commercial, industrial, or business activity established or organized by a member of a federally-recognized Tribal Nation for the purpose of profit, provided that such Indian ownership constitutes 51 percent or more of the enterprise.
[194] 2 C.F.R. § 200.321.

- Performing a cost or price analysis in connection with every procurement action above the simplified acquisition threshold,[195] including contract modifications;
  - Applicants must make independent estimates before receiving bids or proposals.[196]
- Evaluating and documenting the contractor's integrity, compliance with public policy, record of past performance, and financial and technical resources;[197]
- Ensuring that the contractor was not suspended or debarred;[198]
- Excluding contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals from competing for such procurements to ensure objective contractor performance and eliminate unfair competitive advantage;[199] and,
- Maintaining records to detail the history of the procurement including, but are not limited to:
  - Rationale for the method of procurement;
  - Selection of contract type;
  - Contractor selection or rejection; and,
  - The basis for the contract price.[200]

Terminology

Simplified acquisition threshold - The dollar amount below which a non-federal entity may purchase property or services using small purchase methods. The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. 1908. As of the publication of this part, the simplified acquisition threshold is $250,000, but this threshold is periodically adjusted for inflation.

Micro-purchase: purchase of supplies or services where the total cost does not exceed the micro-purchase threshold set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1.

Simplified acquisitions procedure: relatively simple and informal procurement method for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1.

Sealed bid: publicly solicited bid awarded via a firm fixed-price contract to the lowest responsive and responsible bidder.

Proposal: normally conducted with more than one source submitting an offer and generally used when conditions are not appropriate for the use of sealed bids.

[195] The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 C.F.R. § 2.101. The threshold is adjusted periodically for inflation.
[196] 2 C.F.R. § 200.324(a).
[197] 2 C.F.R. § 200.318(h).
[198] 2 C.F.R. § 200.214.
[199] 2 C.F.R. § 200.319(b).
[200] 2 C.F.R. § 200.318(i).

Noncompetitive procurement: solicitation of a proposal from only one source. See 2 C.F.R. § 200.320 for federal rules that apply to each individual method.

Procurement of real property: The purchase or lease of real property is a unique transaction that might not readily allow use of one of the competitive methods of procurement. If an applicant is unable to conduct a competitive procurement, it may use a noncompetitive method in accordance with the requirements in this section. The appropriate method will depend on the facts and circumstances of each procurement.

3. PROCUREMENT METHODS

Local governments, and PNPs must use one of the following procurement methods:[201]

- Micro-purchase;
- Small purchase procedure;
- Sealed bid (formal advertising);
- Competitive proposal; or,
- Noncompetitive proposal (sole-sourcing).

C. Noncompetitive Procurement

FEMA reimburses reasonable costs incurred under a contract procured through a noncompetitive proposal, also referred to as sole-source, only when one or more of the following circumstances apply:

- The item is only available from one source;
- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (this exception to competitive procurement is only for work specifically related to the circumstance and only while the circumstances exist. Therefore, applicants need to immediately begin the process of competitively procuring similar goods and services and transition to a competitively procured contract as soon as the circumstances cease to exist);
- FEMA or the recipient expressly authorizes a noncompetitive proposal in response to a written request from the applicant; or,
- After solicitation of several sources, competition is determined inadequate.[202]

In instances where applicants submit cost claims based on noncompetitive bids or contracts, time-and-materials contracts, or cost-plus-percentage-of-cost or percentage-of-construction contracts, FEMA will review the project for reasonable cost and procurement and contracting compliance.

For large projects with costs based on noncompetitive procurement, applicants must identify which of the four circumstances listed above apply and provide all of the following information, documentation, and justification:

[201] 2 C.F.R. § 200.320.
[202] 2 C.F.R. § 200.320(f).

- A brief description of the product or service being procured, including the expected amount of the procurement;
- Explanation of why a noncompetitive procurement is necessary;
  - If there was a public exigency or emergency, the justification should explain the specific conditions and circumstances that clearly illustrate why competitive procurement would cause unacceptable delay in addressing the public exigency or emergency. (Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency.)
- Length of time the noncompetitive contract will be used for the defined SOW, and the impact on that SOW should the noncompetitively procured contract not be available for that amount of time (e.g., how long does the applicant anticipate the exigency or emergency circumstances to continue; how long it will take to identify requirements and award a contract that complies with all procurement requirements; or how long it would take another contractor to reach the same level of competence);
- The specific steps taken to determine that the applicant could not have used, or did not use, full and open competition for the SOW (e.g., research conducted to determine that there were limited qualified resources available that could meet the contract provisions);
- Any known conflicts of interest and any efforts that the applicant made to identify potential conflicts of interest before the noncompetitive procurement occurred (and if the applicant made no efforts, explain why); and,
- Any other justification that applies.

If FEMA determines that none of the allowable circumstances existed or did not preclude the applicant from adhering to competitive procurement requirements, FEMA will work with the recipient to identify remedies for non-compliance. However, if FEMA or the recipient determine that non-compliance cannot be remedied by imposing additional conditions, FEMA will disallow all or part of the associated costs.[203]

Examples: Exigent vs. Emergency Situations

- **Exigent Situation**: A tornado impacts a city in June and causes widespread and catastrophic damage, including damage to a city school. The city wants to repair the school and have it ready for use by the beginning of the school year in September. The city estimates, based on experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city's engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city—in compliance with state and local law—wants to sole source with a contractor it has contracted with previously.
- **Emergency Situation**: Severe weather impacts a city and causes widespread and catastrophic damage, including loss of life, widespread flooding, loss of power, damage to public and private structures, and millions of cubic yards of debris across the city, leaving majority of the jurisdiction inaccessible. The city needs to begin debris removal activities immediately to restore access to the community, support search and rescue operations, power restoration, and address health and safety concerns.

[203] 2 C.F.R. § 200.339.

1. CONTRACT TYPES

FEMA reimburses costs incurred by local governments and PNPs using three types of contract payment obligations: fixed price, cost-reimbursement, and, to a limited extent, T&M.[204]

Local governments, and PNPs must maintain oversight on all contracts to ensure contractors perform according to the conditions and specifications of the contract and any purchase orders.[205]

D. Time-and-Materials Contracts

Time-and-material (T&M) contracts do not provide incentives to the contractor for cost control or labor efficiency. Therefore, use of T&M contracts is only allowed if all of the following apply:

- No other contract type was suitable;
- The contract has a ceiling price that the contractor exceeds at its own risk; and,
- The applicant maintains a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.[206]

FEMA generally limits the use of T&M contracts to a reasonable timeframe based on the circumstances during which an applicant could not define a clear SOW. Therefore, applicants should define the SOW as soon as possible to enable procurement of a more acceptable type of contract.

Some entities, such as rural electrical cooperatives, provide the materials necessary to restore the facilities and refer to such contracts as time-and-equipment (T&E) contracts. The limitations and requirements that apply to T&M contracts also apply to T&E contracts.

1. COST-PLUS-PERCENTAGE-OF-COST OR PERCENTAGE-OF-CONSTRUCTION

In addition to limiting reimbursement to costs that can be determined to be reasonable, FEMA does not reimburse the increased cost associated with the percentage on a cost-plus-percentage-of-cost calculation or percentage-of-construction cost method.[207] This type of contract billing is prohibited as it does not provide incentive to contractors to control costs because the contractor's profit increases as the costs of performance increase. Instead, it provides a financial interest to the contractor to increase costs so that its profit increases. FEMA identifies these cost methods by determining whether:

- Payment is on a predetermined percentage rate;
- The predetermined percentage rate is applied to actual performance costs;
- The contractor's total payment amount is uncertain at the time of contracting; and,
- The contractor's payment increases commensurately with increased performance costs.

[204] For additional information on these contract types and other procurement requirements, refer to: Contracting with Federal Funds for Goods and Services Before, During and After Disasters | FEMA.gov
[205] 2 C.F.R. § 200.318(b).
[206] 2 C.F.R. § 200.318(j).
[207] 2 C.F.R. § 200.324(c).

2. ADDITIONAL CONTRACTING CONSIDERATIONS

i. Pre-Positioned Contracts

Some applicants have pre-positioned contracts, which are contracts awarded before an incident occurs for the potential performance of work. These contracts are also referred to as advance or standby contracts. FEMA reimburses reasonable costs under a pre-positioned contract if:

- It was originally procured in compliance with federal procurement requirements;
- The SOW was adequate to cover the work performed;
- The work performed was eligible; and
- The contract term covers time when work was performed.

ii. Cooperative Purchasing

A cooperative purchasing program is a cooperative arrangement for acquiring goods or services that involves aggregating the demand of two or more entities to obtain a more economical purchase.[208] Program membership may provide entities with access to lists of agreements or contracts for goods and services at pre-negotiated rates or prices. Typically, the member then purchases the goods or services by negotiating with participating vendors and placing purchase orders or entering into contracts based on the pre-negotiated rates or prices. FEMA advises against the use of cooperative purchasing programs due to frequent compliance issues with federal procurement requirements. FEMA provides tools to assist with Cooperative Purchasing Programs[209] and provides additional information to assist with compliance issues for procurements above the simplified acquisition threshold. Applicants must document and explain how its use of the program complied with all procurement requirements.

Piggyback contracting is a type of cooperative purchasing and occurs when one entity assigns the contractual rights it has in a contract to another entity. FEMA advises against the use of piggyback contracts. Piggyback contracts are usually not compliant with federal procurement requirements as the SOW pertains to the needs of a different entity.

E. Required Documentation and Information for Procurement and Contracting

Applicants must submit the following to support claims for contract costs:

[208] Cooperative purchasing programs are distinguishable from joint procurements. A joint procurement is a method of contracting in which two or more purchasers agree from the outset to use a single solicitation and enter into a single contract with a vendor for the delivery of goods or services. Joint procurements must still comply with federal procurement requirements. However, FEMA sees fewer compliance issues with joint procurements.
[209] For more information, refer to: Cooperative Purchasing Programs | fema.gov.

Table 15. Required Documentation and Information for Contract Costs

For Small Projects[210]	For Large Projects[211]
▪ Itemized cost summary including actual or estimated costs for each contractor: ○ Procurement method: – Competitive; or – Non-competitive; ○ Type of contract: – Fixed; – Time-and-materials; – Cost-plus-percentage or percentage of construction; or – Other; and, ○ Total contract award.	▪ Itemized cost summary including estimated costs, or actual costs for completed work, for each contractor: ○ Contractor name; ○ Dates worked; ○ Billing or invoice number; ○ Amount; and, ○ Description of work performed; ▪ Procurement documents, including: ○ Requests for proposals; ○ Bids; ○ Selection process; ○ Procurement policy; ○ Cost or price analysis; ○ Contracts and change orders; and, ○ Invoices; and, ▪ Documentation that substantiates a high degree of contractor oversight (required for T&M contracts), including: ○ Daily or weekly logs; or ○ Records of performance meetings.

XI. Mutual Aid

When an applicant does not have enough resources to respond to an incident, it may request resources from another agency, organization, or jurisdiction through a "mutual aid" agreement. FEMA refers to the entity requesting resources as the requesting entity. FEMA refers to the entity providing the requested resource as the assisting entity.

[210] All small projects must comply with procurement and contracting laws and regulations. In instances where applicants submit cost claims based on non-competitive bids or contracts, time and materials contracts, or cost-plus-percentage-of-cost or percentage-of-construction contracts, FEMA will review the project for reasonable cost and procurement and contracting compliance.
[211] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.

Terminology

Requesting entity - An entity that requests mutual aid assistance from an assisting entity for work resulting from a declared fire, emergency, or major disaster within its legal jurisdiction.

Assisting entity - The entity providing mutual aid assistance to a requesting entity pursuant to a local or statewide mutual aid agreement.

FEMA provides PA funding to the requesting entity as it is legally responsible for the work. FEMA does not provide PA funding directly to the assisting entity. For the work to be eligible, the requesting entity must have requested the resources provided.

Some states have a statewide mutual aid agreement that designates the state as being responsible for reimbursing mutual aid costs. In these states, the assisting entity may request funding directly from the state, with prior consent of the requesting entity, in accordance with applicable state laws and procedures. If the requesting entity and the state approve the request and the state pays the assisting entity, FEMA provides PA funding to the state. The requesting entity may be responsible for reimbursing the state for any non-federal local cost share, depending on specific state requirements.

The requesting entity or state, if applicable, must provide a description of the services requested and received, along with documentation of associated costs (e.g., labor, equipment, supplies, or materials) to FEMA in support of a request for PA funding.

A. Post-Incident Agreements

When the requesting and assisting entities do not have a written agreement or, where such an agreement exists but is silent on reimbursement, they are not precluded from engaging in mutual aid activities eligible for reimbursement through PA. In such situations, these entities can enter into a verbal agreement to define the resources to be provided and to establish the terms, conditions, and costs of the assistance to be rendered. This allows flexibility in responding to the incident's specific needs.

The agreement should be consistent with past practices for mutual aid between the entities. For example, if the requesting entity does not normally reimburse an assisting entity for its costs, it should not agree to do so specifically for the declared incident.

Prior to funding, the verbal agreement, or agreement otherwise not defined in writing, must be codified in writing, and formally adopted by officials from both entities. This written record should outline the specifics of the agreement, including the resources requested/provided, the terms, conditions, and cost arrangements. Once the verbal agreement is documented and executed, it should be submitted with the project application in which the requesting entity is seeking reimbursement through FEMA. The requesting entity should submit documentation to support the costs claimed under the mutual aid agreement. The mutual aid documentation provided in this section is not exhaustive and therefore FEMA is clarifying that any documentation that provides details of services requested and received,

information about labor, equipment, and supplies may be used to support this requirement for eligibility. Some examples include letters, memos, written agreements, meeting minutes, emails, purchase orders, and invoices certifying to work and costs.

B. Eligibility

Mutual aid resources are eligible when used for emergency protective measures, emergency utility restoration (regardless of whether it is deemed category B or F), building code and floodplain management administration and enforcement, or grant management activities. Labor expenses for the assisting entity will be treated as contract labor, with regular time and overtime wages and certain benefits eligible, provided labor rates are reasonable. Costs to transport the assisting entity's equipment and personnel to the declared area are eligible.

Examples: Ineligible Work Performed by an Assisting Entity

Ineligible work performed by an assisting entity includes, but is not limited to:

- Preparing to deploy;
- Dispatch operations outside the receiving state, Tribal Nation, or territory;
- Training and exercises; and,
- Support for long-term recovery and mitigation operations.

The assisting entity's straight-time and overtime labor are eligible, including fringe benefits. When the requesting entity is an SLTT government and the assisting entity is another division within the same SLTT government, straight-time for budgeted employees of the assisting entity is ineligible.

If the assisting entity backfills deployed personnel, overtime for backfill personnel is eligible even if they are not performing eligible work. However, straight-time for backfill personnel is ineligible.

FEMA reimburses the use of equipment provided to a requesting entity based on either the terms of the agreement or equipment rates (detailed under Applicant-Owned and Purchased Equipment in this chapter). FEMA provides PA funding to repair damage to this equipment the same way as it provides PA funding to repair damage to applicant-owned equipment (detailed under Damage Caused During Performance of Emergency Work in Chapter 7).

C. Emergency Management Assistance Compact

The Emergency Management Assistance Compact (EMAC) is a national interstate mutual aid agreement that enables states and territories to share resources in response to an incident. Work performed outside the receiving state or territory that is associated with the operation of EMAC, including tracking of resources, is ineligible unless the work is associated with the receiving state's or territory's emergency operations for the incident. FEMA does not perform a reasonable cost analysis of work performed through EMAC, as long as the project followed established EMAC rules.

D. Required Documentation and Information for Mutual Aid

Applicants must submit the following to support claims for mutual aid costs:

Table 16. Required Documentation and Information for Mutual Aid Costs

Mutual Aid Type	For Small Projects	For Large Projects[212]
EMAC[213]	▪ The EMAC Resource Support Agreement signed by all parties (required at project obligation); ▪ "Interstate Reimbursement Summary" (R-1) form (required at project closeout); ▪ "Associated Intrastate Reimbursement Summary" (R-2) forms (required at project closeout); and, ▪ Proof of payment by the requesting entity to the assisting entity (required at project closeout).	▪ The EMAC Resource Support Agreement signed by all parties (required at project obligation); ▪ "Interstate Reimbursement Summary" (R-1) form (required at project closeout); ▪ "Associated Intrastate Reimbursement Summary" (R-2) forms (required at project closeout); and, ▪ Proof of payment by the requesting entity to the assisting entity (required at project closeout).
Non-EMAC	▪ Itemized cost summary including actual or estimated costs: ○ Services requested and received; and, ○ Total cost.	▪ Written agreement; ▪ Services requested and received; ▪ Itemized cost summary including actual costs for completed work. For each assisting entity: ○ Dates worked; ○ Entity name; ○ Description of work performed; and, ○ Total cost. ▪ Same information and documentation for labor, equipment, and supplies (as applicable); and, ▪ Invoices.

[212] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[213] All forms referenced are contained within *the EMAC Operations Manual v.4.5, May 2023.*

XII. Prisoners

FEMA provides PA funding for prisoner labor costs based on the rate that the applicant normally pays prisoners. FEMA also provides PA funding for prisoner transportation to and from the worksite and extraordinary costs of security guards, food, and lodging.[214]

Applicants must submit the following to support claims for prison labor costs:

Table 17. Required Documentation and Information for Prison Labor Costs

For Small Projects	For Large Projects[215]
▪ Itemized cost summary including actual or estimated costs: ○ Number of individuals; ○ Pay rate; and, ○ Total cost.	▪ Prison's labor policy; ▪ Estimated hours and pay rate for work to be completed; ▪ Itemized cost summary including actual costs for completed work. For each individual: ○ Name and location worked; ○ Date and hours worked; and, ○ Pay rate; and, ▪ Description of work performed with daily logs/activity reports.

XIII. National Guard

The Governor may activate National Guard personnel to State Active Duty in response to an incident. Labor costs and per diem, if applicable, are eligible for State Active-Duty personnel performing eligible work. Both straight-time and overtime are eligible, including fringe benefits.

The U.S. Department of Defense funds National Guard personnel activated under Full-Time National Guard Duty (Title 32) or Active Duty (Title 10). Therefore, Title 32 and Title 10 personnel costs, and any other costs funded by the U.S. Department of Defense, such as training, are ineligible.

XIV. Direct Federal Assistance

When the impact of an incident is so severe that the SLTT governments lack the capability to perform or contract eligible emergency protective measures, recipients may request that the federal government provide this assistance directly.[216] FEMA may task another federal agency to perform or contract the work

[214] Stafford Act § 406(a)(2)(B); 42 U.S.C. § 5172.
[215] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[216] 44 C.F.R. § 206.208(a).

provided it is an eligible activity under Chapter 7: Emergency Work Eligibility unless the work falls under the authority of another federal agency.[217] FEMA issues a "Mission Assignment" to task the work and refers to it as direct federal assistance (DFA).[218] DFA has the same cost-share provisions applicable to the declaration (as described under Federal Cost Share in Chapter 1).

XV. Increased Federal Cost Share for a Limited Timeframe

When the president authorizes an increased federal cost share for a limited timeframe, FEMA applies it to all eligible costs related to work performed through 11:59 p.m., in the time zone where the work took place, on the date of expiration. Therefore, the applicant needs to delineate costs for work performed prior to the deadline versus costs for work performed after the deadline. FEMA applies the increased federal cost share according to the following criteria:

- Employees: Costs for hours worked up to the date and time of expiration.
- Purchased material and equipment: Cost to purchase each item that the applicant needed and used to perform eligible work during the increased funding period. In this case, FEMA also applies the increased federal cost share to the usage cost up to the date and time of expiration.
- Leased equipment and facilities: Costs to lease each item up to the date and time of expiration. FEMA calculates the cost based on a proration of time. For example, if a facility is leased for six months based on a monthly rate and the period for the increased federal cost share expired 45 days from the start of the lease, FEMA applies the increased federal cost share to the cost to lease the facility for 45 days based on a proration of the monthly rate.
- Contract costs: Costs for work performed up to the date and time of expiration. If costs cannot be distinguished by date performed, FEMA prorates costs based on the percentage of work completed prior to the deadline versus the percentage of work remaining. However, applicants should work with contractors to delineate dates associated with work.

XVI. Donated Resources

Individuals and organizations often donate resources to assist with response activities. FEMA does not provide PA funding for the value of donated resources; the value of the resources is used only as an offset for the non-federal share of eligible work and costs. However, FEMA allows the applicant to use the value of donated resources (non-cash contributions of property or services)[219] related to eligible emergency protective measures and debris removal to offset the non-federal cost share of its eligible emergency protective measure and debris removal projects and DFA. FEMA also allows applicants to use the value of donated resources related to eligible work on a permanent work project to offset the non-federal cost share of that specific permanent work project. FEMA applies the offsets regardless of the cost share arrangements between a recipient and its subrecipients.

For emergency protective measures and debris removal specifically, if there is a time-limited 100 percent federal cost share period (see Increased Federal Cost Share for a Limited Timeframe in this chapter) and the

[217] 44 C.F.R. § 206.208(c)(2).
[218] 44 C.F.R. § 206.208(c)(1).
[219] 2 C.F.R. § 200.1.

applicant uses resources donated during this time period, it may use the value of those donated resources to offset the non-federal cost share incurred after the 100 percent federal cost share period expires. If the applicant uses resources from its stock that were donated during a previous incident or timeframe, it may use the value of those donated resources to offset its non-federal cost share if the applicant has not claimed the resources as an offset in a previous incident.

The applicant may apply the offset if all of the following conditions are met:

- The donated resource is from a third party (e.g. private entities or individuals, including individuals that are normally paid employees of the applicant or federal, state, Tribal Nation, or territorial government, but are volunteering as unpaid individuals and not on behalf of the employer);
- The donated resource is necessary and reasonable;[220]
- The applicant uses the resource in the performance of eligible work[221] and within the respective project's period of performance;[222] and,
- The applicant or volunteer organization tracks the resources and work performed, including description, specific locations, and hours.[223] The applicant must track the donated resources for permanent work to the specific project for which it is associated.

FEMA considers unpaid individuals who volunteer its labor to the applicant to be third-party even if they are officially members or employees of the applicant organization (e.g., volunteer fire fighters at a PNP volunteer fire department performing eligible emergency protective measures).

Resources donated to the applicant by an organization that would normally provide the same resources under its mission, such as the American Red Cross, are eligible as an offset if the organization is not federally funded. Additionally, if a mutual aid agreement provides for assistance at no cost to the applicant, the applicant may use the value of that assistance to offset its non-federal cost share.

The value of a donated resource is ineligible as an offset toward the non-federal cost share if the resource is:

- Donated by a federal agency;
- Donated by another federally funded source;
- Funded through a federal award;[224]
- Used as an offset to any other federal award;[225] or,
- Used for ineligible work.

[220] 2 C.F.R. § 200.306(b)(3).
[221] Applicants may not use the value of standby time as a donated resource as no work is being performed.
[222] 2 C.F.R. § 200.309. For emergency protective measures, the end of the period of performance is equal to the latest emergency protective measures project's period of performance.
[223] 2 C.F.R. §§ 200.434(d) and 306(b)(1).
[224] 2 C.F.R. § 200.306(b)(5).
[225] 2 C.F.R. § 200.306(b)(2).

Requesting donated resources from contractors during the solicitation phase of a procurement may violate federal procurement rules as it may be considered overly burdensome or restrictive of competition.[226] To remain compliant, applicants can do the following:

- Accept unsolicited donated resources from contractors;
- Maintain a list of donors; and,
- Ask contractors that are donating resources to work with other organizations.

If an applicant accepts donated resources from contractors, it must not do any of the following:

- Solicit donations in its requests for proposals or solicitations for bids;
- Directly solicit donations or requests for proposals from contractors who are actively bidding on its contracts;
- Grant an award to a contractor which has donated resources for the specific work covered by the contract;
- Show favoritism or give the appearance of showing favoritism to a contractor who has donated resources; and,
- Limit competition among contractors based on donated resources, especially for smaller contractors (including women or minority owned businesses) that might not be able to afford to donate resources.

A. Offset Amounts

FEMA applies values to donated resources as follows:

- Volunteer labor: The offset is based on the same straight-time hourly labor rate, and fringe benefits, as a similarly qualified person in the applicant's organization who normally performs similar work. FEMA does not offset volunteer labor based on overtime or premium rates. If the applicant does not have employees performing similar work, FEMA credits the non-federal share based on a rate consistent with those ordinarily performing the work in the same labor market that the applicant would otherwise compete for that type of work.[227]
- Equipment: The offset is based on equipment rates and must not exceed the fair rental value (if loaned) or the fair market value of equipment that is in similar age and condition at the time of donation (if donated with a transfer of title). See Applicant-Owned and Purchased Equipment in this chapter for information on equipment rates.[228]
- Supplies or materials: The offset is based on current commercial rates, which FEMA validates based on invoices from previous purchases or information available from vendors in the area. The amount must not exceed the fair market value at the time of donation.[229]
- Buildings or land: For buildings or land donated permanently (i.e., with a transfer of ownership), the offset is based on the fair market value at the time of donation as established by an independent appraisal and certified by the applicant.

[226] 2 C.F.R. § 200.319.
[227] 2 C.F.R. § 200.306(e) and (f).
[228] 2 C.F.R. § 200.306(g), (h), and (i).
[229] 2 C.F.R. § 200.306(g).

- Space: For building or land space donated for temporary use, the offset is based on the fair rental value of comparable privately-owned space in the same locality as established by an independent appraisal.[230]
- Logistical support: Reasonable logistical support for volunteers doing eligible work, such as donations warehousing and management related to eligible work, may be eligible either for funding (if the applicant provides the logistical support) or as a donated resource offset (if a third party provides the logistical support), subject to approval by FEMA.

FEMA applies the donated resource offset against the combined non-federal cost share for all the applicant's emergency protective measure and debris removal projects (category A and B) under the declared incident. The offset may not exceed the total out-of-pocket costs and is capped at the total non-federal cost share of these projects. FEMA prepares the category A and B donated resource project as a category B project separate from all other category A and B projects for the applicant's incurred costs. FEMA does not obligate the donated resource project until after it obligates all emergency protective measure and debris removal projects for the applicant.

For permanent work, FEMA applies the donated resource offset against the non-federal cost share of the specific permanent work project for which the resources were donated. The offset may not exceed the total out-of-pocket costs. FEMA caps the offset at the non-federal cost share of that specific permanent work project. The type and amount of resources donated must directly correlate to, and may not exceed, the type and amount approved in the SOW of the permanent work project (e.g., if the approved SOW includes replacement of 10 chairs and 15 chairs are donated, the donated resource offset is limited to 10 chairs). FEMA adjusts the Permanent Work project to capture any donated resource offsets related to the project upon receipt of the donated resource information and no later than closeout.

B. Required Documentation and Information for Donated Resources

Applicants must submit the following to support the offset value for donated resources:

Table 18. Required Documentation and Information for Offset Values for Donated Resources

Labor	Equipment	Supplies or Materials
▪ Sign-in sheet; and, ▪ For each individual: ○ Name; ○ Title and function (for professional services); ○ Date and hours worked; ○ Location; and, ○ Description of work performed.	▪ For each piece of equipment: ○ Name of donor; ○ Type of equipment, including make, model, size, capacity, horsepower, and wattage (as applicable); ○ Location or site used; and, ○ Dates and hours used.	▪ For each supply or material: ○ Name of donor; ○ Description and quantity; ○ Location used; and, ○ Documentation to validate claimed value, including invoices, or historical cost records.

[230] 2 C.F.R. § 200.306(i)(3).

XVII. Project Management and Design Services

FEMA provides PA funding for costs related to project management and design activities as part of the project. Project management includes activities performed to manage the actual project. These are activities that would be required regardless of whether the entity is receiving PA funding and differ from management costs, which are costs for activities related to the receipt and administration of PA funding.

Project management activities may include procurement actions, legal review of contracts, monitoring contractor work, construction oversight and inspections, environmental and historic preservation technical studies/surveys, permits, best management practices as recommended by regulatory agencies, and completing load tickets for debris operations. These activities are eligible provided they are tracked, documented, and directly related to a specific, eligible project.

Architectural, engineering, and design services for the approved SOWs, including PA hazard mitigation, are also eligible provided the services are reasonable. Some projects do not need these services or require only basic services, while others require specialized engineering and design.

When evaluating the eligibility of project management and design services, FEMA considers whether the project includes improvements that are ineligible for funding (costs for management and design services associated with improvements or other ineligible work are ineligible). Additional architectural and engineering services related to the improvements for Improved Projects are ineligible.

XVIII. Grant Management and Administration

FEMA provides contributions for management costs that a recipient or subrecipient incurs in administering and managing PA awards under a major disaster or emergency declaration. Eligible activities include any indirect cost, direct administrative cost, and other administrative expense associated with developing and managing eligible PA projects under a major disaster or emergency. For recipients, FEMA provides PA funding for management costs based on actual costs incurred up to 7 percent of the total award amount. For subrecipients, FEMA provides PA funding for management costs based on actual costs incurred up to 5 percent of a subrecipient's total award amount. Additional information is available in FEMA's interim policy.[231]

Terminology

Indirect cost - A cost incurred for a common or joint purpose benefiting more than one cost objective that is not readily assignable to the cost objectives specifically benefited.

In support of a claim for management costs, applicants must provide a summary of the work performed and costs claimed, including the number of employees, a list of equipment used and the equipment rates, total

[231] For more information, refer to: *PA Management Costs Interim Policy* (FEMA Recovery Policy FP 104-11-2) and *PA Management Costs Standard Operating Procedures*.

labor and equipment hours (or miles for vehicles) during the time frame, total labor and equipment costs, and general description of all tasks performed by individuals during the time frame. If FEMA has questions or concerns based on a review of the cost summary submitted, it may request additional documentation in support of an applicant's claim. All claims must be associated with eligible facilities, work, and costs.

XIX. Surveys to Assess or Locate Damage or Debris Impacts

Applicants are responsible for identifying locations of incident-related damage or debris impacts. Costs related to assessing overall impacts of an incident, locating damage or debris impacts, and conducting preliminary damages assessments (PDAs) are not eligible project costs. However, these costs are eligible as management costs if the costs meet the requirements discussed under Grant Management and Administration in this chapter.

If, during a survey after the declaration, an applicant identifies incident-related damage to a facility, the costs related to the inspection of that facility are eligible as management costs provided the facility is eligible.

Further detailed inspections of that damage to determine the extent of damage or quantity of debris and method of repair or removal, including professional evaluations, are eligible as part of the work to restore the facility or work to remove the debris. If an applicant performs a detailed inspection of a partially damaged system, eligible costs are based on the percentage of the system that was damaged. For example, if after inspecting 500 linear feet of sewer line, the applicant identified 100 linear feet of line damaged by the incident, only one-fifth of the inspection costs are eligible.

FEMA has specific eligibility criteria for inspecting earthquake damage to buildings constructed with welded steel-moment frames.[232]

XX. Duplication of Benefits

FEMA is legally prohibited from duplicating benefits from other sources. If applicants receive financial assistance from another program, from insurance, or from any other source for the same work that FEMA funded, FEMA reduces the eligible cost or deobligates funding to prevent a duplication of benefits.[233]

A. Insurance Proceeds

FEMA cannot provide PA funding that duplicates insurance proceeds.[234] Consequently, FEMA reduces eligible costs by the amount of:

- Actual insurance proceeds, if known;[235] or

[232] For more information, refer to: *Recommended Post Earthquake Evaluation and Repair Criteria for Welded Steel Moment-Frame Buildings* (FEMA-P-352).
[233] Stafford Act § 312; 42 U.S.C. § 5155; 2 C.F.R. § 200.406.
[234] Stafford Act § 312; 42 U.S.C. § 5155; 2 C.F.R. § 200.406.
[235] 44 C.F.R. §§ 206.252(c) and 253(a).

- Anticipated insurance proceeds based on the applicant's insurance policy if the amount of actual insurance proceeds is unknown. FEMA subsequently adjusts the eligible costs based on the actual amount of insurance proceeds that the applicant receives.

FEMA requires applicants to take reasonable efforts to pursue claims to recover insurance proceeds that it is entitled to receive from its insurer(s). FEMA limits funding if the insurance policy provides coverage that should be pursued. If an applicant expends costs to pursue its insurance claim, FEMA offsets the insurance reduction with the applicant's reasonable costs to pursue the claim if:

- The incurred cost resulted from pursuing insurance proceeds for FEMA-eligible work; and,
- The applicant can provide documentation to show that the incurred cost was attributed to pursuing more insurance proceeds than the initial settlement amount.

If applicants receive insurance proceeds for ineligible losses (e.g., business interruption), FEMA calculates a relative apportionment of insurance proceeds to determine the insurance reduction based on:

- The proceeds received per type of loss as specified by the insurance policy or settlement documentation;
- Policy limits for categories of loss as specified in the insurance policy; or
- The ratio of total eligible losses to total ineligible losses.

FEMA Recovery Policy (FP) 206-086-1, Public Assistance Policy on Insurance,[236] describes insurance reductions in detail.

Applicants must submit the following to support insurance proceeds:

Table 19. Required Documentation and Information for Insurance Proceeds

Type	Including (As Applicable)
Insurance Policies	▪ Property insurance; ▪ Auto insurance; ▪ Flood insurance; ▪ Wind insurance; and ▪ Self-insurance or self-insured retention.
Insurance Policy documentation	▪ Property policy declaration pages; ▪ Schedule of covered locations; ▪ Property policy forms and endorsements; ▪ Inland marine coverage section; and ▪ Equipment breakdown section.

[236] For more information, refer to: *Public Assistance Policy on Insurance* (FEMA Recovery Policy 206-086-1).

Type	Including (As Applicable)
Insurance Settlement Information (as soon as available)	▪ Final statement of loss; ▪ Adjuster's estimates; ▪ Settlement checks or documentation to support total insurance proceeds; ▪ Correspondence explaining the settlement amount and allocation; and, ▪ Letter of denial.

B. Non-Federal Grants and Cash Donations

Grants and cash donations from non-federal sources are subject to the following criteria based on whether the funds are provided toward a specific purpose and whether that specific purpose is otherwise eligible for PA funding.

- If the funds are designated for the same purpose as eligible work, the following apply:
  - The applicant may use the funds toward its non-federal cost share.
  - If the funds are not used toward the non-federal cost share, FEMA considers the donation or non-federal grant a duplication of benefits and reduces eligible costs by the duplicated amount.
  - If the funds exceed the amount of the non-federal cost share, FEMA reduces eligible costs by the excess amount.
- If the funds are designated for non-specific purposes, FEMA does not consider the funds a duplication of benefits. Applicants may use the funds toward their non-federal cost share. If the funds exceed the amount of the non-federal share, applicants can apply the excess amount toward ineligible work.
- If the funds are designated for a specific purpose that is ineligible, FEMA does not allow applicants to apply the funds toward their non-federal cost share.

C. Third-Party Liability

A third party is a private entity or individual that is not involved in the federal award, i.e., not the applicant or federal, state, Tribal Nation, or territorial government. When a third party causes damage or increases the cost of repair or cleanup and an applicant requests FEMA funding for the costs, FEMA requires the applicant to make reasonable efforts to pursue claims to recover costs it is entitled to receive from the third party.

If the costs recovered are not adequate despite the applicant's good faith effort, FEMA reduces eligible costs based on the recovered amount. If the applicant receives funds from the third party for eligible and ineligible work or losses, FEMA determines the offset amount based on:

- The proceeds received for eligible losses as specified by the settlement documentation; or
- The ratio of total eligible losses to total ineligible losses.

D. Other Federal Awards

If applicants receive funds from another federal agency for the same purpose as PA funding, it is a duplication of benefits. FEMA cannot duplicate funds provided by another federal agency.

XXI. Duplication of Funding Between FEMA Programs

FEMA provides assistance under other programs, such as its Individual Assistance (IA) programs and Hazard Mitigation Grant Program (HMGP), that could duplicate assistance that is available under the PA Program. FEMA must ensure it does not duplicate funds in areas where its programs have the same or similar eligible costs. Applicants must certify that no work or costs being claimed are covered by another funding source.

XXII. Interest on Loans

Applicants may need to obtain a loan to complete work. Financing costs for a loan are only eligible when they meet the conditions established in 2 C.F.R. § 200.449.

XXIII. Ineligible Costs

The Stafford Act authorizes FEMA to provide PA funding for specific work performed as a result of the incident. It does not authorize FEMA to provide PA funding for all losses or costs resulting from the incident. The following costs are ineligible because the Stafford Act does not authorize FEMA to provide PA funding for these items.

A. Loss of Revenue

FEMA cannot provide PA funding for revenue lost due to the incident. The following are examples of when loss of revenue may occur because of an incident:

- Hospitals release noncritical patients to make room for survivors;
- Hospitals sustain damage that reduces pre-disaster existing capacity;
- Waiving toll fees on a toll road, even if for evacuation purposes;
- Waiving the normal fee for ferry service to encourage alternate transportation;
- Waiving tipping fees;
- A utility system is shut down; or
- Events are cancelled due to an entity using a venue for incident-related activities, such as sheltering.

B. Loss of Useful Service Life

FEMA cannot provide PA funding for the projected loss of useful service life of a facility. For example, if a road has been inundated by flood waters for an extended timeframe, FEMA cannot provide PA funding for the value of the projected loss of useful life of the road due to the long-term effects the inundation might have on the road. Similarly, FEMA cannot fund the value of the loss of landfill capacity due to incident-related debris.

C. Tax Assessments

SLTT governments may conduct tax assessments to re-assess real property values after an incident. Costs related to conducting these assessments are ineligible because the assessments are neither essential to addressing an immediate threat to life or improved property, nor connected with the permanent restoration of eligible facilities.

D. Increased Operating Costs

Increased costs related to operating a facility or providing a service due to an increased demand for the services the facility provides are generally ineligible, even when directly related to the incident. However, short-term increased costs that are directly related to accomplishing specific emergency health and safety tasks as part of emergency protective measures are eligible if the costs meet the requirements discussed under Increased Operating Costs in Chapter 7. An example of a potentially eligible increased operating costs includes fuel for increased use of a pumping station. This limited allowance is separate from and does not include loss of revenue.

Chapter 7: Emergency Work Eligibility

PA provides assistance for two types of emergency work following a presidential declaration which are crucial to disaster response and recovery efforts. Financial assistance and technical support are available to ensure the efficient and effective execution of debris removal and emergency protective measures. The goal is to minimize the negative impacts of disasters and promote a swift recovery for affected communities. Proper implementation of these components is essential for communities to regain stability, ensure public safety, and restore essential services following a disaster.

XI. Eligibility Considerations for Emergency Work

FEMA is authorized to provide PA funding for emergency work,[237] including category A: debris removal and category B: emergency protective measures. This chapter includes PA policy for emergency work, which is work that must be done immediately to:

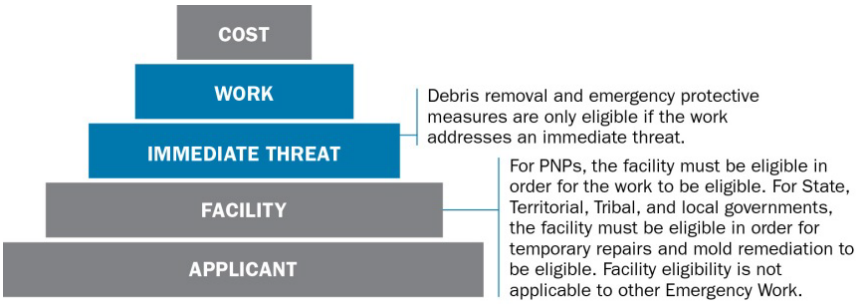

Figure 9. Emergency Work Eligibility

- Save lives;
- Protect public health and safety;
- Protect improved property;[238] or
- Eliminate[239] or lessen an immediate threat of additional impacts and damage.[240]

"Immediate threat" is defined as the threat of additional damage or destruction from an incident that can reasonably be expected to occur within five years of the declared incident.[241]

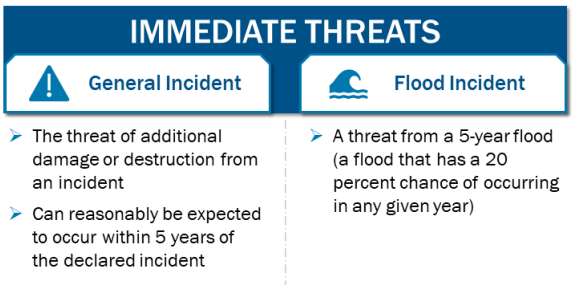

Figure 10. Immediate Threats

The declared incident must have caused the immediate threat to exist. However, the threat itself can be from any type of incident; it is not limited to the type of incident that caused the initial impact or threat. For example, post-fire rainfall may trigger debris flows in an area affected by a presidentially declared wildfire and may pose an immediate threat to life, public health and safety, or improved property. Therefore, under a wildfire declaration, emergency work to

[237] 44 Code of Federal Regulations (C.F.R.) § 206.201(b).
[238] 44 C.F.R. § 206.221(d)
[239] While the regulatory definition of the term "emergency work" includes the term "avert," the regulatory language used for the specific eligibility criteria for debris removal and emergency protective measures includes the term "eliminate," not "avert."
[240] In addition to addressing immediate threats to life, health and safety, and improved property, debris removal may be authorized to ensure economic recovery of the affected community.
[241] 44 C.F.R. § 206.221(c).

address an immediate threat of additional damage or destruction from a rain event that could reasonably be expected to occur within five years could be eligible.

Example: Emergency Work

Tornadic winds damage an eligible facility's roof. The applicant can be reimbursed for emergency work, which is usually work that is temporary in nature. If the legally responsible PA applicant demonstrates that the condition of the roof is such that another incident would cause it to collapse, causing an immediate threat to life, public health and safety, or improved public or private property, FEMA provides funding to temporarily stabilize and make temporary repairs to the roof as a category B emergency work emergency protective measure until the applicant can make more lasting repairs to their facility; reference Emergency Repair or Stabilization in this chapter.

The deadline to complete emergency work is six months from the declaration date unless the recipient or FEMA authorizes an extension.[242] Although federal regulations allow six months to complete emergency work, FEMA considers the urgency with which applicants proceed with work when evaluating eligibility. Applicants should not delay when taking actions to address threats to life, public health and safety, and improved property.

To be eligible, work must be the legal responsibility of an eligible applicant.[243] Emergency response is a governmental function. As a result, for private nonprofit (PNP) applicants, eligible emergency work is generally limited to that associated with an eligible PNP facility as follows:

- Debris removal from the facility property; and,
- Emergency protective measures to prevent damage to the facility and its contents.

In limited circumstances, other types of emergency work for PNPs is eligible when essential components of a facility are urgently needed to save lives or protect public health and safety. If a PNP provides emergency services at the request of, certified by, and documented in a written agreement or contract between the legally responsible government entity, FEMA provides PA funding through that government entity as the eligible applicant.

For state, local, Tribal Nation, and territorial (SLTT) applicants, evaluating facility eligibility is not necessary for most emergency work. For these applicants, eligibility of emergency work is primarily based on the evaluation of an immediate threat and the legal authority to perform the work. Applicants must submit the following to support work eligibility:

[242] 44 C.F.R. §§ 206.204(c) and (d).
[243] 44 C.F.R. § 206.223(a)(3).

Table 20. Required Documentation and Information for Work Eligibility

For Small Projects	For Large Projects[244]
▪ Detailed description of work performed; and, ▪ Applicants can certify to the following requirements to support eligibility in lieu of providing documentation to support that: ○ The work is as a result of immediate threat; ○ Activities are required as a result of the declared incident; ○ Work is located on improved property and in a declared area; and, ○ The applicant is legally responsible for conducting the work.	▪ Detailed description of work performed; ▪ Description of immediate threat; and, ▪ Records demonstrating presence of immediate threat (e.g., technical reports, safety inspector reports, photographs), if an immediate threat is not apparent based on the descriptions provided.

XII. Debris Removal (Category A)

Debris removal activities, such as clearance, removal, recycling, and disposal are eligible under category A if the removal is in the public interest, based on whether the work is necessary to:

- Eliminate immediate threats to life, public and safety; or
- Eliminate immediate threats of significant damage to improved[245] public or private property; or
- Ensure economic recovery of the affected community to the benefit of the community-at-large;[246] or
- Reduce or limit the risk to life and property by removing substantially damaged structures and associated ancillary facilities as needed to convert property acquired using Hazard Mitigation Grant Program (HMGP) funds for uses compatible with open space, recreation, or wetlands management practices. Such removal must be completed within two years of the declaration date unless extended by the Assistant Administrator of the Recovery Directorate at FEMA Headquarters.[247]

Debris includes, but is not limited to, vegetative debris, construction and demolition debris, sand, mud, silt, gravel, rocks, boulders, white goods, and vehicle and vessel wreckage. Snow-related activities including road clearing are not considered debris operations, as snow is not considered a form of debris.

[244] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.
[245] 44 C.F.R. § 206.221(d).
[246] This condition is generally restricted to debris removal from large commercial areas when a significant percentage of the commercial sector of a community is impacted and coordinated debris removal is necessary to expedite restoration of the economic viability of the affected community.
[247] Stafford Act § 407; 42 United States Code (U.S.C.) § 5173; 44 C.F.R. § 206.224(a).

For a PNP applicant, eligible debris removal is limited to that associated with an eligible facility, including debris on the property of the eligible facility.

Terminology

Federal-aid roads are highways on the federal-aid highway system and all other public roads not classified as local roads or rural minor collectors. The federal-aid highway system means the National Highway System and the Dwight D. Eisenhower National System of Interstate and Defense Highways (the Interstate System).

Debris left by the declared incident on improved public property and public rights-of-way (ROWs), including federal-aid roads, is eligible for removal. If state, local, Tribal Nation, or territorial (SLTT) governments authorize residents to move incident-related debris from residential, non-commercial properties to public ROWs, the removal of this debris is also eligible. However, commercial debris placed on the ROW is not eligible. FEMA provides Public Assistance (PA) funding to cover the removal of debris from ROWs for a limited period.

Applicants must monitor contracted debris removal operations and document work and costs that may be eligible for reimbursement through the PA Program. Monitoring debris removal operations requires observation and documentation of all work from the point of debris collection to the final disposal.

Table 21. Required Documentation and Information for Debris Removal and Disposal

For Small Projects	For Large Projects[248]

▪ Estimated or actual debris quantities removed, reduced, disposed, and recycled by type;
  ○ If debris removal is contracted, documentation to substantiate monitoring was conducted.
▪ Location of temporary debris staging and reduction sites (TDSRs) and permanent or final disposal sites;
▪ Type of disposal site (e.g., municipal, private, or commercial);
  ○ If commercial, name of vendor.
▪ Copies of permits and authorization for reduction and disposal sites;
	▪ Estimated or actual debris quantities removed, reduced, disposed, and recycled by type;
	▪ Load tickets;
	▪ Photographs of debris impacts;
	▪ If debris removal is contracted:
	  ○ Proof of monitoring; and
	  ○ Tower logs.
	▪ Location of temporary debris staging and reduction sites (TDSRs) and permanent or final disposal sites;
	▪ Type of disposal site (e.g., municipal, private, or commercial);
	  ○ If commercial, name of vendor.

[248] FEMA utilizes an attribute-based sampling approach, following the *GAO Financial Audit Manual*, for verifying supporting documentation for PA projects; therefore, FEMA may select a representative sample rather than reviewing all documentation. For more information, refer to: *Public Assistance Sampling Procedure*.

For Small Projects	For Large Projects[248]
▪ Documentation to substantiate debris is not pre-existing for waterway debris removal; ▪ Documentation to substantiate coordination with other regulatory or federal agencies; and, ▪ If removing vegetative debris in an invasive species quarantine area: ○ Name of quarantine area; ○ Method of disposal; and ○ Confirmation that the debris was disposed of according to quarantine requirements.	▪ Copies of permits and authorization for reduction and disposal sites; ▪ Documentation to substantiate debris is not pre-existing for waterway debris removal; ▪ If removing vegetative debris in an invasive species quarantine area: ○ Name of quarantine area; ○ Method of disposal; and ○ Confirmation that the debris was disposed of according to quarantine requirements. ▪ Documentation to substantiate coordination with other regulatory or federal agencies; and, ▪ If removing hazardous trees, limbs and stumps, documentation supporting the specifics of the immediate threat with the location and photos.

To support removal of hazardous trees, limbs, and stumps FEMA requires that applicants retain documentation supporting the specifics of the immediate threat with the location and photograph or video documentation. However, for small projects, this doesn't have to be provided with the project when submitted. As will all project documentation, the information should be retained and can be requested.

Removal of debris placed on the public ROWs from commercial properties is ineligible unless FEMA provides an exception for very limited, extraordinary circumstances (see Debris Removal from Private Commercial Property in this chapter). Additionally, removal of materials related to the construction, repair, or renovation of either private non-commercial or commercial structures is ineligible.

Removal and disposal of pollutants and hazardous substances are generally eligible under category B; however, they may be eligible as category A debris removal when conducted as part of the overall debris operations. Otherwise, removal of hazardous materials is category B work in accordance with the Hazardous Materials section in this chapter.

Debris removal from the following is ineligible:

- Federally maintained navigable channels and waterways (usually under the authority of the U.S. Coast Guard (USCG) or USACE[249]);

[249] The U.S. Army Corps of Engineers (USACE) has primary responsibility for the removal of debris from federally-maintained navigable channels and waterways. Section 202 of the Water Resources Development Act of 1976 (PL 94-587) authorizes USACE to remove debris from federally-maintained commercial harbors and water areas immediately adjacent thereto. Sections 15, 19 and 20 of the River and Harbor Act of 1899, as amended, authorize USACE to remove sunken vessels or other obstructions from navigable waterways under emergency conditions. A navigable waterway is one that has been authorized by Congress and which USACE operates and maintains for general (including commercial and recreational) navigation. USACE's policy is to oversee removal of

- Agricultural land; and
- Natural, unimproved land, such as heavily wooded areas and unused areas.[250]

Removing debris to restore the pre-disaster capacity of engineered facilities is eligible as permanent work if the applicant can substantiate the pre-disaster capacity and maintenance of that facility as described under Restoring the Capacity of Channels, Basins, and Reservoirs in Chapter 8.

Removal and disposal of pollutants and hazardous substances are eligible either as category A debris removal when conducted as part of the overall debris operations or as category B work in accordance with the Hazardous Materials section in this chapter.

A. Hazardous Limbs, Trees, and Stumps

Eligible vegetative debris includes tree limbs, branches, stumps, or trees that are still in place, but damaged to the extent they pose an immediate threat to life, public health and safety, or significant damage to improved property. These items are ineligible if the hazard existed prior to the incident, or if the item is in a natural area and does not extend over or otherwise threaten improved property or public-use areas, such as trails, sidewalks, or playgrounds.

Contractors typically charge debris removal based on a unit price for volume (cubic yards) or weight (tons). A hazardous tree or stump may be collected individually. When these items are collected individually, contractors often charge a price per tree or stump based on its size. FEMA encourages applicants to procure branch or limb removal from trees on a one-time charge per tree basis as opposed to a unit price per limb or branch to facilitate more cost-effective operations. FEMA has specific eligibility criteria and information or documentation requirements for funding these items.

Terminology

Hazardous tree - A hazardous tree is a standing tree that presents a hazard to the public due to conditions such as, but not limited to, deterioration or physical damage to the root system, trunk, stem or limbs, and the direction and lean of the tree per 43 U.S. Code § 1772.

Bracing a tree is eligible as category B work. FEMA encourages applicants to work with a registered professional forester, an individual with a Tree Risk Assessment Qualification (TRAQ), or a certified arborist to perform hazard tree assessments to determine those trees that can be saved by bracing without causing a public health and safety concern.

Pruning, maintenance, trimming, and landscaping are ineligible.

sunken vessels by an identifiable owner, operator or lessee if the sunken vessel is in or likely to be moved into a federal navigation channel. USACE will remove a vessel using its emergency authorities only if the owner, operator or lessee cannot be identified or they cannot affect removal in a timely and safe manner.

[250] 44 C.F.R. § 206.224(b)).

1. HAZARDOUS LIMB OR BRANCH REMOVAL

Removal of broken limbs or branches that pose an immediate threat is eligible. For example, a broken limb or branch hanging over improved property or public-use areas, such as trails, sidewalks, or playgrounds, poses an immediate threat of falling and causing injury to the public or damage to improved property.

FEMA does not fund removal of broken limbs or branches located on private property unless:

- The limbs or branches extend over the public right-of-way (ROW);
- The limbs or branches pose an immediate threat; and
- The applicant removes the hazard from the public ROW (without entering private property).

Note: Only the minimum cut necessary to remove the hazard is eligible. For example, cutting a branch at the trunk is ineligible if the threat can be eliminated by cutting it at the closest main branch junction.

2. HAZARDOUS TREE REMOVAL

FEMA considers incident-damaged trees to be hazardous and eligible for removal if the tree presents a hazard to the public due to conditions including, but not limited to:

- Deterioration or physical damage to the root system, trunk, stem, or limbs;[251] or
- The direction and lean of the tree per the Occupational Safety and Health Standards.[252]

For hazardous trees that have 50 percent or more of the root-ball exposed, removal of the tree and root-ball and filling the root-ball hole are eligible. For contracted removal of a tree with an exposed root-ball, FEMA will not reimburse two separate unit costs to remove the tree and its root-ball.

For hazardous trees that have less than 50 percent of the root-ball exposed, FEMA only provides PA funding to flush cut the item at ground level and dispose of the cut portion based on volume or weight. Grinding any residual stump after cutting the tree is ineligible.

The removal of hazardous trees that pose an immediate threat to life, public health and safety, or significant damage to improved public or private[253] property, as assessed by the authority having jurisdiction, in coordination with a qualified individual[254] is eligible.

When estimating or calculating costs for tree removal, applicants may utilize a cost per parcel of land approach or a cost per tree. Applicants must clearly state which method they have selected when requesting reimbursement for eligible work. Only those trees that pose an immediate threat to public health and safety

[251] 29 C.F.R. § 1910.266(c).
[252] Forest Health Protection Technical Report Revised: March 2022 (FHP Report # RO-22-01).
[253] Removal from private property subject to the policy language regarding Private Property Debris Removal (PPDR) in this chapter.
[254] According to the International Society of Arboriculture, only a registered professional forester, an individual with a Tree Risk Assessment Qualification (TRAQ), or a certified arborist may perform hazard tree assessment; however, the authority having jurisdiction of the geographic location, will make the determination regarding recognition of individuals qualified to make the determination.

or improved property are eligible under either approach. The applicant must provide sufficient documentation to validate the approach was cost-effective.

3. HAZARDOUS STUMP REMOVAL

For stumps that have 50 percent or more of the root-ball exposed, removal of the stump and filling the root-ball hole are eligible. If grinding a stump in-place is less costly than extraction, grinding the stump in-place is eligible.

Stump removal in areas with known or high potential for archaeological resources requires that FEMA Environmental and Historic Preservation (EHP) further evaluate and consult with the state historic preservation officer (SHPO) and/or tribal historic preservation officer (THPO). If an applicant discovers any potential archeological resources during stump removal, the applicant must immediately stop work and notify FEMA. For highly sensitive areas, such as cemeteries or Tribal Nation lands, FEMA will determine if a qualified monitor[255] is required.

i. Contracted Stump Removal

FEMA only reimburses contracted costs charged on a per-stump basis if extraction is required as part of the removal. Applicants need to ensure the price for stump removal includes extraction, transport, disposal, and filling the root-ball hole.

For stumps that have less than 50 percent of the root-ball exposed, FEMA only provides PA funding to flush cut the item at ground level and dispose of the cut portion. Grinding any residual stump is ineligible.

For stumps that do not require extraction, FEMA only provides PA funding based on volume or weight as removal of these stumps does not require special equipment.

If an applicant incurs additional costs in picking up stumps that the contractor did not extract, it should present information or documentation to substantiate the costs as reasonable based on the equipment required to perform the work.

ii. Documentation Requirements for Hazardous Limbs, Trees, and Stumps

In addition to the general documentation required for debris removal operations, applicants must provide all of the following documentation to support the eligibility of work to remove tree limbs, branches, stumps, or trees that are still in place:

- Quantity removed;
- Quantity, location, and source of material to fill root-ball holes; and,
- Description of equipment used to perform the work.

[255] A qualified monitor is an individual meeting the Secretary of the Interior's Professional Qualification Standards in archaeology in accordance with Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines | nps.gov.

B. Waterways

Debris removal from waterways that is necessary to eliminate an immediate threat to life, public health and safety, or improved property is eligible. Removal of debris in a waterway that does not meet this criterion is ineligible, even if the debris is deposited by the incident.

Certain federal agencies hold specific authority for debris removal in waterways. For effective coordination and to respect their areas of responsibility, agencies like the EPA and USCG should be consulted before debris removal begins. The EPA and USCG have specific authority over the removal of hazardous materials: the EPA handles hazardous material removal in most inland water areas, while the USCG is responsible for coastal waters, navigable lakes, and rivers outside of inland zones. Debris removal from waterways usually requires coordination with the U.S. Army Corps of Engineers (USACE) for the use of a nationwide permit and with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) to ensure compliance with Section 7 of the Endangered Species Act (ESA).

1. NAVIGABLE WATERWAYS

If an applicant has the legal responsibility to maintain a navigable waterway, removal and disposal of incident-related debris that obstructs the passage of vessels is eligible. Debris removal is eligible to a maximum depth of 2 feet below the low-tide draft of the largest vessel that utilized the waterway prior to the incident. Any debris below this zone is ineligible unless it is necessary to remove debris extending upward into an eligible zone.

If a tree is still rooted to an embankment and is floating or submerged, the cost to cut the tree at the water's edge is eligible.

Debris removal from federally maintained navigable waterways is ineligible. The USCG and the USACE have specific authorities for removal of hazardous substances, vessels, and other obstructions from federally maintained navigable waterways.[256]

2. NON-NAVIGABLE WATERWAYS, INCLUDING FLOOD CONTROL WORKS AND NATURAL WATERWAYS

Debris deposited by the incident may obstruct a natural waterway that is not improved or maintained or a constructed channel, including flood control works. In these cases, removal of the debris from the channel is eligible if the debris poses an immediate threat to improved facilities/properties, such as when the debris:

- Obstructs, or could obstruct, intake structures;
- Could cause damage to structures, such as bridges and culverts; or
- Is causing, or could cause, flooding to improved public or private property during the occurrence of a flood that has a 20 percent chance of occurring in any given year (5-year flood).

Removal of the obstruction may be eligible in streams where debris removal might also be eligible under the Natural Resources Conservation Service (NRCS) Emergency Watershed Protection Program (EWP)[257]. Each

[256] For more information, refer to: Mission Assignments (FP 104-010-3) | fema.gov.
[257] For more information, refer to: Emergency Watershed Protection | Natural Resources Conservation Service | usda.gov.

agency has different program eligibility requirements; therefore, FEMA, the recipient, and the applicant need to coordinate with NRCS prior to conducting work to maximize funding and ensure there is no duplication of benefits.

Debris removal from flood control works that were installed under the specific authority of NRCS and Public Law 83-566 (The Watershed & Flood Prevention Operations Program (WFPO), or Section 216 of Public Law 81-516, 33, U.S. Section 701b-1. is ineligible for PA funding, even if NRCS does not have sufficient funding or does not provide assistance.

Flood control works under the specific authority of NRCS are those that are part of the WFPO Program under PL 83-566WFPO Program.[258]

For flood control works that are eligible for the USACE Rehabilitation and Inspection Program (RIP),[259] debris removal is eligible for PA funding. USACE does not reimburse applicants for debris removal but conducts this activity when necessary.

3. IDENTIFYING DEBRIS IMPACT LOCATIONS

Applicants are responsible for identifying debris deposited by the incident that poses an immediate threat. Random surveys to look for debris, including surveys performed using side scan sonar, are ineligible. Satellite imagery or waterway soundings/bathymetric surveys showing the waterway pre-and post-disaster can substantiate that debris was deposited by the incident and was not pre-existing. If an applicant identifies an area of debris impacts and demonstrates the need for a survey to identify a specific immediate threat, PA funding for the survey in that location, including the use of side scan sonar, is eligible.

C. Privately-Owned Vehicles and Vessels on Public Property

Removal of privately-owned vehicles and vessels from public property is eligible if all of the following conditions are met:

- The vehicle or vessel blocks access to a public-use area;
- The vehicle or vessel is abandoned;
- The applicant follows applicable SLTT government ordinances or laws for private vehicle or vessel removal; and,
- The applicant documents the handling of the vehicle or vessel.

Applicants need to provide documentation to support it met these criteria.

A limited timeframe for vehicle and vessel storage is eligible if it is necessary to remove the item prior to being able to identify the owner. If the owner is identified, the applicant should work with private property owners to pursue and recover storage and removal costs and credit FEMA the federal share of any funds received.

[258] For more information, refer to: Watershed and Flood Prevention Operations (WFPO) Program | Natural Resources Conservation Service | usda.gov.
[259] For more information, refer to: Rehabilitation and Inspection Program | USACE.army.mil.

D. Disposal

FEMA provides PA funding for various costs related to disposing of debris. Applicants should dispose of debris in an efficient and cost-effective manner.

Vegetative debris is bulky and can consume a significant volume of landfill space. To minimize the use of landfill space, FEMA encourages applicants to reduce the volume of vegetative debris. Costs to reduce vegetative debris using methods, such as mulching, grinding, or burning are eligible. Reducing and/or recycling debris has financial and environmental advantages.

When removing sand, disposal of sand spoils on a public beach is eligible as part of the debris removal project when it is the most cost-effective method of disposal.

Certain types of construction and demolition debris are reusable or recyclable. Applicants should conserve landfill space by separating materials for reuse or recycling.

1. RECYCLING REVENUE

If an applicant receives revenue from recycling debris, FEMA reduces PA funding by the amount of revenue received. Applicants may deduct costs for administering and marketing the sale of the salvageable materials from the fair market value.

If a contract allows the contractor to take possession of salvageable material and benefit from its sale to lower bid prices, there is no salvage value to be recovered at the end of the project. Therefore, the applicant has no further obligation to FEMA.

2. TEMPORARY STAGING SITES

Establishing and operating a temporary staging site necessary for debris separation and reduction is eligible. The cost to lease property is eligible. Additionally, if the terms of the lease require that an applicant restore the leased property back to its condition prior to the applicant's use, the costs related to that restoration are also eligible as part of the category A project. If leased, applicants must provide the lease agreement.

3. HAND-LOADED TRUCKS AND TRAILERS

FEMA has determined that, for vegetative debris, hand-loaded trucks and trailers achieve approximately half the compaction level of mechanically loaded trucks and trailers. Therefore, FEMA only provides PA funding for 50 percent of the debris monitor's observed capacity of hand-loaded trucks and trailers carrying vegetative debris.

Similarly, trucks without solid tailgates cannot be compacted to full capacity. Therefore, FEMA only funds up to a maximum of 85 percent of the certified capacity for trucks without solid tailgates and would apply a 15 percent reduction to the total debris quantity.

Applicants must document the types and total quantity of hand-loaded debris, and the types and total quantity of debris hauled in trucks without solid tailgates and provide this information to FEMA to ensure appropriate reductions are taken for this debris.

4. LANDFILLS AND TIPPING FEES

Landfill tipping fees usually include fixed and variable costs, along with special taxes or fees assessed by the jurisdiction in which the landfill is located. Eligible tipping fee costs are limited to the variable and fixed costs that are directly related to landfill operations, such as recycling tax.

Eligible fixed costs for tipping fees include:

- Equipment;
- Construction;
- Permits;
- Landfill closure;
- Post-closure activities; and,
- Amortized costs for facilities that support the landfill.

Eligible variable costs for tipping fees include:

- Labor;
- Supplies;
- Maintenance; and,
- Operation of utilities.

The components of tipping fees that are not directly related to landfill operations, such as special taxes or fees related to other government services or public infrastructure, are ineligible as part of the tipping fee. When providing PA funding for tipping fees, FEMA removes any ineligible components.

Applicants may use a significant portion of the available capacity of a landfill to dispose of incident-related debris. Although FEMA provides PA funding for tipping fees, it cannot provide PA funding for the value of the loss of landfill capacity due to incident-related debris.

E. Monitoring Contracted Debris Removal Operations

Applicants must monitor all contracted debris removal operations to ensure that the quantities and work claimed are accurate and eligible. This includes documenting debris quantities by types, quantities reduced, reduction methods, and pickup and disposal locations.

Applicants may use force account resources (including temporary hires), contractors, or a combination of these for monitoring. It is not necessary, or cost-effective, to have professional engineers or other certified professionals perform debris monitoring duties. FEMA considers costs unreasonable when associated with the use of staff that are more highly qualified than necessary for the associated work. If an applicant uses staff with professional qualifications to conduct debris monitoring, it must document the reason it needed staff with those higher qualifications.

FEMA provides training to an applicant's force account debris monitors (including its temporary hires) upon request.

Eligible activities associated with debris monitoring include, but are not limited to:

- Field supervisory oversight;
- Monitoring contracted debris removal at both the loading and disposal sites;
- Compiling documentation, such as load tickets and monitor reports, to substantiate eligible debris; and,
- Training debris monitors on debris removal operations, monitoring responsibilities and documentation processes, and FEMA debris eligibility criteria.

The "Public Assistance Debris Monitoring Guide"[260] provides in depth guidance for monitoring debris removal operations, including eligibility, roles, resources, and activities.

F. Private Property Debris Removal

Debris removal from private property (e.g., privately-owned roads, privately-owned non-commercial property, or commercial property) is the responsibility of the property owner and is usually ineligible under the PA Program. In limited circumstances, based on the severity of the impact of an incident and whether debris on private property is so widespread that it threatens public health and safety or the economic recovery of the community, FEMA may determine that private property debris removal (PPDR) is eligible under the PA Program. In such cases, FEMA works with the SLTT governments to designate specific areas where PPDR, including private waterways, is eligible. The debris removal must be in the public interest, not merely benefiting an individual or a limited group of individuals. Figure 11. Debris on Public Property is an example of the level of debris impacts that may warrant FEMA assistance for PPDR.

Figure 11. Debris on Public Property

1. PPDR ELIGIBILITY DETERMINATION PROCESS

Pre-approval from FEMA is not required for applicants to begin PPDR work (including on privately-owned roads, privately-owned non-commercial, and commercial property). However, applicants must notify FEMA that PPDR is being conducted and identify the type of property on which the PPDR is being conducted (e.g., privately-owned roads, privately-owned non-commercial, or commercial property) so FEMA can ensure notifications are made to the necessary FEMA components, (including EHP), and federal partners. Given the limited eligibility of and the additional requirements related to PPDR on both non-commercial and commercial property, although not required, applicants are encouraged to obtain preliminary approval for the activity from FEMA prior to starting work.

For FEMA to evaluate eligibility of PPDR funding requests, applicants must submit written documentation to FEMA identifying the specific properties or areas of properties where PPDR activities occurred. Before FEMA will provide PA funding, the applicant must provide confirmation that it satisfied all legal processes, described below and obtained permission requirements from the property owners (rights-of-entry)

[260] For more information, refer to: *Public Assistance Debris Monitoring Guide*.

agreements to indemnify and hold harmless the Federal government. Additionally, the applicant must provide documentation to support that it obtained all necessary permits and complied with EHP requirements. FEMA only approves PA funding for PPDR if an applicant demonstrates all the following with sufficient documentation:

Table 22. Required Documentation and Information for PPDR

For Small and Large Projects
▪ Written documentation identifying the specific properties or areas of properties where PPDR occurred; ▪ A written statement from an authorized applicant official that: ○ Certifies the applicant has legal authority and responsibility to remove debris from private property; ○ Cites all applicable sources of authority (law, ordinance, code, contract, etc.); and, ○ Indemnifies the federal government for any claim arising from the debris removal. ▪ Documentation to show the work is eligible for PA funding.

These requirements are in addition to the guidance regarding debris-related documentation under Table 21. Required Documentation and Information for Debris Removal and Disposal.

i. Public Interest

Applicants must demonstrate that the PPDR was in the public interest.[261] This includes:

- The basis for the assertion that removing the debris from the private property locations requested was in the public interest. The assertion must be made by the state, Tribal Nation, territorial, county, or municipal government's public health authority or other public entity that has legal authority to assert that disaster-generated debris on private property constitutes an immediate threat to life, public health, or safety, or to the economic recovery of the community at large.
- The established, specific legal requirements for declaring the existence of a threat to public health and safety.

Terminology

Public entity - An organization formed for a public purpose whose direction and funding are provided by one or more political subdivisions of the state.

FEMA evaluates the submission to determine if PPDR is in the public interest for any properties or area of properties for which an applicant has requested funding for debris removal. When evaluating PPDR funding requests, FEMA considers if the incident generated debris in quantities and/or types on non-commercial or commercial private property that is so widespread or of such magnitude that it creates a threat to public health, safety, or improved property. FEMA also considers factors, such as social vulnerability, the

[261] Stafford Act § 407; 42 U.S.C. § 5173; 44 C.F.R. § 206.224(b).

percentage of homes destroyed in the community or census designated area, community density, watershed exposure, the fire hazard severity zone (FHSZ) of the area, and the cost of hazardous debris removal.

2. DEBRIS REMOVAL FROM PRIVATE ROADS

Private roads are those that are not owned by, or operated by, or otherwise the legal responsibility of a public entity, such as orphan roads, roads in gated communities, or homeowners' association roads.

If the public has unrestricted access (e.g., no locks, gates, or guards) and frequently uses the private road, then removal and disposal of the debris is demonstrably in the public interest. This work includes debris placed at the curbside by residents. The applicant is generally not required to submit additional documentation demonstrating the debris removal is in the public interest.

If the public has restricted road access (e.g., behind locks, gates, or guards) or the private roads are unrestricted but rarely used by the public, then the applicant must demonstrate that such debris removal is in the public interest. FEMA has the authority to determine whether such debris removal is eligible.

Debris removal from private roads does not include debris on private driveways or parking lots. Debris clearance (e.g., push or cut and toss) for emergency access is eligible as category B work if it meets the criteria under the Emergency Access section in this chapter.

3. DEBRIS REMOVAL FROM PRIVATE NON-COMMERCIAL PROPERTY

Debris removal from private non-commercial property is usually not in the public interest because the debris does not typically represent an immediate threat to public health and safety.[262] If the incident generates debris quantities and/or types of debris on non-commercial property that is so widespread or of such magnitude that it creates an immediate threat to public health and safety, debris removal may be in the public interest. To determine if removal of debris from private residential property is in the public interest, FEMA evaluates the public health determination, and will consider:

- Whether the debris is located in open areas accessible to the public (e.g., in a yard with no fence or barrier next to a public sidewalk), located in maintained areas, or creating a health and safety hazard, such as a rodent infestation;
- Volume of debris;
- Height of debris;
- Number of houses and blocks with large volumes of debris; and,
- Amount of the public population affected.

4. DEBRIS REMOVAL FROM PRIVATE COMMERCIAL PROPERTY

Debris removal from commercial property is typically ineligible, as commercial businesses are expected to have insurance covering this. Applicants are advised to obtain written pre-approval from FEMA for any debris removal from commercial properties before starting work.

[262] 44 C.F.R. § 206.224

In rare and exceptional cases, such as when critical facilities are involved, restoration costs for damaged infrastructure in a small area are exceptionally high, or debris is heavily concentrated, the FEMA Regional Administrator may grant an exception. In these cases, applicants must meet the stated requirements.

Commercial property owners are not allowed to move or place debris from their properties onto public rights-of-way. Debris on public rights-of-way from the incident itself is eligible for removal, but debris deliberately moved there from commercial properties is not eligible.

5. DUPLICATION OF BENEFITS IN PRIVATE PROPERTY DEBRIS REMOVAL

Applicants must work with private property owners to pursue and recover insurance proceeds and credit FEMA the federal share of any insurance proceeds received.[263] In some circumstances, FEMA may provide Individual Assistance (IA) to individuals for debris removal; consequently, FEMA PA staff coordinates closely with IA staff to ensure FEMA does not fund the same work under both programs.

XIII. Emergency Protective Measures (Category B)

Emergency protective measures conducted before, during, and after an incident are eligible if the measures:

- Eliminate or lessen immediate threats to lives, public health or safety; or
- Eliminate or lessen immediate threats of significant additional damage to improved public or private property in a cost-effective manner.[264]

FEMA may require certification by federal or SLTT government officials that a threat exists, including:

- Identification and evaluation of the threat; and
- Recommendations of the work necessary to cope with the threat.[265]

A. Saving Lives and Protecting Public Health and Safety

Emergency protective measures save lives or protect public health and safety. Eligible emergency protective measures include, but are not limited to:

- Transporting and pre-positioning equipment and other resources for response;
- Flood fighting;
- Emergency Operations Center (EOC);
- Provision of emergency access;
- Provision of supplies and commodities;
- Medical care and transport;
- Evacuation and sheltering, including that provided by another state or Tribal Nation;
- Childcare services provided in support of emergency sheltering;

[263] Stafford Act § 312; 42 U.S.C. § 5155.
[264] 44 C.F.R. § 206.225(a)(3).
[265] 44 C.F.R. § 206.225(a)(2).

- Building safety inspections;
- Animal carcass removal;[266]
- Demolition of structures;[267]
- Debris clearance and removal;[268]
- Search and rescue to locate survivors, household pets, and service animals requiring assistance;
- Firefighting;
- Security, such as barricades, fencing, or law enforcement;
- Use or lease of temporary generators for facilities that provide essential community services;
- Dissemination of information to the public in an accessible and effective manner to provide warnings and guidance about health and safety hazards using various strategies, such as flyers, public service announcements, or newspaper campaigns;
- Searching to locate and recover human remains;
- Storage and interment of unidentified human remains; and,
- Mass mortuary services.[269]

The following are eligible under limited circumstances based on specific criteria described in each of the referenced sections:

- Increased costs related to operating a facility or providing a service as a result of the incident because of an increased demand for the services the facility provides;[270]
- Mosquito abatement;[271]
- Temporary relocation of essential services;[272] and,
- Snow-related activities[273] when specifically authorized in the declaration.

B. Protecting Improved Property

Eligible emergency protective measures to protect improved property include, but are not limited to:

- Constructing emergency berms or temporary levees to provide protection from floodwaters or landslides;
- Emergency repairs necessary to prevent further damage, such as covering a damaged roof to prevent infiltration of rainwater;
- Buttressing, shoring, or bracing facilities to stabilize them or prevent collapse;

[266] FEMA funds the removal of animal carcasses as category A if the removal is part of the applicant's overall debris disposal operation as opposed to a separate and distinct emergency protective measure operation under category B.
[267] FEMA usually reimburses demolition of a public structure as part of the permanent work project to replace the facility.
[268] Stafford Act 403(a)(3)(A).
[269] FEMA provides PA assistance for mass casualty management, including mass mortuary services, as part of recovery from an incident generating a large number of casualties. However, PA does not cover individual burial or funeral services. FEMA's Individual Assistance (IA) Funeral Assistance Program, if activated, may provide limited assistance to individuals and households.
[270] For more information, refer to Increased Operating Costs in Chapter 6.
[271] For more information, refer to Mosquito Abatement in this chapter.
[272] For more information, refer to Temporary Relocation of Essential Services in this chapter.
[273] For more information, refer to Snow-Related Activities in this chapter and Appendix K: Snow Declarations.

- Emergency slope stabilization to eliminate a threat of significant additional damage to improved public or private property;[274]
- Mold remediation to prevent further damage to the facility and its contents, such as removal of water damaged building materials;
- Removal and storage of contents from eligible facilities for the purpose of minimizing additional damage;
- Extracting water and clearing mud, silt, or other accumulated debris from eligible facilities if the work is conducted expeditiously for the purpose of addressing an immediate threat;[275] and,
- Taking actions to save the lives of animals that are eligible for replacement.[276]

C. Emergency Protective Measures on Private Property

In limited circumstances, FEMA may determine that emergency protective measures conducted on private property are eligible under the PA Program if:

- The immediate threat is widespread, affecting numerous homes and businesses such that it is a threat to the health and safety of the general public;
- The applicant has legal authority to perform the work; and,
- The applicant obtained rights-of-entry and agreements to indemnify and hold harmless the federal government.

Situations where this may occur are generally limited to:

- Demolition of unsafe private structures that endanger the public;[277]
- Animal carcasses removal;
- Installation of fiber-reinforced sheeting to cover damaged roofs, commonly referred to as Operation Blue Roof[278] (direct federal assistance only);
- Provision of emergency access;[279]
- Pumping of septic tanks or decontamination of wells causing a pollution threat;[280]
- Building safety inspections);[281] and,
- Stabilizing a slope.[282]

Upon submittal of its claim, an applicant must include the following support documentation for the work to be eligible:

- A detailed explanation documenting the applicant's legal authority and responsibility to enter private property;
- The basis for the determination that a threat exists to the general public; and,

[274] 44 C.F.R. § 206.225(a)(3).
[275] If the work is only necessary to restore the facility, it is permanent work, not emergency work.
[276] For more information, refer to Animals in Chapter 8.
[277] For more information, refer to Demolition of Private Structures in this chapter.
[278] For more information, refer to Operation Blue Roof (DFA Only) in this chapter.
[279] For more information, refer to Emergency Access in this chapter.
[280] For more information, refer to Hazardous Materials in this chapter.
[281] For more information, refer to Safety Inspections in this chapter.
[282] For more information, refer to Slope Stabilization in this chapter.

- Copies of the rights-of-entry and agreements to indemnify and hold harmless the federal government.

If the above criteria are not met, the private property owner may be eligible for assistance under FEMA's Individual Assistance (IA) Program. FEMA PA and IA staff will coordinate closely to ensure FEMA does not fund the same work under both programs.

D. Emergency Protective Measures Conducted by Private Nonprofit Organizations

For eligible PNPs, emergency protective measures are generally limited to activities associated with preventing damage to an eligible facility and its contents.

Emergency services are the responsibility of SLTT governments. Therefore, PNPs are generally not legally responsible for those services and FEMA does not provide PA funding to PNPs for the costs associated with providing those services. However, when a PNP provides emergency services at the request of, and certified (e.g. in a written agreement or contract) by, the legally responsible SLTT government entity, FEMA provides PA funding through that government entity as the eligible applicant. These services include:

- Fire and rescue activities;
- Animal control;
- Emergency ambulance service for evacuation;
- 211 call services, if tracked and related to eligible work; and,
- Other similarly urgent governmental services.

PNPs that own or operate a medical or custodial care facility are eligible for direct reimbursement of costs related to patient evacuation. In limited circumstances, FEMA may also reimburse a PNP directly when essential components of a facility are urgently needed to save lives or protect health and safety, such as an emergency room of a PNP hospital or a PNP sewage or water treatment plant.

FEMA reimburses a PNP volunteer fire department directly as an eligible applicant, if:

- The PNP volunteer fire department operates based on an established agreement with an SLTT government; and,
- The agreement certifies the PNP volunteer fire department is legally authorized to provide emergency services in areas of coverage specifically designated by the SLTT government.

E. Pre-Positioning Resources

Costs related to pre-positioning of resources, specifically equipment and supplies, for the declared incident are eligible if the resources are used in the performance of eligible emergency work. For more information regarding pre-positioning of labor, see Applicant (Force Account) Labor in Chapter 6.

Additionally, costs related to pre-positioning equipment and supplies outside of the declared area are eligible when related to conducting search and rescue, evacuation, sheltering, or providing emergency medical care during the evacuation period (such as ambulances and buses) provided the resources were ultimately used for the declared area.

F. Increased Operating Costs

Applicants may incur increased costs related to operating a facility or providing a service as a result of the incident because of an increased demand for the services the facility provides.

These additional costs are only eligible if:

- The services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property in response to the declared incident;
- The costs are for a limited timeframe based on the emergency or exigency of the circumstances; and,
- The applicant tracks and documents the additional costs.

Increased operating costs that are eligible for a limited time, include but are not limited to, costs for:

- Water testing and treatment, including supplies, in the immediate aftermath of the incident to counter a specific threat; and,
- Fuel for increased use of pumps (e.g., pumping station) which may include electricity utility fees for pumps operated by electric motors. Eligibility is subject to policy regarding applicant-owned and purchased equipment (see Chapter 6: Cost Eligibility).

Increased operating costs that are ineligible, even for a limited time, include but are not limited to, costs for:

- Patient care, except as noted under Emergency Medical Care in this chapter;
- Administrative activities;
- Provision of food, except as noted under Supplies and Commodities and Meals in this chapter;
- Costs related to staff that were retained to work additional hours, but did not perform eligible emergency work (e.g., staff working additional shifts due to other staff's inability to get to work);
- Obtaining electrical power from an alternate source;
- Obtaining water from an alternate source;
- School make-up days, including contracted costs for bus service for make-up days;
- Provision of school bus service including fuel or mileage for transporting students from alternate locations or to alternate schools or temporary facilities; and,
- Modification or construction of a new landfill to add landfill capacity.

For PNPs, operating costs are generally ineligible even if the services are emergency services, unless the PNP performs an emergency service at the request of and certified by the legally responsible government entity. In such case, FEMA provides PA funding through that government entity as the eligible applicant.

G. Emergency Public Transportation and Communication (DFA Only)

An SLTT government may provide emergency communication services and public transportation when existing systems are damaged to the extent vital functions of community life or incident response are disrupted. The costs of these services are ineligible for reimbursement. However, FEMA may provide short-

term DFA for these services.[283] Transportation costs for the purpose of evacuation are eligible for reimbursement as described under Evacuation and Sheltering in this chapter.

H. Flood Fighting

Flood fighting activities may include, but are not limited to, sandbagging, dewatering behind a levee by breaching or pumping, or increasing the height of a levee. These activities are eligible if necessary to reduce an immediate threat to life, public health and safety, or improved property. These activities are eligible even if they are associated with a facility that is eligible for the USACE RIP, as USACE cannot reimburse applicants for flood fighting.

The repair of deliberate breaches made by the applicant to accomplish dewatering is eligible as part of the emergency work project.

Dewatering agricultural and natural areas behind levees and other water control structures is ineligible.

I. Emergency Operations Centers

An applicant may use its EOC to direct and coordinate resources and response activities for a period of time. Response activities conducted at EOCs are eligible provided they are associated with eligible work. Costs associated with operating the EOC[284] are also eligible, including, but not limited to:

- Increased utility costs;
- Costs to lease a facility;
- Supply costs; and,
- Meal costs, as described under Meals in this chapter.

J. Emergency Access

There are times when the declared incident causes damage or debris blockage to access routes to an essential community service, or to a community with survivors. If the extent of damage or blockage makes these areas cut off or isolated, work related to providing access is eligible. This includes clearing debris from or conducting emergency repairs to an access facility, such as a road or bridge. Eligible work is limited to what is necessary for the access to remain passable. Any debris removal or additional debris clearance is category A and funded based on the criteria under Debris Removal (Category A) in this chapter.

Private roads are those that are not owned or operated by or otherwise the legal responsibility of a local, county, tribal, territorial, state, or federal entity. Emergency road clearance includes pushing or clearing debris from private roads, including orphan roads, roads in gated communities, homeowners' association roads, etc. Debris clearance must be in the public interest and is eligible if the debris impairs emergency access by local emergency responders, ambulances, fire, and police. For example, downed trees may be cut and moved off the roadway. Eligible work is limited to that necessary for roads to remain passable but might

[283] Stafford Act §§ 418 and 419; 42 U.S.C. §§ 5185 and 5186; 44 C.F.R. § 206.225(c) and (d).
[284] Additional information regarding the function and requirements of an EOC may be accessed at: NIMS Components - Guidance and Tools | fema.gov.

include removal and disposal during the initial pass as necessary to ensure emergency access. Applicants are not required to submit documentation demonstrating that debris clearance is in the public interest.

Applicants must complete all necessary legal processes or obtain rights-of-entry and agreements to indemnify and hold harmless the federal government.

Emergency repairs to privately-owned roads, including those within gated communities, are eligible only when all of the following conditions are met:

- There is no other access point;
- Repair of the damage economically eliminates the need for temporary housing and sheltering; and,
- The applicant completes all legal processes and obtains rights-of-entry and agreements to indemnify and hold harmless the federal government.

K. Hazardous Materials

Removal and disposal of pollutants and hazardous substances are eligible. Eligible activities include:

- Separation of hazardous materials from other debris;
- Specialized procedures for handling and disposing of hazardous materials;
- Control or stabilization of the hazardous materials;
- Pumping water contaminated with the hazardous materials; and,
- Clean-up and disposal of the hazardous materials.

Short-term testing for contaminants in water, air, or soil necessary to ensure elimination of the immediate threat is eligible; however, testing for the purpose of long-term cleanup actions is ineligible.

Applicants must comply with federal and SLTT government environmental requirements for handling hazardous materials. Before handling or disposing of hazardous materials, applicants should contact the appropriate federal or SLTT agency to obtain required permits, notify proper agencies of hazardous materials storage, and coordinate the creation of any required facility specific emergency response plans for spills, safety, and proper handling. Additionally, appropriate certified hazardous waste specialists should handle, capture, recycle, reuse, or dispose of hazardous materials. When providing PA funding for work involving the handling of hazardous materials, FEMA must ensure compliance with the Resource Conservation and Recovery Act (RCRA).[285]

Additionally, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)[286] authorizes the federal government to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Under CERCLA and the Clean Water Act (CWA),[287] EPA and the USCG have the authority to respond to actual or potential discharges of oil, hazardous substances, pollutants, and contaminants that may present an imminent and substantial danger to public

[285] For more information, refer to: Resource Conservation and Recovery Act | epa.gov.
[286] For more information, refer to: Comprehensive Environmental Response, Compensation, and Liability Act and Federal Facilities | epa.gov.
[287] For more information, refer to: Clean Water Act | epa.gov.

health or welfare. EPA has responsibility for responses in the inland zone and the USCG has responsibility for responses in the coastal zone.[288] Response actions may include containment, stabilization, decontamination, collection (e.g., orphan tanks, drums), and disposal.

Terminology

Inland zone is the environment inland of the coastal zone, excluding the Great Lakes and specified ports and harbors on inland rivers. Precise boundaries are identified in federal regional contingency plans.

L. Supplies and Commodities

Costs related to applicants purchasing supplies or using their own stock to perform emergency work are eligible and reimbursed in accordance with the Supplies section in Chapter 6. Examples include, but are not limited to, safety equipment, personal protective equipment, radios, power tools, sand, and tarps.

Purchasing and packaging lifesaving and life-sustaining supplies and commodities and providing them to the impacted community are eligible. Examples of such commodities include, but are not limited to, food, water, ice, personal hygiene items, cots, blankets, tarps, plastic sheeting for roof damage, and generators, as well as food, water, bowls, and containment for household pets and service animals. The cost of delivering these same commodities to unsheltered residents in communities where conditions constitute a level of severity such that these items are not easily accessible for purchase is also eligible. Provision of mass care, emergency feeding operations by SLTT or PNP organizations are eligible in the context of distributing supplies and commodities. This includes food and water for household pets.

Figure 12. Distribution of Supplies

The cost of leasing distribution and storage space for the commodities is also eligible. Supplies and equipment purchased to provide emergency protective measures may be subject to disposition requirements in accordance with the Disposition of Equipment and Supplies section in Chapter 6.

M. Meals

Applicants often provide meals for emergency workers. Provision of meals, including beverages and meal supplies, for employees and volunteers engaged in eligible emergency work, including those at EOCs, is eligible provided the individuals are not receiving per diem and one of the following circumstances apply:

[288] For more information, refer to: *FEMA POLICY: Mission Assignments FEMA Policy #104-010-3*.

- Meals are required based on a labor policy or written agreement that meets the requirements under Chapter 6: Cost Eligibility;
- Conditions constitute a level of severity that requires employees to work abnormal, extended work hours without a reasonable amount of time to provide for their own meals; or
- Food or water is not reasonably available for employees to purchase.

FEMA only reimburses the cost of meals that are brought to the work location and purchased in a cost-effective and reasonable manner, such as bulk meals. FEMA does not reimburse costs related to group outings at restaurants or individual meals. FEMA reimburses meal costs as part of a contract in accordance with the contract terms provided it meets the requirements under Procurement and Contracting Requirements in Chapter 6.

N. Emergency Medical Care

When the emergency medical delivery system within a declared area is destroyed, severely compromised, or overwhelmed, FEMA funds extraordinary costs associated with operating emergency rooms and with providing temporary facilities for emergency medical care of survivors. Costs associated with emergency medical care should be customary for the emergency medical services provided. Costs are eligible for up to 30 days from the declaration date unless the applicant obtains FEMA approval for any time extension, which should include a detailed justification for the continued need and an analysis of options for providing care, including the costs for each option. The Assistant Administrator for the Recovery Directorate at FEMA Headquarters has the authority to approve this policy exception.

Eligible emergency medical care includes, but is not limited to:

- Triage and medically necessary tests and diagnosis;
- Treatment, stabilization, and monitoring;
- Patient assessment and provision of first aid;
- A one-time 30-day supply of prescriptions for acute conditions or to replace maintenance prescriptions;
- Vaccinations for survivors and emergency workers to prevent outbreaks of infectious and communicable diseases;
- Durable medical equipment;
- Consumable medical supplies;
- Temporary facilities, such as tents or portable buildings for treatment of survivors;
- Leased or purchased equipment for use in temporary medical care facilities;
- Security for temporary medical care facilities; and,
- Use of ambulances for distributing immunizations and setting up mobile medical units.

Terminology

The following types of equipment and supplies are intended for the treatment of an illness or injury, to prevent a patient's further deterioration, or for the functional needs support of persons living with disabilities.

Durable medical equipment is reusable medical equipment including, but not limited to:

- Oxygen equipment;
- Wheelchairs;
- Walkers;
- Hospital beds; and,
- Crutches,

Consumable medical supplies are medical supplies generally for one-time use only, including, but not limited to:

- Medications (may include Naloxone [Narcan]);
- Diapers;
- Adult incontinence briefs; and,
- Bandages.

FEMA determines the reasonableness of these costs based on Medicare's cost-to-charge ratio.

FEMA does not provide PA funding for these costs if underwritten by private insurance, Medicare, Medicaid, a pre-existing private payment agreement or otherwise covered by another funding source.[289] Applicants must take reasonable steps to provide documentation on a patient-by-patient basis verifying that insurance coverage or any other source funding, including private insurance, Medicaid, or Medicare, has been pursued and does not exist for the costs associated with emergency medical care and emergency medical evacuations.

Terminology

Cost-to-charge ratio - A ratio established by Medicare to estimate a medical service provider's actual cost in relation to its charges.

Ineligible costs include:

- Medical care costs incurred once a survivor is admitted to a medical facility on an inpatient basis;

[289] Stafford Act § 312; 42 U.S.C. § 5155.

- Medical care costs incurred beyond immediate emergency medical care, such as those associated with follow-up treatment or long-term medical treatment; and,
- Administrative costs associated with the treatment of survivors.

O. Evacuation and Sheltering

1. EVACUATION

Transportation to evacuate (and subsequently return) survivors, household pets,[290] service animals,[291] assistance animals,[292] luggage, and durable medical equipment is eligible. This includes emergency medical transportation and evacuation. The mode of transportation should be customary and appropriate for the work required. Evacuation of exhibition or agricultural/livestock animals and reptiles, except turtles, is not eligible.

Terminology

Household pets are domesticated animals that:

- Are traditionally kept in the home for pleasure rather than for commercial purposes;
- Can be transported through commercial carriers; and,
- Can be housed in temporary facilities.

Examples are dogs, cats, birds, rabbits, rodents, and turtles.

Household pets do not include reptiles (except turtles), amphibians, fish, insects, arachnids, farm animals (including horses), or animals kept for racing purposes.

Under the Americans with Disabilities Act (ADA), a **service animal** is defined as a dog that has been individually trained to do work or perform tasks for an individual with a disability. The task(s) performed by the dog must be directly related to the person's disability.

Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or provide emotional support that alleviates identified symptoms or effects of a person's disability. Although dogs are the most common type of assistance animal, other animals can also be assistance animals.

Eligible activities include, but are not limited to:

[290] The definition of household pets was developed by PA for the purpose of determining eligibility of work and costs under the PA grant program and does not impose restrictions on what animals a jurisdiction may choose to evacuate and/or shelter.
[291] Service animals are defined by the Department of Justice (DOJ) and more information may be accessed at ADA 2010 Revised Requirements: Service Animals; "In addition to the provisions about service dogs, the Department's ADA regulations have a separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities."
[292] The definition for assistance animals was developed based on information from U.S. Department of Housing and Urban Development (HUD).

- Transferring patients from inoperable, compromised, or overwhelmed eligible medical or custodial care facilities to another medical facility or to an appropriate shelter facility;
- Transferring patients back to original medical or custodial care facility, when appropriate;
- Transporting survivors, including sheltered survivors, who require emergency medical care to and from the nearest existing or temporary medical care facility equipped to adequately treat the medical emergency. Transport may include emergency air, sea, or ground ambulance services if necessary;
- Use of equipment, such as buses, trucks, or other vehicles (including accessible vehicles) to provide one-time transportation to evacuate survivors and their household pets and service and assistance animals to evacuation facilities or emergency shelters from pre-established pick-up locations. This includes standby time for drivers and contracted equipment while waiting to transport survivors;
- Paratransit transportation services, such as vans, minibuses, and buses (including accessible vehicles) to transport senior citizens, individuals with disabilities (including mobility disabilities) or access and functional needs, individuals in nursing homes and assisted-living facilities, and homebound individuals impacted by the incident;
- Tracking of evacuees, household pets, service animals, luggage, and durable medical equipment. This includes the use of animal microchips GPS tags, and other electronic means for the purpose of tracking and reunification of evacuated animals;
- Provision of food and hydration during transport;
- Provision of emergency medical care during transport, including emergency medical personnel and supply costs;
- Stabilization of individuals injured during evacuation; and,
- Preparation necessary in advance of an incident for evacuations in threatened areas including mobilization of ambulances and other transport equipment.

Figure 13. Staging Area with Ambulances

Contracts for staging ambulance services must be part of the state, territorial, Tribal Nation, or regional evacuation plan. Costs of staging ambulances are eligible even if the incident does not impact the area normally served by those ambulances. PA funding for activating, staging, and using ambulance services ends when any of the following occurs:

- FEMA and the state, Tribal Nation, or territory determines that the incident did not impact the area where it staged ambulances;
- Evacuation and return of medical patients and individuals with disabilities or access and functional needs is complete; or
- The immediate threat caused by the incident has been eliminated or lessened and the demand for services has returned to normal operation levels.

FEMA does not provide funding for costs related to:

- Ambulance services that are covered by private insurance, Medicare, Medicaid, or a pre-existing private payment agreement;[293] and,

[293] Stafford Act § 312, 42 U.S.C. § 5155.

- Self-evacuee transportation.

2. SHELTERING

FEMA provides PA funding to SLTT government applicants for costs related to emergency sheltering for survivors, and their household pets,[294] service animals,[295] and assistance animals. Although SLTT governments may contract with other sheltering providers for such services, FEMA only provides PA funding directly to the SLTT government as it is legally responsible for the work.

Emergency sheltering is meant to provide disaster survivors with safe, sanitary, and secure shelter during emergencies in facilities that are intended to provide temporary refuge for all members of the community, including children and adults requiring functional needs' support services. Typically, emergency sheltering is congregate. Congregate sheltering may provide overnight accommodation operating 24/hours a day or operate during limited hours to provide relief from extreme temperature weather events and provide shelter as either a cooling or warming center.

i. Congregate Sheltering

Congregate shelter funding includes reimbursement for eligible costs related to the shelter facility, shelter staff, shelter supplies and commodities, and shelter services. These eligible costs for congregate sheltering are based on the type of shelter and the specific needs of the sheltered survivors.

Eligible costs for congregate sheltering are covered in more detail within the following subsections. If any of the items listed are donated, including labor, applicants may offset the non-federal cost share of their eligible emergency work projects in accordance with Donated Resources in Chapter 6. Eligible costs are only reimbursed for the time the facility is actively used to shelter disaster victims.

Congregate sheltering costs not listed in the four groupings below may be eligible for reimbursement on an incident specific basis. Applicants should consult FEMA PA staff for guidance if items not listed below need to be considered for eligibility.

a. Congregate Shelter Facility Costs

Eligible congregate shelter facility costs include:

- Facility lease or rent, including space for food preparation;
- Utilities, such as power, water, telephone, and internet service;
- Minor facility modifications if necessary to make the facility:
  - Habitable,

[294] The definition of household pets was developed by PA for the purpose of determining eligibility of work and costs under the PA grant program and does not impose restrictions on what animals a jurisdiction may choose to evacuate and/or shelter.
[295] Service animals are defined by the Department of Justice (DOJ), and more information may be accessed at ADA 2010 Revised Requirements: Service Animals; "In addition to the provisions about service dogs, the Department's ADA regulations have a separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities."

- Compliant with the Americans with Disabilities Act (ADA),[296]
- Functional to support ancillary services, such as a childcare facility; or
- Functional as a household pet shelter;

- Restoration to return the facility to its condition prior to use;[297]
- Generator costs; and,
- Secure storage space for medical supplies.

If an eligible SLTT government applicant owns or leases the shelter facility, and a volunteer agency operates the shelter, the facility costs described above are eligible. However, the labor costs for the volunteer agency's workers are ineligible (except as a donated resource in accordance with the criteria under Donated Resources in Chapter 6).

b. Congregate Shelter Staff Costs

Eligible shelter staff costs for congregate facilities include:

- Medical staff;
- Personal assistance service staff;
- Veterinary and animal care staff;
- Public information officer;
- Social workers (for crisis intervention/psychological first aid, and/or possibly to support transition out of the shelter for acute care);
- Food service workers;
- Custodial and facilities staff; and,
- National Guard personnel.[298]

c. Congregate Shelter Supplies and Commodities

Eligible items are those needed for, and used directly on, the declared incident and are reasonable in both cost and need. Eligible supplies and commodities for congregate shelters include:

- Hot and cold meals, snacks, beverages, and related supplies for survivors;
- Cooking and serving supplies;
- Food, water, and bowls for household pets and service and assistance animals;
- Durable medical equipment;
- Consumable medical supplies;
- Medication for animal decontamination and parasite control;
- Infant formula, breast feeding/chest feeding support items, baby food, and diapers;

[296] The applicant should ensure that the facility is in compliance with the ADA standards.
[297] If more than cleaning and minor repairs to the building are needed, applicants should consult FEMA regarding work eligibility.
[298] For more information, refer to the National Guard section in Chapter 6.

- Refrigerators, microwaves, and crock pots;
- Cots, cribs, linens, blankets, pillows, tables, and chairs;
- Crates, cages, leashes, and animal transport carriers;
- Personal hygiene kits with items, such as shampoo, soap, toothpaste, a toothbrush, towels, and washcloths;
- Animal cleaning tables and supplies;
- Televisions or radios (one per 50 sheltered survivors);
- Basic cable service;
- Computers (one per 25 shelterees);
- Internet service, including wi-fi;
- Washers and dryers (one of each per 50 shelterees); and,
- Toys and books.

d. Congregate Shelter Services

Shelter services are only eligible for the time the facility is actively used to shelter survivors. Eligible shelter services for congregate facilities include:

- Shelter management;
- Supervision of paid and volunteer staff;
- Cleaning the shelter, linens, and animal crates;
- Shelter safety and security;
- Use of equipment, such as ambulances, buses, trucks, or other vehicles, to provide sheltering support;
- Phone banks and Internet access for survivors;
- Care for survivors with disabilities or access and functional needs, including the provision of the following personal assistance services:
  - Grooming, eating/feeding, walking, bathing, toileting, dressing, and undressing;
  - Transferring (e.g., movement between a cot and wheelchair or wheelchair to restroom facilities);
  - Maintaining health and safety, including serving as accessible cooling or warming center;
  - Assisting with self-administering medications; and
  - Communicating or accessing programs and services (e.g., translation and interpretation services for individuals with limited English proficiency or accessible communication services for individuals with disabilities).
- Emergency medical, crisis intervention/psychological first aid, and veterinary services for sheltered survivors, household pets, and service and assistance animals, including:
  - Emergency and immediate life stabilizing care, including necessary prescriptions (not to exceed a 30-day supply);
  - Triage, medically necessary tests, diagnosis, treatment, stabilization, and monitoring;
  - Patient assessment;

- Provision of first aid, health information, and referral to acute care facilities as necessary;
- Care for evacuees with chronic conditions;
- Administering vaccinations to sheltered survivors and workers for transmissible or contagious diseases, including, but not limited to, tetanus and hepatitis;
- Administering vaccinations to household pets, and service and assistance animals, for transmissible or contagious diseases, including, but not limited to, Bordetella (kennel cough). The vaccinations need to be effective while the animal is in the shelter;
- Provision of durable medical equipment (DME) and consumable medical supplies (CMS) to support shelter residents;[299]
- Provision of crisis intervention/psychological first aid in support of emotional distress, and referral to other behavioral health and substance use health care services and facilities outside the congregate shelter environment as necessary; and,
- Medical waste disposal.

- Outpatient costs for sheltered survivors requiring emergency life-sustaining treatment not available at the shelter for the period of time that a survivor is housed in the shelter. Eligible outpatient services are limited to:
  - Physician services in a hospital outpatient department, urgent care center, or physician's office;
  - Related outpatient hospital services and supplies, including X-rays, laboratory and pathology services, and machine diagnostic tests; and,
  - Local professional transport services to and from the nearest hospital equipped to adequately treat the emergency.
- Sheltering self-evacuees (self-evacuee transportation costs are ineligible); and,
- Costs paid to the American Red Cross (ARC) or other non-governmental organizations (NGOs) to operate shelters under a written agreement. Costs that ARC or other NGOs incur under their own organizational mission (i.e., independent of any federal or SLTT request) are ineligible for reimbursement.

Note: Transportation of shelter residents to and from (other than for the medical purpose referenced above) the shelter is not an eligible sheltering activity. Additionally, costs incurred in the provision of disaster case management and/or mental/behavioral health services are ineligible unless the mental/behavioral health services are provided as an accommodation to survivors with disabilities, services in the NCS environment beyond "crisis intervention/psychological first aid" would require referral or transfer to a medical facility for treatment of an acute condition.

ii. Non-Congregate Sheltering

FEMA may reimburse costs related to emergency sheltering provided in non-congregate environments under limited and exigent circumstances. Non-congregate sheltering does not require pre-approval when conducted in traditionally operated facilities limited to hotels, motels, dormitories, and retreat camps, which offer an increased level of privacy over congregate sheltering. NCS activity in any other facility (e.g., recreation vehicles, including travel trailers; condominiums; short-term rentals, including Airbnb; ships)

[299] Reference the list of DME & CMS located under Emergency Medical Care in this chapter.

requires FEMA pre-approval by the Assistant Administrator for the Recovery Directorate at FEMA Headquarters.

Applicants are required to notify FEMA Headquarters and their Regional Administrator, through the recipient, within five days of initiating NCS operations for a declared incident. If sheltering is conducted prior to a federal declaration, then the notification requirement applies as five days post declaration.

Examples: Exigent Circumstances where NCS may be Considered

NCS will be considered for approval in limited, exigent circumstances, such as when congregate shelter facilities are:

- Not available due to the nature of the incident (e.g., identified shelter facilities were damaged by the incident);
- Insufficient to meet the need for sheltering; or,
- No longer available for use if owners of facilities used as congregate shelters require their return to their routine purpose or use, resulting in cessation of shelter operations.

When providing NCS, as a condition of assistance, recipients and applicants must comply with all statutes, regulations, and EOs, including those that require impartial and fair delivery of FEMA funding to all communities. FEMA monitors compliance with these laws when granting assistance. Failure to adhere to these laws may result in the termination of or refusal to grant or continue providing federal financial assistance.

a. Requests for Non-Congregate Sheltering

Applicants must submit written requests for work and costs related to NCS in non-traditionally operated facilities (e.g., recreation vehicles, including travel trailers; condominiums; short-term rentals, including Airbnb; ships) through the recipient and obtain FEMA approval prior to sheltering survivors. At a minimum, an applicant should include the following information in its request:

- Justification for the necessity of non-congregate sheltering;
- Whether the state, Tribal Nation, or territorial government has requested the Transitional Sheltering Assistance (TSA) from FEMA's Individual Assistance (IA) Program;[300]
- The type of non-congregate sheltering available and which type the applicant intends to use;
- An analysis of the available options with the associated costs of each option; and
- The timeframe requested (i.e., date of activation and length of time projected for NCS operations).

[300] FEMA's Transitional Sheltering Assistance provides short-term sheltering for survivors transitioning from emergency shelters to temporary or permanent housing solutions. Additional information is available in FEMA's *Individual Assistance Program and Policy Guide*.

While selecting the location of NCS facilities, applicants are encouraged to consider community demographics to ensure all populations have ready access to sheltering.

To establish and conduct NCS in non-traditional facilities, such as recreational vehicles (RVs), applicants must request this specifically. Such requests must be approved by the Assistant Administrator for the Recovery Directorate at FEMA Headquarters. NCS provided in any setting other than traditional facilities (i.e., hotels/motels, dormitories, and retreat camps) will be subject to additional disaster-specific requirements and guidance issued by FEMA.

FEMA limits any NCS approval to that which is reasonable and necessary to address the needs of the incident. FEMA determines the eligible costs based on the contractual agreement, including reimbursement for repairing damage if it is the applicant's legal responsibility based on the facility use agreement or lodging services contract.

If FEMA approves the request, recipients must provide sufficient data and documentation to establish eligibility (including the need for NCS resulting from the disaster, reasonableness, and costs).

b. Eligible Costs for Non-Congregate Sheltering

NCS costs are based on a per night, per room amount. Unlike congregate sheltering, funding for NCS does not include separate reimbursement for facility, staff, service, or supply costs. Costs for items or services associated with NCS are eligible if included within the NCS per night, per room charges.

Generally, feeding support and shelter support services are limited to the initial 30 days of NCS operations. These support services are only eligible for a longer period of time when routine access to food, other essential supplies and commodities, and support services are disrupted by the disaster incident, and clearly documented when an applicant seeks reimbursement.

Limited funding for casework in support of disaster survivor's transition to temporary or long-term housing options may be eligible.

If applicants are uncertain whether specific NCS-related costs would be considered eligible, they are encouraged to seek guidance from FEMA PA regional staff before incurring such costs.

c. Ineligible Costs for Non-Congregate Sheltering

Ineligible costs include:

- Costs associated with ancillary services (e.g., room service, pay-per-view movies, parking fees, or other costs for *à la carte* amenities);
- Costs related to reserving rooms or deploying facilities (e.g., RVs as NCS) that go unoccupied by an identified, displaced disaster survivor individual or household requiring sheltering assistance;
- Costs related to any expense beyond a traditional per night, per room charge when providing NCS via hotel, motel, dormitory, or retreat camp (this includes damages to the facility by the disaster survivors); and
- Costs incurred in the provision of disaster case management and/or mental/behavioral health services.

d. Survivor Insurance and Non-Congregate Sheltering

Survivors being sheltered in NCS facilities may have homeowner's insurance coverage. Such coverage does not constitute a duplication of benefits even if the individual's or household's insurance includes additional living expenses or loss of use coverage for their home. This is based on NCS being an emergency protective measure to protect the health and safety of the public at large, as opposed to being a benefit directly to an individual or household. Further, homeowners' insurance policies typically include additional living expenses as an expense that overall insurance proceeds may cover, as opposed to a specific line item dedicated to that specific expense.

e. Time Extensions for Non-Congregate Sheltering

When applicants anticipate that the need for NCS will exceed the approved time period, they must obtain FEMA approval for any time extensions. These time extensions are granted in 30-day increments. NCS conducted for more than 30 days is subject to the criteria in the NCS Work Eligibility Requirements section below.

Applicants must submit a written time extension request through the recipient to the FEMA Regional Administrator. This request should include a detailed justification for the continued need and a revised analysis of options, including the costs for each option. Applicants should submit time extension requests at least seven calendar days before the expiration date of the currently approved NCS period of performance.

The Regional Administrator has the authority to approve time extensions for traditional and non-traditional NCS for up to 6 months from the date of declaration. All NCS activities beyond the initial 6 months require approval by the Assistant Administrator of Recovery at FEMA Headquarters.

f. NCS Work Eligibility Requirements

If applicants request an extension of NCS activities beyond the initial period of performance, NCS work eligibility will be determined based on the criteria detailed below. For NCS conducted for more than 30 days, recipients and applicants are required to use data regarding the individuals and households sheltered to ensure that only individuals and households with a demonstrated need for continued emergency sheltering remain in NCS facilities.

Only non-congregate sheltering that is provided to individuals and households who align with the following criteria is considered PA eligible work beyond the initial period of performance. To be eligible for NCS beyond the first 30 days, each household must:

- Be in an area (county or parish) designated for both the Individual Assistance (IA) and PA Programs;
- Be registered with IA for disaster assistance;
- Have not requested to withdraw its IA registration;
- Be able to document pre-disaster status as an owner or renter of the primary residence; and
- Have their primary residence determined to be uninhabitable due to incident-caused damage or inaccessible due to the ongoing incident.

Applicants may determine a household's habitability status using IA information, home assessment information, or a habitability assessment process developed by the applicant. Applicants must submit the habitability determination method with the time extension request. Additionally, applicants should maintain information about the basic habitability for each household in NCS during the period for which they are requesting a time extension.

g. Data Collection, Management, and Reporting During NCS Operations

To effectively manage NCS operations and ensure that only individuals and households with a demonstrated need for continued emergency sheltering remain in NCS facilities, applicants are required to collect, compile, and report on information from disaster survivors housed in NCS. Applicants conducting NCS activities must establish and maintain a reporting system that captures the following data elements to ensure eligibility of the work and associated costs:

- FEMA IA Registration ID (if available);
- Head of household first and last name and phone number (mobile or other);
- Number of disaster survivor households and individuals sheltered in NCS by county;
- Damaged dwelling street address, city, state, zip code;
- Pre-incident primary-residence habitability status
- Number of rooms/NCS shelter units occupied by disaster survivors by county;
- Number of rooms
- NCS shelter check in and out date;
- Shelter site identification (number or name); and,
- The counties in which NCS is being conducted.

Applicants should inform individuals and households that the above collected information will be shared with FEMA.

FEMA PA staff will not collect the data on behalf of the recipient or applicant. FEMA expects recipients to ensure applicants are prepared to provide information substantiating eligibility and submit the defined data elements to FEMA on a weekly basis.

Applicants are expected to provide recipients with data reporting the first week of NCS operations and weekly thereafter until the NCS operations have concluded. This reporting supports project management and facilitates the transition of disaster survivors to longer-term housing solutions or out of NCS. Applicants may opt to provide more frequent reporting and should provide an updated report with any time extension requests.

Recipients are required to submit this weekly report information to the FEMA Data Sharing Support Box[301]. FEMA's Recovery Reporting and Analytics Division (RRAD) utilizes these data points and cross-checks them against disaster survivors receiving Individual Assistance to: 1) ensure the continued need for sheltering

[301] The FEMA Data Sharing Support Box can be reached at: fema-recovery-rad-data-sharing-support@fema.dhs.gov.

services; and 2) prevent duplication of benefits between the PA and IA programs. RRAD provides reports based on this information back to recipients, PA, and IA to enable effective management of the NCS population. Aggregated information, excluding personally identifiable information (PII), is also provided to PA senior staff upon request for inclusion as support for NCS projects.

The recipient and applicant must comply with the above described NCS data reporting requirements to determine eligibility and to help prevent fraud, waste, or abuse. FEMA, the applicant, and the recipient (including its contractors) may need to enter into information sharing access agreements (ISAAs) to coordinate data sharing of PII between the recipient, applicant, and FEMA. The recipient, applicant, and their contractors must abide by all terms and conditions of any relevant ISAA or data sharing addendum (DSA) to the FEMA state/Tribal Nation/territory agreement.

3. HOST-STATE OR HOST-TRIBE EVACUATION AND SHELTERING

If the impacted state or Tribal Nation (impact-state or impact-tribe) has evacuation and congregate sheltering needs beyond its ability to address within its jurisdictional area, it may request assistance either from another state or Tribal Nation (host-state or host-tribe) through mutual aid agreements, such as EMAC, or from FEMA. Only congregate sheltering by the host-state/tribe is eligible for PA funding.

Terminology

Impact-state or **impact-tribe** means the state or Tribal Nation for which the president declared an emergency or major disaster and requested FEMA assistance because of a need to evacuate and/or shelter affected individuals outside the state or tribal lands.

Host-state or **host-tribe** means a state or Tribal Nation that by agreement with FEMA provides sheltering or evacuation support to evacuees from an impact-state or impact-tribe.

If the impact-state/tribe requests assistance directly from another state or Tribal Nation, FEMA reimburses costs based on the mutual aid agreement as described under Mutual Aid in Chapter 6. FEMA may also provide PA funding to the host-state/tribe directly, even if the impact-state/tribe already requested assistance directly from that host-state/tribe, provided that:

- The impact-state/tribe requested the assistance;
- The host-state/tribe agrees to accept evacuees based on need—without restriction;
- An authorized official from the host-state/tribe transmits a written agreement to FEMA; and,
- The governor or tribal chief executive of the host-state/tribe signs the FEMA/host-state or FEMA/host-tribe agreement pursuant to the terms and conditions in 44 C.F.R. § 206.44, FEMA-state agreements, to establish the host-state/tribe as the recipient.[302]

If the impact-state/tribe requests assistance from FEMA, FEMA determines whether potential host-states/tribes have sufficient capability to meet some or all of the sheltering and evacuation needs of the

[302] 44 C.F.R. § 206.202(f)(1)(i).

impact-state/tribe. If FEMA determines a host-state/tribe has sufficient capability and the host-state/tribe meets the four conditions described above, FEMA provides PA funding to the host-state/tribe directly.[303]

When FEMA provides PA funding directly to the host-state/tribe, FEMA reimburses 100 percent of the host-state/tribe's eligible costs, including straight-time and benefits of the host-state/tribe's permanent employees[304] so that it does not have any out-of-pocket costs. In these cases, the impact-state/tribe is responsible for the non-federal cost share and must subsequently reimburse FEMA for the non-federal cost share of the eligible costs incurred by the host-state/tribe. The non-federal cost share is based on the category B cost-share amount designated in the declaration. The impact-state/tribe cannot offset its non-federal cost share with the host-state/tribe's volunteer labor.

Figure 14. Evacuees Boarding a Bus

In addition to the other eligible evacuation and sheltering costs described in this chapter, FEMA also reimburses the host-state/tribe for the following:

- Straight-time and benefits of entities' employees that provide assistance under a mutual aid agreement or a contract with the host-state/tribe, such as a local government or PNP;
- Costs to provide the requested shelter capacity, even if the shelter was underused or not used at all;
- Costs related to arrest and incarceration of evacuees who commit unlawful acts in the host-state/tribe congregate shelter, including costs incurred by on-duty law enforcement officers in order to detain, take into custody, or make an arrest (costs of chemical tests, processing, charging, booking, and holding such persons are ineligible costs). Costs to transport a detainee back to the shelter is eligible if the individual was not charged;
- When patients in hospitals in the impact-state/tribe are evacuated, transported, and admitted into hospitals in the host-state/tribe through mission assignment with U.S. Department of Health and Human Services (HHS), and the patients are treated and discharged but require follow-on care while awaiting transport, and shelters are not available, the costs that the host-state/tribe's hospital incurs for hotel rooms during patients' follow-on care until the patients can be transported back to the impact-state/tribe, provided that Medicare, Medicaid, or private insurance does not cover these costs;
- Bus or shuttle transport to pick up evacuees at the airport, train station, or bus terminal when the expected plane, train, or bus is re-routed, canceled, or rescheduled;
- Ambulance costs for hospital-to-hospital transfers, provided it is a transfer within the host-state/tribe;
- When the impact-state/tribe determines that it is safe for re-entry, it coordinates with the host-state/tribe and FEMA to return evacuees, household pets, and service and assistance animals to the impact-state/tribe by air, rail, or bus. Return transportation costs are eligible along with food, water, and security during transport;

[303] 44 C.F.R. § 206.208(c)(3).
[304] 44 C.F.R. § 206.202(f)(1)(ii).

- Return transportation costs for family members of the impact-state/tribe evacuee who were admitted to a hospital after the congregate shelters close;
- When evacuees are discharged from a hospital after all congregate shelters have closed and transportation cannot be arranged for departure on the same day discharged, FEMA reimburses up to 5 nights of hotel lodging while awaiting return transport; and,
- FEMA reimburses a state agency from the impact-state/tribe for transportation costs and related expenses to transport the evacuated decedent's remains and accompanying family members to the impact-state/tribe. The cost of the state/tribe-mandated embalming or cremation of the body prior to return are also eligible.

The host-state/tribe must determine whether any ambulance or medical service costs are covered by a patient's private insurance, Medicare, Medicaid, or a pre-existing private payment agreement as FEMA deducts this amount from the host-state/tribe's eligible cost.

Fees that the host-state/tribe waives for the use of state parks by self-evacuees with recreational vehicles (RVs) are ineligible. Additionally, purchase and distribution of gas cards, bus passes, cash vouchers, debit cards, food vouchers, or direct payments to evacuees are ineligible.

4. CHILDCARE SERVICES

FEMA reimburses SLTT governments for the cost of providing licensed childcare services to support sheltered populations. This includes the cost of the labor, facility, supplies, and commodities. Childcare services can be eligible in support of both congregate and non-congregate sheltering.

Childcare includes services, such as:

- Day care for children; and,
- Before- and after-school care.

Applicants may provide these services within a shelter facility or in a separate facility, as appropriate. FEMA PA and IA staff will coordinate to ensure no duplication with IHP assistance.

P. Infectious Disease Incident

The HHS Centers for Disease Control and Prevention (CDC) has primary authority to enable support and assistance to SLTT governments in response to an infectious disease incident. In response to a Stafford Act declaration request, FEMA will formulate a recommendation based on all available information to include whether emergency protective measures and/or DFA (e.g., personnel, equipment, and supplies) is needed to meet critical emergency protective requirements that are beyond the capability or capacity of the state, Tribal Nation, or territory. However, the president retains sole authority to approve all declaration requests, regardless of any FEMA recommendation.

In the event of an emergency or major disaster declaration, FEMA may provide assistance for the evacuation and movement of persons; movement of supplies; and care, shelter, and other essential needs of affected human populations directly related to the declared incident. Any assistance provided by FEMA in response to an infectious disease incident or pandemic is done in coordination with the CDC. When FEMA engages with and supports work and costs related to a specific infectious disease incident or pandemic, FEMA will issue

disaster-specific guidance (DSG) to identify what emergency protective measures will be considered as necessary and therefore eligible work for the incident.

Q. Mosquito Abatement

Mosquito abatement measures are eligible when an SLTT government public health official validates in writing that a mosquito population poses a specific health threat as discussed further in Appendix F: Mosquito Abatement. FEMA consults with the CDC to determine the eligibility of mosquito abatement activities. FEMA only provides PA funding for the increased cost of mosquito abatement. The eligible costs are calculated by deducting the average mosquito abatement expenses from the most recent three non-disaster years from the disaster-related costs.

R. Safety Inspections

Building department officials typically conduct post-incident safety inspections to determine whether a building has sustained damage that results in a hazardous condition.[305] Post-incident safety inspections to determine whether the facility is safe for entry, occupancy, and lawful use for public and private facilities are eligible; this includes posting appropriate placards (e.g., "red-tagging" a building that is unsafe).

Applicants must clearly substantiate that the purpose of the inspection was for safety and not to assess damage, such as building inspections.

S. Animal Carcasses

Removal and disposal of animal carcasses, including interim processing,[306] is eligible. If the removal and disposal is conducted as part of the overall debris removal efforts, the work may be funded as category A.

FEMA may require certification from the SLTT government health department, HHS, or the U.S. Department of Agriculture (USDA) that a threat to public health and safety exists.

Smaller animal carcasses (e.g., rodents, skunks, or possums) do not usually pose an immediate threat to public health or safety. Removal and disposal of these carcasses is ineligible unless the appropriate public health official determines a threat to public health or safety exists.

FEMA does not provide PA funding when another federal agency has authority to provide assistance for carcass removal and disposal. The NRCS has authority for the removal of animal carcasses if it determines that the measure is eligible as debris removal. The USDA's Farm Service Agency may provide assistance for farmland debris cleanup. EPA and USCG have authority to provide technical assistance and to remove animal carcasses contaminated with oil, hazardous substances, pollutants, or contaminants.[307]

[305] For more information, refer to: *Post-Disaster Building Safety Evaluation Guidance* (FEMA P-2055).
[306] Interim processing may include burning, incinerating, rendering, mounding, composting, or other pre-processing activities.
[307] For more information, refer to: FEMA POLICY: Mission Assignments FEMA Policy #104-010-3.

T. Demolition of Private Structures

Emergency demolition of structures located on private property (e.g., privately-owned non-commercial or commercial property) are eligible when partial or complete collapse is imminent, and that collapse poses an immediate threat to the general public. FEMA accepts determinations that a structure is destroyed and/or in immediate danger of collapsing made by the authority having jurisdiction in coordination with a qualified individual.[308]

In some instances, restricting public access to an unsafe structure and the surrounding area, such as securing the area with a fence, is sufficient to alleviate the immediate threat and is more cost-effective than demolition. In these cases, demolition is ineligible. If a structure is condemned prior to the incident, emergency protective measures related to that structure are ineligible.

1. CONDITIONS OF ELIGIBILITY FOR DEMOLITION

Approval from FEMA prior to demolition work is not required; however, for an applicant to receive PA funding, FEMA must determine that the work is eligible. For demolition to be eligible, applicants must:

- Notify FEMA that demolition of private structures will be conducted and identify the type of property on which the demolition work is being conducted (e.g., privately-owned non-commercial or commercial property) so FEMA can ensure notifications are made to the necessary FEMA components and federal partners;
- Certify that the structures are unsafe and pose an immediate threat to lives or public health and safety as determined by the authority having jurisdiction, in coordination with a qualified individual;
- Provide documentation to confirm its legal authority and responsibility to enter private property and demolish privately-owned unsafe structures, including:
    - Citation of the law, ordinance, code, or emergency powers for which it is exercising its legal authority to demolish privately-owned unsafe structures. The authority cited must be applicable to the structural condition representing the immediate threat and not merely the applicant's uniform level of services.
    - Confirmation that a legally authorized official of the applicant has ordered the exercise of public emergency powers or other appropriate authority to enter onto private property in the declared area in order to demolish privately-owned unsafe structures and remove the resulting debris.
- Indemnify the federal government and its employees, agents, and contractors from any claims arising from the demolition of privately-owned unsafe structures and removal of the resulting debris; and,
- Obtain all necessary permits and comply with all federal and SLTT applicable laws, regulations, and EOs.

Before FEMA will provide PA funding, applicants must provide confirmation that it satisfied all legal processes and obtained permission requirements from the property owners (rights-of-entry) and agreements to indemnify and hold harmless the federal government. Additionally, applicants must provide documentation to support that it obtained all necessary permits and complied with EHP requirements.

[308] Only a licensed engineer or architect or an individual that the jurisdiction authorized can make such decisions.

Given the limited eligibility of and the additional requirements related to demolition of private structures, applicants are encouraged to obtain preliminary approval for the activity from FEMA prior to starting work.

2. COMMERCIALLY OWNED STRUCTURES

Demolition of structures owned by commercial enterprises, including businesses, apartments, condominiums, and mobile homes in commercial trailer parks are generally ineligible as it is expected that the commercial enterprises retain insurance that cover the cost of demolition. In very limited, extraordinary circumstances, the FEMA Regional Administrator may provide an exception. In such cases, applicants must meet the requirements outlined under Private Property Debris Removal (PPDR) in this chapter.

3. ELIGIBLE DEMOLITION WORK

Eligible work associated with the demolition includes, but is not limited to:

- Capping wells;
- Pumping and capping septic tanks;
- Filling open below-grade structures, such as basements and swimming pools;
- Testing for hazardous materials;
- Securing utilities;
- Obtaining permits and licenses; and,
- Performing title searches.

Fees for permits, licenses, and titles issued directly by an applicant are ineligible unless the applicant demonstrates that the fees are above and beyond its normal administrative costs for similar non-disaster demolition work. Overtime labor directly related to issuing these permits, licenses, and titles for facilities that are eligible for demolition is eligible.

The following work is also eligible and may be funded as category A if the removal and disposal is conducted as part of the overall debris removal operations:

- Removing demolition debris, including personal effects; and
- Removing hazardous materials, such as asbestos and household hazardous waste (in accordance with federal and SLTT requirements for handling hazardous materials).

Applicants should work with the property owner to pursue and recover insurance proceeds and credit FEMA the federal share of any insurance proceeds recovered. In some circumstances, the property owner may be eligible for IA funding. FEMA PA and IA staff will coordinate closely to ensure FEMA does not fund the same work under both programs.

Example: Eligibility of Demolition Debris

For demolition, FEMA will accept determinations that a structure is destroyed and/or in immediate danger of collapsing made by the authority having jurisdiction in coordination with a qualified individual. Certain demolition work and costs may be funded as category A if the removal and disposal

is conducted as part of the overall debris removal operations. Demolition is subject to additional requirements and must comply with Demolition of Private Structures in this chapter.

4. INELIGIBLE WORK

Ineligible work associated with the demolition of private structures includes, but is not limited to:

- Removal or covering of concrete pads and driveways except for structures in a FEMA-funded buyout program; and,
- Removal of slabs or foundations that do not present a health or safety hazard, except for structures in a FEMA-funded buyout program through the Hazard Mitigation Grant Program (HMGP).

The placement of debris resulting from demolition of a structure in or on the public right-of-way is ineligible work.

U. Temporary Relocation of Essential Services

If an applicant provides essential community services at a facility that is unsafe, inaccessible, or destroyed as a result of the incident, temporary relocation of these services to another facility is eligible.[309] Essential community services are those services of a governmental nature that are necessary to save lives, protect property and the public, and preserve the proper function and health of the community at large. These services differ from the list of eligible PNP essential social services. FEMA evaluates the criticality of the service and safety of the facility to determine the need for temporary relocation.

1. ELIGIBLE FOR TEMPORARY RELOCATION

Facilities that provide essential community services provided by an eligible applicant are eligible for temporary relocation. These include facilities for education, election and polling, emergency services (including police, fire, and rescue) emergency medical care, homeless and domestic violence shelters, prison, utilities, and other facilities that provide public health and safety services of a governmental nature.

Services provided in administrative and support facilities essential to the provision of the essential community service are also eligible for temporary relocation. These include administration buildings, student housing, hospital and prison laundry and cooking facilities, parking, and storage if items are needed on-site. Athletic, play, and recreational equipment is eligible, within reason.

If an applicant provides the service at a leased, private facility prior to the incident, the service is still eligible to be temporarily relocated.

2. INELIGIBLE FOR TEMPORARY RELOCATION

Facilities that do not provide essential community services are ineligible for temporary relocation. These include facilities and services, such as museums, zoos, community centers, shelter workshops, performing arts centers, recreation and parking, athletic stadiums, houses of worship, housing and residential services, custodial care, assisted living facility, senior citizen centers, alcohol and drug rehabilitation, childcare,

[309] Stafford Act § 403(a)(3)(D); 42 U.S.C. § 5170b.

libraries, research and warehouse facilities, burial, vocational, academic, athletic, political training, and student union buildings.

3. DETERMINING ELIGIBILITY OF TEMPORARY RELOCATION

In addition to all other eligibility requirements that must be met, FEMA determines the eligibility of temporarily relocating services to another facility based on the safety of the damaged facility as follows:

- If the facility can be made usable with the performance of emergency protective measures or minor repairs, a temporary facility is not eligible.
- If the damage is to the extent that it cannot be occupied safely, and restoration cannot be completed without suspending operations of the facility for an unacceptable period of time, then a temporary facility is eligible.
- If the facility is not damaged but lacks a critical utility or operational item, such as potable water, electricity, or road access, and a temporary facility will restore services to the community before the restoration of the disrupted critical utility or operational item at the current site, then a temporary facility is eligible.

The capacity of the temporary facility must not exceed the pre-disaster capacity of the facility that housed the displaced services unless that is the least costly practical option. Applicants must use the temporary facility to provide the eligible service to the same extent and manner as was provided prior to the incident.

Relocation to a site that requires ground disturbance or alteration of an existing property requires EHP review before an applicant implements the action. See Chapter 10: Environmental and Historic Preservation for more information on EHP review and considerations.

FEMA does not require applicants to obtain and maintain insurance for temporary facilities.

If an applicant has a facility that does not meet eligibility requirements for temporary relocation and the facility's damage is to such an extent that the contents are at risk, PA funding for temporary space to store the contents as an emergency protective measure is eligible if the space is:

- Limited to an area necessary to store the contents;
- Used solely for storage; and,
- Not intended for public access, alternate office space, exhibits, or other purposes.

FEMA is not responsible for damage that may occur to contents in temporary storage.

4. LEASE, PURCHASE, OR CONSTRUCT

When deciding whether to rent or purchase space and equipment, applicants should choose the most economical option that meets its needs. Applicants must provide FEMA with a cost analysis,[310] which should include at least three options with cost estimates based on the timeline to restore the original facility. Cost estimates for leasing a facility must account for the entire timeline of the project. Cost estimates must include an itemized list of project costs.[311] FEMA generally reimburses the least costly option of leasing,

[310] 2 C.F.R. § 200.318(d).
[311] For more information, refer to: Cost Estimating Tools | fema.gov.

purchasing, or constructing a temporary facility. However, FEMA also considers whether the least costly option is practical when determining eligibility (e.g., if the least costly option for a temporary school is to lease a building in another county, and the next least costly option is to install modular buildings on the current campus, FEMA reimburses the cost of installing the modular buildings).

If an applicant relocates a service from a facility it owns, the lease costs of a temporary facility are eligible if leasing is the least costly option. If the applicant was leasing the damaged facility and had to temporarily relocate to another leased facility, the increase in rent is eligible.

Purchasing or constructing a temporary facility is eligible if FEMA confirms that it is the least costly option. With exception of modular or manufactured units, the applicant must obtain FEMA approval prior to purchasing or constructing the temporary facility.

5. SAFE ROOMS FOR TEMPORARY SCHOOL FACILITIES

Funding for accessible safe rooms as part of a temporary school facility is if the damaged school contained a safe room or other space that served as a storm shelter and there are no other cost-effective, reasonable alternatives available to address the safety needs of the students and faculty.

If an applicant wishes to seek funding for a safe room as part of a temporary school facility, it must obtain prior approval from FEMA. The request needs to include:

- A description of the safe room or safe space that was used as a storm shelter prior to the incident;
- The population of students and faculty that need access to the safe room;
- Verification that no other cost-effective reasonable alternatives are within proximity that can be used as a safe space for the school population; and,
- An indication that the applicant will have the safe room installed and operational when school resumes and students occupy the temporary classroom space.

If approved, the safe room capacity is based on student population and the number of faculty who are expected to use the temporary school facility. The capacity of the safe room cannot exceed the pre-disaster capacity of the safe room in the damaged school. The safe room should be available no later than the opening day of classes at the temporary facility. The timeframe for providing PA funding for the temporary safe room space coincides with the approved timeframe for providing PA funding for the temporary school facility.

Safe rooms provided as part of a temporary school facility must comply with the requirements of *Safe Rooms for Tornadoes and Hurricanes* (FEMA P-361).[312]

6. TEMPORARY RELOCATION COSTS

Eligible work or costs associated with the provision of temporary facilities include, but are not limited to:

[312] For more information, refer to: *Safe Rooms for Tornadoes and Hurricanes* (FEMA P-361).

- Rental or purchase equipment and furniture necessary to continue the services in the temporary facility if the equipment and furniture was destroyed by the event (FEMA will provide a one-time purchase to replace destroyed equipment and furniture);
- Reasonable alterations of the temporary facility, if required to make the space functional based on the pre-disaster use of the damaged facility;
- Restoration of the temporary facility to its pre-disaster condition when no longer needed;
- Moving expenses to and from the temporary facility;
- Minimal life-safety or other building upgrades required by an applicable code or standard and in effect at the time the temporary facility is purchased or leased (e.g., a "change in use" could trigger the need for such work); and,
- Public outreach and messaging costs necessary to inform the public that the service will temporarily be provided at a different location.

FEMA does not provide PA funding for utility, maintenance, or operating costs in a temporary facility, even if these costs increase.

7. TIME LIMITATIONS

The regulatory time limitation for temporary facilities (emergency work) is 6 months from the declaration date.[313]

Depending on the extent of damage to the facility, applicants may be unable to restore the facility to its pre-disaster design and function within 6 months. 44 C.F.R. provides recipients the authority to extend the deadline for emergency work for up to 6 additional months.[314] However, for temporary facilities, only FEMA has authority to approve any time extensions to the project deadline.

FEMA considers the timeframe necessary to restore the damaged facility when evaluating time extensions for temporary facilities. If an applicant requests funding for a temporary facility and knows at that time that the restoration of the original facility will exceed 6 months, FEMA may approve additional time and funding up to 12 months. If the applicant needs additional time beyond this 12-month deadline, it must submit a written time extension request that includes the status of the restoration work and timeline for completion in accordance with 44 C.F.R. § 206.204(2)(d).

FEMA only approves additional time if the applicant begins construction on the damaged facility within 12 months of the declaration date unless circumstances beyond the control of the applicant prevented starting the construction within this 12-month timeframe.

i. Conditions When Temporary Facility Funding is Limited

a. Improved Project

If FEMA approves an improved project for the permanent repair or restoration of a facility for which it also approved temporary relocation of the essential community services to a temporary facility, the temporary

[313] 44 C.F.R. § 206.204(c)(1).
[314] 44 C.F.R. § 206.204(c)(2)(ii).

facility is only eligible for PA funding for the estimated amount of time necessary to restore the facility to its pre-disaster design and function. If the actual time to restore the facility with the improvements extends beyond this timeframe and causes the applicant to continue its use of the temporary facility, FEMA does not reimburse any cost associated with that continued use. However, FEMA may reimburse costs associated with relocating its services back into the original, damaged facility as part of the approved temporary facility project.

b. Alternate Project

If FEMA approves an alternate project for the permanent repair, restoration, or replacement of a facility for which it also approved temporary relocation of the essential community services to a temporary facility, FEMA does not reimburse any temporary facility costs incurred after the date the applicant requests that alternate project.

c. Alternative Procedures Project

If FEMA approves an alternative procedures project for the permanent repair or restoration of a facility for which it also approved temporary relocation of the essential community services to a temporary facility, continued PA funding for the temporary facility is dependent upon the scope of work (SOW) of the alternative procedures project. Additional information about alternative procedures projects can be found in Appendix G: Alternative Procedures for Permanent Work.

8. DISPOSITION REQUIREMENTS

If an applicant purchased or constructed a temporary facility, it must return to FEMA the federal share of the equity in the facility. Applicants must report the equity to FEMA when the approved deadline has expired or when the facility is no longer needed for the authorized purpose, whichever occurs first.

If FEMA only funded a portion of the cost of the facility, applicants must return to FEMA the federal share of FEMA's proportionate equity in the facility. The amount due to FEMA is computed by applying FEMA's percentage of participation in the cost of the purchase or construction to the fair market value or sale proceeds, taking into consideration reasonable out-of-pocket costs related to the sale.

Applicants may either retain the facility or sell it. If the applicant disposes of real property (land or structures) acquired with PA funding and acquires replacement real property using funds from the same PA project, it may use the net proceeds of the sale to offset the cost of the replacement property.

V. Snow-Related Activities

When the president declares an incident as a snowstorm or specifically authorizes snow assistance in a declaration for a severe winter storm, FEMA provides PA funding for impacts related to snow, but the assistance is limited.[315] The request for a major disaster declaration for a winter storm or snowstorm, must

[315] 44 C.F.R. § 206.227.

include a request for snow assistance to be approved in the declaration. See Appendix K: Snow Declarations for detailed information. FEMA does not authorize snow assistance for emergency declarations.

1. LIMITED TIME PERIOD

Snow-related activities are eligible for a continuous 48-hour period to address the most critical emergency needs.[316] Each applicant designates the beginning of its 48-hour period. However, a state or territorial agency that conducts snow-related activities in multiple locations throughout the state or territory, such as a Department of Transportation, may use different 48-hour periods for different locations. Once FEMA approves a project for an applicant's designated 48-hour period, the applicant cannot change its selected period. If an applicant awards a contract for periods greater than the 48-hour period, PA funding is limited to the costs incurred during the designated 48-hour period. The FEMA Assistant Administrator of the Recovery Directorate may extend the eligible period by 24 hours in counties, parishes, or Tribal Nation areas where the snowfall exceeds the historical record snowfall by at least 50 percent. The applicant should submit a written request for the additional 24-hour time extension.

2. ELIGIBLE WORK

Eligible work includes:

- Snow-related activities (for limited time as discussed above):
  - De-icing;
  - Salting;
  - Sanding of roads and other eligible facilities;
  - Snow dumps; and,
  - Snow removal;
- Other emergency protective measures including, but not limited to search and rescue and sheltering conducted during a declared incident that includes snow related activities. These emergency protective measures are not restricted to the 48 hours designated for snow related activities.

Limited snow-related activities necessary to carry out emergency protective measures, such as clearing snow in the immediate area of a downed power line, are eligible outside of the limited time period and in counties declared but not designated for snow assistance.

For severe winter storm declarations that do not specifically authorize snow assistance, FEMA only provides PA funding for limited snow-related activities that are necessary to perform otherwise eligible work. For example, snow removal necessary to repair downed power lines is eligible, while normal snow removal from roads (including salting and sanding) is ineligible.

W. Emergency Repair or Stabilization

Emergency repair or stabilization of an eligible facility is eligible as emergency work if it eliminates or lessens an immediate threat.[317] To be eligible as category B eligible emergency repair or stabilization, work must be

[316] Ibid.
[317] 44 C.F.R. § 206.201(b).

temporary in nature. Emergency repair or stabilization work performed under an exigent circumstance that restores the pre-disaster design and function of the facility in accordance with codes and standards is permanent work,[318] not emergency work, with one exception – work to restore power (see Power Restoration in Chapter 8).

Emergency repair of a facility is ineligible if another federal agency has the specific authority to provide assistance for the facility (even if the repair is temporary),[319] such as for:

- Federal-aid highways – Federal Highway Administration (FHWA);
- Flood control works – U.S. Army Corps of Engineers (USACE); or
- Watershed structures – Natural Resource Conservation Service (NRCS).

For Tribal Nations specifically, although the Bureau of Indian Affairs (BIA) or FHWA may have authority to provide temporary emergency repairs of tribal roads, such roads are eligible for PA funding provided the Tribal Nation does not receive funding from BIA or FHWA for the work.

1. OPERATION BLUE ROOF (DFA ONLY)

Operation Blue Roof provides homeowners with plastic sheeting to cover damaged roofs until arrangements can be made for permanent repairs through contracts administered by USACE. The purpose of Operation Blue Roof is to protect property, reduce temporary housing costs, and allow residents to remain in their homes while recovering from the incident. Therefore, only dwellings that can be safely occupied after blue roof installation are eligible. The costs of these services are ineligible for reimbursement. However, FEMA may provide DFA for these services.[320]

2. SLOPE STABILIZATION

If a landslide or other slope instability is triggered by the incident and poses an immediate threat to life, public health and safety, or improved public or private property, emergency protective measures to stabilize the slope is eligible.

FEMA only provides PA funding for the least costly option necessary to alleviate the threat. FEMA limits eligible stabilization measures to the area of the immediate threat, not the entire slope. Work must be reasonable relative to the size and scope of the area of instability.

If slope instability is triggered by the incident and it is not apparent that the instability creates an unsafe condition that poses an immediate threat, PA funding for post-disaster inspections and limited geotechnical investigations is eligible to determine if an immediate threat exists.

Eligible emergency protective measures include, but are not limited to:

- Emergency drainage measures;
- Emergency ground protection to better stabilize the mass (rip rap, sheeting);

[318] 44 C.F.R. § 206.201(j).
[319] 44 C.F.R. § 206.226(a).
[320] For more information, refer to: *USACE Temporary Roofing Fact Sheet*.

- Partial excavation at the head of a sliding mass to reduce its driving force;
- Backfilling or buttressing at the toe of a sliding mass using measures, such as gabions, rock toes, cribwalls, binwalls, and soldier pile walls; and,
- Installation of barriers to redirect debris flow.

3. MOLD REMEDIATION

The incident may cause facilities to be inundated or exposed to wet and humid weather conditions for extended periods of time. These conditions may cause growth and spreading of mold in structures and on contents, causing threats to public health and increasing the repair cost.

The following remediation activities are eligible as emergency protective measures:

- Wet vacuuming, damp wiping, or vacuuming with high-efficiency particulate air (HEPA) equipment of the interior space;
- Removal of contaminated gypsum board, plaster (or similar wall finishes), carpet or floor finishes, and ceilings or permanent light fixtures; and,
- Cleaning of contaminated heating and ventilation (including ductwork), plumbing, and air conditioning systems or other mechanical equipment.

Applicants may use a variety of mold cleanup methods to remediate mold damage based on the extent of damage and type of damaged material. Appendix H: Mold Remediation provides information for consideration when developing a SOW for mold remediation. Applicants must follow applicable SLTT government guidelines for mold sampling and remediation.

Note: Pre-remediation mold sampling is only eligible when the sampling reveals the presence of mold. Post-remediation sampling is eligible to confirm that remediation is complete.

FEMA only provides PA funding for mold sampling performed by an indoor environmental professional, such as a certified industrial hygienist, certified indoor environmental consultant, or certified microbial consultant. The indoor environmental professional should not be employed by the remediation company to avoid a conflict of interest. FEMA considers technical evaluations performed by licensed professionals when determining the eligibility of mold remediation.

For mold remediation to be eligible, mold must not be a result of poor facility maintenance or failure to take protective measures to prevent the spread of mold in a reasonable time after the incident. If an applicant can document and justify why it did not take measures to prevent further contamination, or why measures taken were insufficient to prevent further damage, mold remediation is eligible. Examples of extenuating circumstances include:

- Disruption of power;
- Facility is underwater;
- Facility is inaccessible;
- Heating, ventilation, and air conditioning (HVAC) equipment is damaged; and,
- Insufficient resources to remediate the entire facility.

FEMA evaluates whether the facility had pre-existing water infiltration conditions when determining whether mold remediation is eligible. For this evaluation, FEMA considers whether there is evidence of pre-existing damage or deferred maintenance, such as:

- Improperly sealed windows or exterior vents;
- Standing water against an exterior wall;
- Poorly maintained drains or gutters with rust or vegetative growth; and,
- Leaking and or water-stained ceiling tiles.

4. EMERGENCY BERMS ON BEACHES

If a natural or engineered beach has eroded to a point where flooding from a storm that has a 20 percent chance of occurring in any given year (5-year storm) could damage improved property, cost-effective emergency protective measures on the beach that protect the improved property against damage from that 5-year storm are eligible.

Eligible measures typically include the construction of emergency sand berms to protect against additional damage from a storm that has a 20 percent chance of occurring in any given year. Emergency sand berms are not intended to permanently restore the beach; they are intended only to provide protection from immediate threats. Applicants may construct emergency berms with sand recovered from the beach or with imported sand. If an applicant constructs the berms with imported sand, FEMA will only provide PA funding if the sand is from a source that meets applicable environmental regulations and one of the following circumstances exists:

- Recoverable quantities are insufficient; or
- SLTT government regulations prohibit placement of the recovered sand.

To show that flooding from a storm that has a 20 percent chance of occurring in any given year could damage improved property, applicants must demonstrate that the still water level plus wave runup elevation for a 5-year storm exceeds the post-incident elevation of the primary dune.

The 5-year still water level (SWL) is equal to the average water surface elevation of the rise in seawater level (surge) resulting from a storm that has a 20 percent chance of occurring in any given year, plus wave setup and the astronomical tide. The 5-year total water level (TWL) is equal to the elevation of the wave runup predicted for a storm that has a 20 percent chance of occurring in any given year plus the SWL. Locations where the elevation of the post-incident profile is less than the TWL are eligible for placement of an emergency berm to protect improved property. See Figure 15. Determining Eligibility of Emergency Berms on Beaches below.

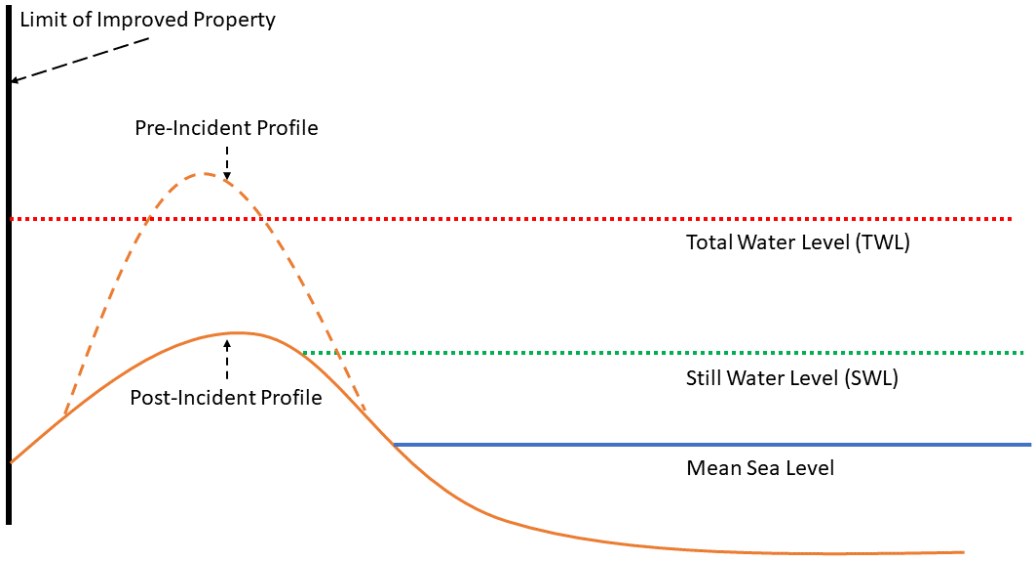

Figure 15. Determining Eligibility of Emergency Berms on Beaches

Based on the average expected erosion for a storm that has a 20 percent chance of occurring in any given year, FEMA only provides PA funding for emergency berms constructed with up to 6 cubic yards per linear foot of sand above the 5-year stillwater level or the berm's pre-incident profile, whichever is less. In some cases, placing sand below the 5-year stillwater level may be necessary to provide a base for berm. The placement of that sand is also eligible as part of the emergency protective measure.

Placement of dune grass on an emergency dune or berm is only eligible if it is required by permit and is an established, enforced, uniform practice that applies to the construction of all emergency berms within an applicant's jurisdiction, regardless of the circumstance. If dune grass is required, the applicant must include the grass placement cost in the dune or berm construction cost when evaluating cost-effectiveness. Any maintenance of the dune grass after the initial installation is ineligible.

For berms located on natural beaches, or improved beaches which do not qualify as category G-eligible facilities, the category B work will not result in a dune eligible under category G in future disasters. If an applicant chooses to construct engineered dunes, the eligible work and costs are limited to that necessary for addressing the immediate threat.

Applying eligible sand volumes to an aggregate total as the result of several disasters, to be used in a work-to-be-completed project, is not allowable for emergency berm sand since category B, by definition, addresses an immediate threat.

X. Elections and Polling Activities

Public Assistance may fund election-related work, as these services are essential to ensuring the continued function of communities. Disasters can damage or destroy the facilities that host these activities or render them unusable due to power outages. These facilities are often located in public buildings, such as schools or community centers, which may also be needed for disaster response and recovery efforts, like sheltering, potentially disrupting election activities.

If disaster-related damage impacts election facilities or voting equipment, Public Assistance is available to support work and costs, subject to cost-sharing requirements.

XIV. Damage Caused During Performance of Emergency Work

Applicants may damage improved property, supplies, or equipment during the performance of eligible emergency response activities or debris removal operations.

The repair of damage to public property, supplies, or equipment is eligible as part of the respective emergency work (category A or B) project[321] if the damage was:

- Due to severe conditions resulting from the incident;
- Unavoidable; and
- Not due to improper or excessive use.

Replacement of damaged trees, shrubs, or other ground cover is eligible as part of the repair work when damaged during eligible emergency work activities. Reasonable cost standards as outlined in Chapter 6: Cost Eligibility still apply. Crops and agriculture are not eligible for replacement.

For equipment damage, FEMA requires maintenance records to demonstrate that the equipment was regularly maintained and in good operational order prior to the incident, and details regarding when, where, and how the damage occurred.

Repair of damage to private property is only eligible if the above criteria is met and either:

- The property is an easement, and the applicant is legally responsible for repairing the damage it causes to the easement; or
- The applicant leased the property either for sheltering or for a temporary debris staging site, and the lease agreement establishes that the applicant is legally responsible for the repair.

Damage caused by snow-related activities conducted outside of the authorized period, as described under Snow-Related Activities in Chapter 7 is ineligible.

[321] Although the repairs may be permanent work, FEMA includes it on the emergency work project as damage resulting from the emergency work.

Chapter 8: Permanent Work Eligibility (Categories C-G)

Section 406 of the Stafford Act authorizes FEMA to provide assistance for both permanent work (categories C-G) and building code and floodplain management administration and enforcement activities (category I). Permanent work is subject to insurance obtain and maintain requirements to protect facilities against future loss. This requirement applies to insurable facilities or property (buildings, contents, equipment, and vehicles). Work must also comply with all applicable environmental and historic preservation laws, executive orders, and regulations.

I. Facility Restoration (Categories C-G)

Permanent work (categories C–G) is work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards.[322] Categories C-G work is subject to the eligibility of the facility as described under the Facility Eligibility section in Chapter 4 and shown in Figure 16. Permanent Work Eligibility.

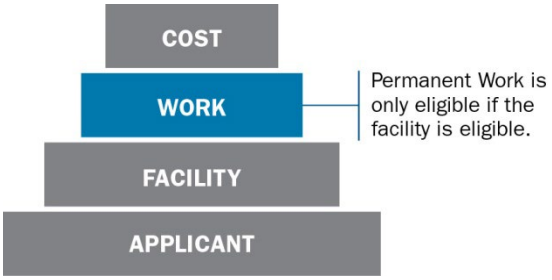

Figure 16. Permanent Work Eligibility

Pre-disaster design means the size or capacity of a facility as originally constructed or subsequently modified. It does not mean the capacity at which an applicant was using the facility at the time of the incident if different from the most recent designed capacity.[323]

Pre-disaster function is the function for which the facility was originally designed or subsequently modified. For example, if an applicant designed and constructed an administrative building, but later altered it in accordance with applicable construction codes or standards to use as a school, the pre-disaster function would be a school. If the facility was serving an alternate function at the time of the incident, but was not altered to provide that function, FEMA provides PA funding to restore the facility either to the original pre-disaster function, or pre-disaster alternate function, whichever costs less.[324]

[322] 44 Code of Federal Regulations (C.F.R.) § 206.201(i). Although this section of 44 C.F.R. does not reference function as part of the definition of permanent work, 44 C.F.R. § 206.203(d)(2) states that if the applicant does not restore the function, it is an alternate project. See Public Assistance Mitigation Funds for Capped Projects in Chapter 8 for discussion on alternate projects.
[323] 44 C.F.R. § 206.201(j).
[324] 44 C.F.R. § 206.226(k)(1).

Examples: Restoring to Pre-Disaster Design and Pre-Disaster Function

- Restoring to Pre-Disaster Design: If a school designed for a capacity of 100 students is damaged beyond repair, the eligible funding for the replacement facility is limited to that necessary for 100 students, even if more than 100 students were attending the school prior to the incident.
- Restoring to Pre-Disaster Function: If the applicant is using an office building as a storage facility at the time of an incident, and it is less costly to restore the facility as a storage facility, only those repairs necessary to restore it as a storage facility are eligible.

II. Codes and Standards

To promote resiliency and reduce future risk in the repair and replacement of disaster damaged facilities funded by the PA Program, FEMA requires the application of codes and standards throughout project development.[325] FEMA has a framework and requirements for consistent and appropriate implementation of consensus-based design, construction, and codes, specifications, and standards for PA to promote resiliency and achieve risk reduction ("consensus-based codes, specifications, and standards"). Applicants must incorporate these consensus-based codes, specifications, and standards in the planning, design, and execution of eligible repair, replacement, or new construction[326] projects, as feasible. Locally adopted codes, specifications, or standards may also apply or exceed FEMA's requirements as detailed under the Locally Adopted Codes and Standards section below.

A. Consensus-Based Codes, Specifications, and Standards

FEMA's consensus-based codes, specifications, and standards are intended to improve the resilience of PA-funded projects by establishing guidelines and standards to use as a benchmark. PA funding for eligible facilities must be in conformity with the latest published editions of relevant consensus-based codes, specifications, and standards that incorporate the latest hazard-resistant design provisions. These represent the minimum design criteria in cases where an applicant either has no code for the type of repair or restoration required, or the code's hazard resistance provisions are insufficient.

FEMA's consensus-based codes, specifications, and standards apply to permanent work projects for buildings, electric power facilities, roads, bridges, potable water facilities, and wastewater facilities. These codes apply when triggered by the type of repair or restoration required. However, the costs associated with ongoing operations and maintenance are not eligible under this policy.

Applicants are required to restore facilities in conformity with both local codes and FEMA's consensus-based codes, specifications, and standards. It is possible that applicants may have adopted a similar code to the one being required by the FEMA's consensus-based codes, specifications, and standards.[327] In these cases,

[325] For more information, refer to: Section 1235(b) | Consensus-Based Codes and Standards | FEMA.gov.
[326] This includes improved and alternate projects. Per 44 C.F.R. § 206.203(d), funding for improved and alternate projects is capped at the cost to restore the facility to its pre-disaster design and function in accordance with codes and standards, including the required codes and standards referenced in this section, that would otherwise be applicable to the facility if rebuilt as it existed.
[327] For more information, refer to the Locally Adopted Codes and Standards section in this chapter.

PA funds the use of these locally-adopted codes if the applicant can demonstrate their eligibility under FEMA's regulatory requirements discussed in more detail under Codes and Standards Eligibility Criteria in this chapter. State, local, Tribal Nation, and territorial (SLTT) codes or standards apply if they are equal to or more stringent or relate to facilities not covered by FEMA's consensus-based codes, specifications, and standards requirements, such as dams or levees.

Failure to include the required codes, specifications, and standards in eligible PA project restoration will result in denial or deobligation of project funding. However, there are situations where applicants are not required to follow FEMA's consensus-based codes, specifications, and standards, such as when:

- The jurisdiction has adopted codes that comply with 44 C.F.R. Part 206.226(d) and have hazard-resistant elements that are the same or greater than those listed as FEMA's requirements;
- Implementing the required consensus-based codes, specifications, and standards would be technically infeasible;
- It would create an extraordinary burden on the applicant; or
- It would otherwise be inappropriate for the facility (such as adversely affecting a facility that is listed or is eligible to be listed on the National Register of Historic Places).

If any of the above conditions apply, Applicants may request a waiver for the incorporation of codes, specifications, and standards with approval from the Regional Administrator.

1. IDENTIFICATION REQUIREMENTS

Applicants are responsible for identifying which of the consensus-based codes, specifications, and standards are applicable for each damaged facility, element, or component.

Applicable consensus-based codes, specifications and standards outlined in Appendix M. Consensus-Based Codes, Specifications, and Standards are the minimum design criteria for eligible projects. Once these applicable codes, specifications, and standards are identified, applicants should develop a description of the work required to comply with those standards. The description should:

- Identify specific elements or components affected and describe how each code, specification, or standard applies (include damage inventory line item numbers);
- Describe the work related to the codes, specifications, and standards and provide design drawings, component lists, or other similar documentation;
- Include dimensions and quantities for all components; and,
- Describe the direct relationship between disaster-related damage and any upgrades to undamaged elements.

In addition, applicants must use the following criteria when implementing any of the consensus-based codes, specifications, and standards:

- The consensus-based codes, specifications, and standards apply to the damaged facility, element, or component, as appropriate, based on the type of repair or restoration required to restore the facility to pre-disaster capacity and function.

- If the applicant elects to rebuild to an alternate or improved project that alters the pre-disaster function or capacity of the facility, the applicant must incorporate any applicable consensus-based codes, specifications and standards to the new capacity or function of the facility.
- In the case where the consensus-based codes, specifications, and standards are being applied and require an upgrade to an entire structural facility, including undamaged elements/components, the upgrade is only eligible for PA funding if there is a direct relationship between the upgrade work and eligible damage.

When the consensus-based code, specification, or standard allows for discretion or for variances in the facility design to be appropriate for the facility's location, these adjustments need to be identified, documented and submitted to FEMA for approval.

2. VERIFICATION REQUIREMENTS

Compliance with the consensus-based codes, specifications, and standards requirements must be established by the applicant and will be validated by FEMA.

Upon completion of the project, the applicant must provide proof of compliance. Acceptable forms of proof include but are not limited to written certification by a registered engineer, design professional, or other qualified individual that the project was designed and constructed in compliance with the applicable consensus-based codes, specifications, and standards identified.

Failure to include these consensus-based codes, specifications, and standards or their equivalent in the planning, design and construction of eligible PA projects will result in the denial or deobligation of FEMA project funding.

3. ADDITIONAL ELIGIBLE WORK AND COSTS

- FEMA may approve PA funding as part of a project for technical assistance support, which may include architectural and engineering design (A&E), at the applicable cost-share of the project, to assist communities that lack the necessary subject matter expertise to implement the required codes, specifications, and standards.
- Applicants may include the cost for purchasing a code, specification, or standard on a specific project in the engineering and design expenses for the project. This is a one-time purchase per disaster where the applicant can use the code, specification, or standard for similar projects.
- Funding for capped projects will be based on the estimated amount to restore the facility to its pre-disaster capacity and function including any eligible work such as work required by the consensus-based codes, specifications, and standards.
- The scope of work will be based on pre-disaster capacity unless the adopted code or standard requires an increase to that capacity.

4. OTHER CONSIDERATIONS

- When evaluating whether a facility is eligible for replacement under 44 C.F.R. § 206.226(f), upgrades to meet the identified required consensus-based codes, specifications, and standards will be treated in the same manner as locally adopted codes, specifications, and standards for the purposes of calculating repair and replacement costs.

- When a consensus-based code, specification, or standard offers discretion in design, FEMA will fund the least expensive alternative unless FEMA determines, after demonstration by the applicant's engineer, design professional, or other qualified individual that another alternative provides greater hazard risk reduction to the facility. In making a determination, FEMA will consider the additional risk reduction, the additional cost, technical feasibility, and whether the alternative is better achieved through other programmatic options, such as mitigation funding.

B. Locally Adopted Codes and Standards

SLTT governments may have their own codes and standards that are required in the local jurisdiction as opposed to those required by the federal government as a condition of the grant. FEMA provides PA funding to restore facilities based on pre-disaster design and function in conformity with all current applicable codes, specifications, and standards.[328] Applicants must provide documentation to support the eligibility of facility upgrades required by codes or standards.

If the applicant identifies different locally adopted codes, specifications or standards that are the equivalent to or more stringent than the consensus-based codes, specifications, and standards, FEMA requires the applicant's engineer, design professional, or other qualified individual to justify that the hazard-resistant design criteria in the locally adopted code, specification, or standard is equivalent to or more stringent than those approved under FEMA's consensus-based codes, specifications, and standards. If the local code meets or exceeds the specifications of those in FEMA's requirements, FEMA will provide funding to meet that code if it also meets the criteria in the Codes and Standards Eligibility Criteria section below.

C. Codes and Standards Eligibility Criteria

Facility repairs and new construction may "trigger" upgrade requirements established by codes or standards. Upgrades required by federal or SLTT repair or replacement codes or standards are eligible only if the code or standard meets the criteria[329] below:

- Applies to the type of repair or restoration required;
- Is appropriate to the pre-disaster use of the facility;
- Is reasonable, in writing, formally adopted and implemented by the SLTT government on or before the declaration date, or is a legal federal requirement applicable to the type of restoration;
- Applies uniformly; and,
- Was enforced during the time it was in effect.

Details about each of these criteria are discussed in the following sections.

1. APPLIES TO THE TYPE OF RESTORATION REQUIRED

Codes and standards must apply to the type of restoration required. Codes and standards for new construction are often different than codes and standards for repair work. If FEMA determines a facility is eligible for replacement, compliance with current codes and standards for new construction is eligible. If

[328] Stafford Act § 406(e); 42 U.S.C. § 5172(e); 44 C.F.R. § 206.226(d); 44 C.F.R. 206.221(i).
[329] 44 C.F.R. 206.226(d).

FEMA determines a facility is ineligible for replacement, only code-required upgrades applicable to repairs are eligible.

Depending on the type of restoration work, a code or standard may require:

- Upgrades to all structural components; or
- In addition to upgrades to all structural components, upgrading the non-structural components into conformance with current codes or standards for new construction.

Example: Code-Required Upgrade Triggering Further Upgrades

One example of a code-required upgrade triggering further upgrades to additional undamaged structural components may be damages primarily caused by wind and seismic effects to a building resulting in substantial structural damage (SSD) of the gravity load-carrying elements of the facility. This triggers the professional evaluation of the lateral force-resisting elements of the facility and upgrades if the evaluation shows those structural components do not meet International Existing Building Code (IEBC) criteria. SSD, gravity load-carrying elements, and lateral force-resisting elements are defined in the International Existing Building code in terms of capacity loss. Only an evaluation by a licensed professional in compliance with IEBC criteria can determine SSD.

If an upgrade to an entire structural or non-structural system within a building is triggered by an eligible code or standard, the upgrade is only eligible if there is a direct relationship between the upgrade and the eligible work.[330] Eligibility is limited to code compliance for discrete elements within the system that was damaged.

Terminology

Substantial structural damage is defined in the International Existing Building Code in terms of capacity loss and requires evaluation by a licensed engineer and/or retrofitting of certain structural elements beyond the damaged components.

FEMA evaluates the eligibility of the work to upgrade or change the configuration of damaged systems for reasonableness with respect to the type and extent of damage.

Examples: Codes or Standards that Do Not Apply to the Restoration Required

- An applicant requests PA funding for the repair of a damaged building and the construction of a parking garage. The applicant states that while there was no parking garage prior to the incident, zoning codes and other local ordinances now require one. Because parking improvements have no relationship to the disaster-related repairs, they do not apply to the type of restoration required and are ineligible.

[330] 44 C.F.R. § 206.223(a)(1).

- An applicant requests PA funding for a project involving repairs to discrete damaged portions of a road's shoulders. The applicant states that a code or standard that applies to new construction, or the rehabilitation of an entire road, requires the construction of paved shoulders, drainage swales, and berms. Because the improvements, such as drainage swales and berms have no relationship to discrete damaged portions of a road's shoulders, the construction of these improvements is ineligible.

2. APPROPRIATE TO PRE-DISASTER USE

Codes and standards must be appropriate to the pre-disaster use of the facility. FEMA determines the eligibility of code-required upgrades based on the facility's pre-disaster design or actual use at the time of the disaster. The least costly of the following is eligible:

- Pre-disaster use of the facility, if serving the same function for which it was originally designed; or
- Alternate use of the facility, if serving an alternate function at the time of the incident.

Example: Code or Standard Not Appropriate to the Pre-Disaster Facility Use

The original design of a facility was a warehouse; however, the applicant was using the facility as a classroom before the incident. Restoring the facility as a classroom in conformance with classroom codes or standards would not be eligible if it would cost more than restoring the facility as a warehouse in accordance with code or standards applicable to a warehouse. It would be eligible if it would cost the same or less than restoring the facility as a warehouse in accordance with codes or standards applicable to a warehouse.

3. REASONABLE

Codes and standards must be reasonable. FEMA evaluates the eligibility of the work to upgrade or change the configuration of damaged systems for reasonableness with respect to the type and extent of damage. When determining reasonableness, FEMA:

- Examines the general reasonableness of the code or standard and the trigger for application of the code or standard;
- Determines whether the upgrade and trigger relate to the type of restoration required by the damage and whether the upgrade and trigger are justified based on the extent of damage;
- Considers whether the upgrade and the trigger are technically defensible from an engineering perspective; and,
- Determines whether the cost of the upgrade is reasonable.

FEMA may determine a very large upgrade based on a very low trigger to be unreasonable.

4. WRITTEN, FORMALLY ADOPTED, AND IMPLEMENTED

Codes and standards must be in writing, formally adopted by the SLTT government, and implemented by the applicant on or before the declaration date, or be a legal federal requirement, such as an Americans with Disabilities Act (ADA)[331] or seismic safety requirement. The authority that has jurisdiction must:

- Approve the code or standard;
- Make it a matter of public record; and,
- Formally incorporate it into the building code or other applicable ordinance.

The code or standard must apply to the facility in question. For example, if a state has jurisdiction over a particular type of work and formally adopts a code or standard related to that work, a Tribal Nation or local government in that state does not necessarily have to formally adopt the code or standard for it to apply to its facility. The Tribal Nation or local government meets the above requirement if it shows that it has a history of enforcing the code or standard since it was adopted.

FEMA does not recognize codes or standards adopted by a private nonprofit (PNP) specifically for its facilities when determining whether compliance with codes or standards is eligible. FEMA also does not accept codes or standards adopted by agencies or divisions of SLTT governments that are not authorized to set codes or standards within the broad governmental jurisdiction of the SLTT government.

Example: A Standard that is Not in Writing, Formally Adopted, and Implemented

FEMA approves funding to replace a culvert that was washed out by a flood. The state natural resources department denies the applicant's permit application for replacing the culvert and recommends the applicant to construct a bridge instead. The decision of the permitting officials is discretionary and not based on a written and formally adopted code or standard; therefore, the bridge construction is ineligible.

5. APPLIES UNIFORMLY

Codes and standards must apply uniformly to all similar types of facilities, whether private or public, eligible or ineligible, in the applicant's jurisdiction or (if applicable) in a particular hazard zone within its jurisdiction.

For FEMA to find that a code or standard is uniformly applied, the code or standard must meet all of the following conditions. The code or standard must:

- Provide for uniform accountability in the event of noncompliance;
- Not be subject to discretionary enforcement by building or permitting officials; and,
- Not allow for selective application.

A code or standard must meet three tests to demonstrate that it is not selectively applied:

- The upgrade is generally triggered regardless of the cause of damage and is also triggered for renovations or improvements;

[331] For more information, refer to the Accessibility for Individuals with Disabilities section in this chapter.

- The code or standard is applied regardless of the source of funding for the work; and,
- The code or standard is not applied selectively based on the availability of funds.

Example: A Standard that Does Not Apply Uniformly

A local jurisdiction has authority over all facilities, both public and private. A statewide code or standard imposes seismic retrofit requirements for all public buildings, but not for privately-owned buildings. The seismic retrofitting is ineligible as it does not apply uniformly to all similar types of facilities within the applicant's jurisdiction.

6. ENFORCED

The code or standard must have been enforced during the time it was in effect. FEMA provides PA funding for costs related to an upgrade based on confirmation of previous enforcement and in reliance on continued enforcement. If the local jurisdiction subsequently violates this criterion, any additional work to comply with the code or standard is ineligible within the local jurisdiction.

If FEMA determines a jurisdiction has had no reasonable opportunity to enforce the code or standard, the upgrade is eligible with justification. A reasonable opportunity to enforce may be lacking when a code or standard is new or when a facility affected by the code or standard has not been damaged during the time the code or standard was in effect.

Example: A Code or Standard that was Not Enforced While in Effect

A city's building code requires foundation upgrades when installing new or repairing old portable buildings. Prior to the incident, the city allowed for the installation of several new portable buildings without the code-required foundation upgrades. After the incident, the applicant requests funding to upgrade the foundation of several publicly owned portable buildings that have been damaged by the incident, citing the city's building code. The upgrades to the foundation of the damaged portable buildings are ineligible because the applicant had not been enforcing the standard.

D. Ineligible Upgrades

Upgrades recommended by design standards, guidelines, policies, industry practices, or other non-mandatory provisions are ineligible if the provisions do not meet all of the criteria noted in FEMA's consensus-based codes, specifications, and standards or under Codes and Standards Eligibility Criteria in this chapter. Ineligible upgrades include those based on non-mandatory or non-prescriptive standards.

Upgrades FEMA initially deems ineligible but enhance a facility's ability to resist damage in a future incident may be eligible for funding as PA mitigation (see Hazard Mitigation in this chapter) or through FEMA's Hazard Mitigation Grant Program (HMGP)[332].

[332] For more information, refer to: Hazard Mitigation Grant Program (HMGP) | fema.gov.

Additional capacity necessary due to increased population or use of a building, even if required by code, is ineligible.

E. Accessibility for Individuals with Disabilities

The ADA[333] and other disability rights laws, such as the Architectural Barriers Act (ABA), require that all newly constructed facilities be accessible to and usable by individuals with disabilities and that repairs that might affect the ability of individuals with disabilities to use the facility comply with accessibility standards.[334] In some circumstances, FEMA provides PA funding for accessibility compliance requirements. FEMA funded activities and programs must be physically accessible to people with disabilities and access and functional needs.[335] [336]

FEMA provides PA funding regardless of whether the facility was in compliance prior to the incident, provided the applicant was not cited for a violation. If the applicant was notified of being in violation of a requirement prior to the incident and did not bring the facility into compliance, then accessibility requirements related to the violation are ineligible.

Some exceptions apply when ADA requirements threaten or destroy the historic significance of qualified historic buildings and facilities.[337] FEMA addresses these provisions during its consultation with the state historic preservation officer (SHPO) and/or tribal historic preservation officer (THPO) and incorporates them into the agreement regarding the repairs to the building.

FEMA may also provide PA funding for additional SLTT government ADA requirements that meet the eligibility criteria for codes or standards, as described under Locally Adopted Codes and Standards in this chapter.

F. Path of Travel

If the primary function area sustained disaster damage and the path of travel to the primary function area has not sustained damage (or has sustained less damage), FEMA may provide PA funding for reasonable changes required by an eligible code or standard. The purpose is to increase accessibility to undamaged elements that serve the primary function area. These changes may include accessible entrances, accessible path of travel to the primary function area (by ingress and egress), accessible parking, equal access to services (interior routes), and an accessible approach to public areas,

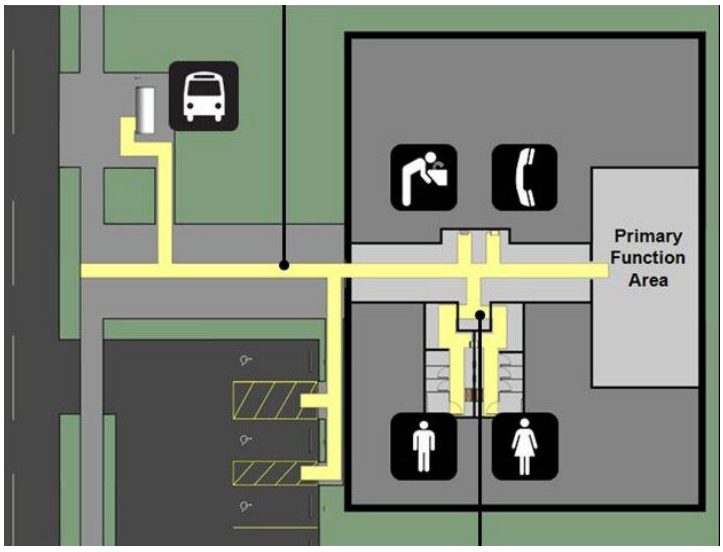

Figure 17. Path of Travel

[333] For more information, refer to: Guide to the ADA Accessibility Standards | access-board.gov.
[334] 42 U.S.C. § 12147(a); 28 C.F.R. § 35.151(b).
[335] Stafford Act, § 308; 42 U.S.C. § 5151.
[336] Section 504 of the Rehabilitation Act of 1973.
[337] 28 C.F.R. § 36.405.

such as restrooms, water fountains, and emergency/evacuation routes.

FEMA may provide PA funding when the code-required alterations have a reasonable and technically supportable relationship to the damaged elements of the facility (e.g., installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls).[338] Applicants are not limited in the amount that they may fund for ADA improvements for their path of travel access, but the PA funding cannot exceed 20 percent[339] of its total funding to restore the primary function area.[340] If the costs for ADA upgrades exceed the 20 percent threshold, the applicant must prioritize elements that will provide the greatest access.[341]

If an applicant engages in repairs that are ineligible for PA funding, the cost of requirements triggered by those repairs are ineligible.

Terminology

A **primary function area** is the area where a major activity occurs for which the facility is intended. Examples include the dining area of a cafeteria, meeting rooms of a conference center, and public offices providing governmental services to the public.

Path of travel includes a continuous, unobstructed way of pedestrian passage to the primary function area. This includes interior and exterior approaches, such as hallways, doorways, sidewalks, streets, parking areas, and public transit drop points. See Figure 17. Path of Travel.

Service facilities to the primary function area include restrooms, telephones, and drinking fountains.

G. Permit Requirements

If a federal or SLTT government permitting agency requires additional work based on a code or standard that does not meet the criteria under Codes and Standards Eligibility Criteria in this chapter, the cost of the additional work is only eligible if the work:

- Does not change the pre-disaster size, capacity, or function of the facility;
- Applies to the type of repair or restoration required;
- Is reasonable based on the type and extent of damage; and,
- Is an established, enforced, uniform practice that applies to all similar types of facilities within the applicant's jurisdiction, regardless of the circumstance.

[338] 28 C.F.R. § 35.151(b)(4)(iii)(B)(2).
[339] For calculation purposes, the total costs of the primary function area repair include the repair costs of the roof, heating, ventilation, and air conditioning (HVAC) systems, mechanical rooms, janitorial closets, locker rooms, and private offices directly associated with the repair of the primary function area.
[340] 28 C.F.R. § 35.151(b)(4)(iii)(A).
[341] 28 C.F.R. § 36.403 (g)(2).

H. Additional Resources

Applicants are encouraged to visit FEMA's Building Science Resource Library[342] for additional information on the contents and potential applicability of select building codes that FEMA supports. These include appropriate building codes, standards, specifications, and national or local floodplain management ordinance compliance. If a community has adopted and enforces local building codes, floodplain management requirements must be met for all construction located in a special flood hazard area. Compliance with the minimum codes and standards do not always guarantee compliance with national or local floodplain management ordinances.

III. Hazard Mitigation

Additional funding to protect an applicant's facilities may be eligible as PA hazard mitigation.[343] Hazard mitigation[344] measures are those taken to help avoid repetitive damage from multiple disasters, reduce the potential for future damage to an eligible facility, and provide long-term solutions to the increasing frequency and severity of natural hazards. PA hazard mitigation allows work beyond code and standard requirements. In cases where the proposed resilience measure(s) exceed a code or standard requirement, eligibility is evaluated based on the work that is above and beyond the code requirements. Upgrades required to meet applicable codes and standards are not mitigation measures because these measures are part of eligible restoration work.

Approved PA hazard mitigation measures are considered part of the total eligible cost of repair, restoration, or reconstruction of a facility. In cases where the eligible repair costs are fully covered by insurance, the PA hazard mitigation may still be eligible if the "total eligible project cost," including mitigation, meets or exceeds the minimum project threshold.

A. Eligibility Criteria

FEMA evaluates proposed PA mitigation measures for eligibility, cost-effectiveness, technical feasibility and effectiveness, and compliance with Environmental and Historic Preservation (EHP) laws, regulations, and executive orders (EOs). In addition, FEMA ensures that the mitigation does not negatively impact the facility's operation or surrounding areas or create susceptibility to damage from another hazard. FEMA provides PA funding for engineering analysis and design services, including surveys, to develop a potential hazard mitigation proposal (HMP) if the work is included in the approved mitigation scope of work (SOW) and the work has been completed.

To be eligible for PA hazard mitigation funding, measures must directly reduce potential for future damage to the damaged portion(s) of the facility, meet cost-effectiveness criteria, and comply with all other federal,

[342] For more information, refer to: FEMA Building Science Resource Library | fema.gov.
[343] FEMA also refers to PA hazard mitigation as 406 mitigation. Section 406 of the Stafford Act provides funding for cost-effective measures that increase the resilience of disaster damaged facilities against future incidents.
[344] 44 C.F.R. § 206.2(a)(14).

state, local, tribal, and territorial legal requirements. PA hazard mitigation may only be included in facility restoration permanent work (categories C-G) projects, not emergency work projects.

Details about each of these requirements are discussed in the following paragraphs.

B. Future Damage Reduction

To ensure protection of the disaster-damaged facility, FEMA evaluates proposed measures to determine feasibility and the capability of the mitigation measure to protect against disaster damages, regardless of hazard type.

Generally, eligible PA mitigation measures are those that applicants perform on damaged portion(s) of a facility. PA mitigation measures protecting damaged portion(s) of a facility may also protect other portions of the facility. If an applicant proposes mitigation measures that are distinct and separate from the damaged portion(s) of the facility, FEMA evaluates the proposal and determines eligibility based on how the measures protect the damaged portion(s) of the facility.

Examples: Potentially Eligible Hazard Mitigation Measures That are Not Applied Directly to the Damaged Portion of the Facility

Examples of eligible PA hazard mitigation measures that may be separate and distinct from the damaged portion(s) of a facility include, but are not limited to:

- Constructing floodwalls or vegetated swales around damaged facilities;
- Installing new drainage structures (including culverts or permeable pavements) along a damaged road;
- Applying fire-resistant materials and/or creating defensible space around eligible facilities; and,
- Dry floodproofing both damaged and undamaged buildings that contain components of a system that are functionally interdependent (i.e., when the entire system is jeopardized if any one component of the system fails).

If FEMA determines that mitigation measures are ineligible as PA hazard mitigation (e.g., the mitigation measures do not protect the damaged portions of the facility against future risk), applicants may request to use hazard mitigation funding under FEMA's Hazard Mitigation Grant Program (HMGP). This provides protection to undamaged portions, while utilizing PA mitigation funds to provide protection to damaged portions.[345] Applicants may use both PA hazard mitigation and HMGP mitigation funds to implement mitigation measures on the same facility, but not for the same work.

If FEMA approves PA funding for mitigation and the applicant does not complete the PA mitigation work, FEMA will deobligate the PA mitigation funds.

[345] For more information, refer to: Hazard Mitigation Grant Program (HMGP) | fema.gov.

1. COST EFFECTIVENESS

To be eligible for PA hazard mitigation funding, mitigation measures must be cost effective.[346] FEMA considers PA hazard mitigation measures to be cost-effective if any of the following criteria are met:

- The cost for the mitigation measure does not exceed 15 percent of the total eligible repair cost (prior to any insurance reductions) of the facility or facilities for which the mitigation measure applies; or
- The mitigation measure is specifically listed in Appendix J: Cost-Effective Public Assistance Hazard Mitigation Measures and the cost of the mitigation measure does not exceed 100 percent of the eligible repair cost (prior to any insurance reductions) of the facility or facilities for which the mitigation measure applies; or
- The recipient or applicant demonstrates through an acceptable benefit-cost analysis (BCA) methodology that the measure is cost-effective, including FEMA's list of mitigation measures pre-determined to be cost-effective, using the FEMA BCA Toolkit.[347]
    - Hazard mitigation measures that do not meet the first two requirements above may prove to be cost-effective based on a BCA. If the hazard mitigation measure is not cost-effective based on the first two criteria, FEMA and the applicant will work together to develop a BCA to determine whether it is cost effective.

A BCA is based on a comparison of the total estimated cost for the PA hazard mitigation measure to the total value of expected benefits to society. FEMA's BCA methodology considers common project benefits, which include reductions in the magnitude or frequency of:

- Damage to the facility and its contents;
- The need for emergency protective measures;
- The need for temporary facilities;
- Loss of function;
- Casualties (typically included only for earthquake, tornado, and wildfire mitigation); and,
- Previous impacts regardless of whether the impacts occurred in federal disaster declarations (only if documented).

FEMA's BCA methodology also considers additional social, environmental, and other benefits that do not directly impact hazard mitigation.

2. COMPLIANCE WITH LEGAL REQUIREMENTS

To be eligible for PA hazard mitigation funding, mitigation measures must comply with applicable laws, regulations, and EOs as well as any federal or SLTT requirements. These may be different from an applicant's usual construction project compliance items.

Compliance with codes and standards may be required. FEMA evaluates the project's SOW under all codes and standards requirements to determine eligibility (see Codes and Standards in this chapter). Resilience measures that are more stringent than codes and standards are implemented as PA hazard mitigation. If an applicant identifies different locally adopted codes, specifications or standards that are the equivalent to or

[346] 44 C.F.R. § 206.226(e).
[347] For more information, refer to: FEMA BCA Toolkit | fema.gov.

more stringent than the consensus-based codes, specifications and standards, FEMA requires the applicant's engineer, design professional, or other qualified individual to demonstrate that the hazard-resistant design criteria in the locally adopted code, specification or standard is equivalent to or more stringent than those approved under FEMA's consensus-based codes, specifications, and standards.[348]

3. PROPOSING PA HAZARD MITIGATION

An applicant, recipient, or FEMA may recommend that PA hazard mitigation measures be included in a project. Figure 18. PA Hazard Mitigation Process Flowchart provides an overview of the steps in the PA hazard mitigation process.

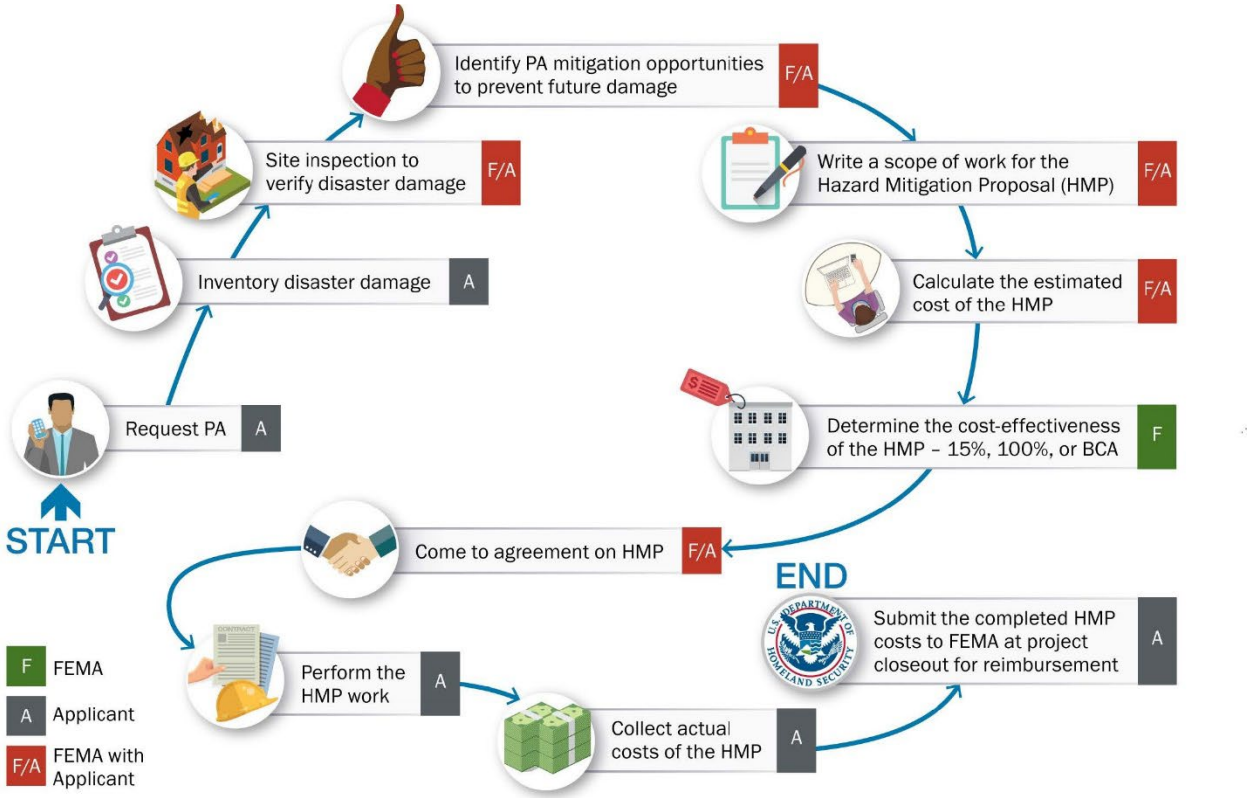

Figure 18. PA Hazard Mitigation Process Flowchart

Applicants may request assistance from FEMA hazard mitigation staff to identify and develop proposed hazard mitigation measures for their facility. These hazard mitigation measures are included in PA permanent work projects via hazard mitigation proposals (HMPs).

[348] For more information, refer to Consensus-Based Codes, Specifications, and Standards in this chapter.

4. REDUCE ADVERSE IMPACTS

To reduce risk, applicants should design hazard mitigation measures to reduce susceptibility to another hazard, adverse impacts to facility operation, and adverse impacts to surrounding areas.

5. POST-REPAIR HAZARD MITIGATION

PA hazard mitigation opportunities usually present themselves during facility repair. However, in cases where applicants need to repair a facility in an expedited manner, an applicant may miss an opportunity to implement hazard mitigation measures during repair. If an applicant implements hazard mitigation measures on a completed PA-funded repair, the mitigation work may still be eligible for PA funding; however, FEMA will not provide PA funding for any duplicative work triggered by the subsequent hazard mitigation.

6. COMPLETED HAZARD MITIGATION ELIGIBILITY

In some instances, applicants may implement hazard mitigation measures after the incident occurs but before the incident is declared or before FEMA can evaluate the measure for eligibility. In these cases, the hazard mitigation work may still be eligible for PA funding if it is cost effective and FEMA confirms compliance with applicable EHP laws, regulations, and executive orders (EOs).

7. NATURE-BASED SOLUTIONS

Nature-based solutions are sustainable planning, design, environmental management, and engineering practices that weave natural features or processes into the built environment to promote adaptation and resilience. These solutions use natural features and processes to reduce flood risk, improve water quality, protect coastal property, restore, and protect wetlands, stabilize shorelines, reduce urban heat, add recreational space, and more.

Nature-based solutions offer significant monetary and non-monetary benefits. They often come at a lower cost than traditional infrastructure. These benefits include economic growth, increased property values, and better public health.

FEMA uses the term "nature-based solutions"[349] to refer to an umbrella of strategies, including nature or nature-based features. Other agencies may also use the terms "engineering with nature" or "nature-based approaches".

Appendix J: Cost-Effective Public Assistance Hazard Mitigation Measures lists numerous cost-effective nature-based hazard mitigation features, including live fascines, vegetated geogrids, live crib walls, brush mattresses, bioswales, and rain gardens. Other nature-based solutions are eligible as PA hazard mitigation, provided they meet all eligibility requirements.

[349] For more information, refer to: Nature-Based Solutions | fema.gov.

C. Historic Preservation Compliance

1. FEDERAL REQUIREMENT

If the facility is listed in, or meets the criteria to be listed in, the National Register of Historic Places, and an applicable code or standard requires repair in a certain manner, costs associated with work to comply with that code or standard are eligible, even if repair costs exceed replacement costs. This is an exception to the regulatory requirement that when a facility is eligible for replacement, FEMA limits eligible costs to the less expensive of repairs or replacement (see Repair vs. Replacement in this chapter).[350]

2. STATE, TRIBAL NATION, OR TERRITORIAL GOVERNMENT REQUIREMENT

If a state and territorial historic building code or standard requires specific work be performed, FEMA evaluates the code or standard using the eligibility criteria provided under the Codes and Standards section in this chapter. Most state historic building codes and standards encourage code officials to allow *less* intrusive alternatives to requirements of the prevailing codes or standards, but do not require any particular work be performed. As a result, the codes and standards usually fail to meet the eligibility criteria.

Tribal Nation historic preservation allows tribes to protect and identify historic places in ways that align with tribal values. These duties can include enforcing preservation laws, identifying and nominating historic places, and preserving traditional cultural properties.

D. Public Assistance Mitigation Funds for Capped Projects

1. IMPROVED PROJECT

Improved projects that involve facility replacement or relocation can include mitigation funding. If the capped amount for an improved project includes PA mitigation funds and the applicant either does not complete the PA mitigation work, or replaces or relocates the original facility, FEMA deobligates the PA mitigation funds.

2. ALTERNATE PROJECT

If the SOW to restore a facility includes PA mitigation, and the applicant elects to proceed with an alternate project, FEMA does not include costs related to the PA mitigation in the capped amount for the alternate project.

E. Construction Method

FEMA considers changes to the pre-disaster design or construction method (including materials) and can approve them if the changes are required due to access or accessibility issues, site conditions, or to tie into existing infrastructure. The changes must not impact the capacity or function of the facility. Applicants must show that the changes are reasonable based on the type and extent of restoration and are consistent with their general construction practices and legal requirements. Codes and standards may also require changes to pre-disaster design or construction methods.

[350] 44 C.F.R. § 206.226(f)(2) and (3).

F. Pre-Existing Site Conditions

In cases where unrepaired, pre-existing conditions may compromise repair of disaster damage, FEMA provides PA funding to repair disaster damage contingent upon the applicant repairing the pre-existing damage. The costs associated with repairing the pre-existing damage are the responsibility of the applicant. For example, FEMA may determine that repairs to a damaged bridge deck are eligible. However, the deck cannot be repaired unless the applicant replaces the rotting timbers that support the deck.

IV. Flexible Restoration (Capped Projects)

FEMA offers flexible options that allow applicants to use PA funding for permanent work in ways other than restoring a facility to its pre-disaster design and function. For these options, FEMA limits (or "caps") the PA funding to the amount it would cost to repair or rebuild the facility as it was before the disaster, including costs for meeting current eligible codes and standards, as outlined in the Codes and Standards section of this chapter. Temporary facility funds are not included in fixed-cost projects. The three capped project options are: improved projects, alternate projects, and alternative procedures projects (see Appendix G: Alternative Procedures).

A. Processing Projects with Capped Funding

Sometimes during the development of the SOW, applicants realize that restoring a damaged facility to its original condition may not be the best choice for the community's recovery. If this decision is made before the project is formulated, a best practice is to submit the project without adding additional damages or scopes of work. This ensures that the project can be reviewed and processed more smoothly, without interference from other faster-moving project reviews in the PA process.

However, in many cases, the decision to pursue an alternative to restoring the facility or improving the facility (beyond codes and standards upgrades and mitigation measures) may be made after the project is formulated and obligated. In such situations, only the site opting for an alternate or improved project will have its funding capped. Other sites within the project will follow the standard process for small or large projects, based on the total project cost after any reductions. Applicants choosing a capped project must first obtain approval from their recipient before moving forward.

B. Improved Project

Applicants may wish to make improvements to a damaged facility that are not required by eligible codes or standards, such as adding a new gymnasium to a school building or relocating a building outside a flood-prone area. An improved project is a project that restores the pre-disaster function of a facility and incorporates improvements or changes (including capacity changes) to the pre-disaster design. These changes may also include a facility replacement and/or hazard mitigation.

FEMA limits PA funding for an improved project to the lesser of the following:

- The federal share of the approved estimate to restore the damaged facility to its pre-disaster design and function; or

- The federal share of the actual costs of completing the improved project.

FEMA only increases eligible funding for an improved project if the applicant identifies an error or omission in the original scope of work or cost estimate related to restoring the facility to its pre-disaster design and function.

1. USE OF IMPROVED PROJECT FUNDS

Applicants may use improved project funds to improve the damaged facility. The facility must have the same function that existed immediately prior to the disaster. An applicant must obtain approval from their recipient before proceeding with an improved project.[351] The following are examples of improved projects:

- Laying asphalt on a gravel road;
- Replacing a firehouse that originally had two bays with a firehouse that has three bays;
- Incorporating requirements dictated by a code or standard that does not meet PA eligibility criteria; and,
- Relocating a facility when FEMA is not requiring the relocation.

The funding available for PA hazard mitigation for an improved project is limited to the amount that would have been available if the facility had been restored to its pre-disaster design. If the capped amount for an improved project includes PA mitigation funds and the applicant either does not complete the PA mitigation work or replaces or relocates the original facility, FEMA deobligates the PA mitigation funds.

Applicants can combine PA funds with funding from another federal agency to construct the improved project. However, FEMA cannot duplicate funds provided by another federal agency for the same work. In addition, applicants cannot use funding from another federal agency toward the non-federal cost share of the PA-funded project, with few exceptions. U.S. Department of Housing and Urban Development's (HUD) Community Development Block Grant – Disaster Recovery Program (CDBG-DR) is an example of a federal program that, in certain circumstances, may be used to meet the non-federal share of FEMA's PA program.[352]

If the improved project significantly changes the pre-disaster configuration of the facility, the recipient must forward the request to FEMA to ensure that the improved project complies with appropriate EHP laws, regulations, and EOs.

C. Alternate Project

Applicants may determine that the public welfare is not best served by restoring the pre-disaster function of the damaged facility. When this occurs, the applicant must obtain FEMA's approval to apply PA funding toward a different facility (or facilities). FEMA refers to this as an alternate project. The alternate project must be a permanent work project that benefits the general public, serving the same general area that was being served by the original facility. See Chapter 10: Environmental and Historic Preservation for more information on the limitations and requirements for the disposition of the original facility.

[351] 44 C.F.R. § 206.203(d)(1).
[352] For more information, refer to: *FEMA-HUD CDBG-DR Flexible Match Implementation Guide*.

FEMA limits federal funding for an alternate project to the lesser of:

- The federal share of the approved estimate to restore the damaged facility to its pre-disaster design and function; or
- The federal share of the actual cost of completing the alternate project.[353]

1. USE OF ALTERNATE PROJECT FUNDS

Applicants may use alternate project funds toward a project that does not restore the pre-disaster function of the damaged facility. This includes the ability to:

- Repair, expand, mitigate, or construct a facility that would otherwise be an eligible facility under the PA Program;[354]
- Demolish facilities;
- Purchase capital equipment that has a useful life of at least 1 year and is equal to, or greater than, $10,000 per unit;
- Fund project shortfalls due to mandatory flood insurance reductions[355] taken from PA Program funding for repairs to buildings in special flood hazard areas (SFHAs);
- Supplement funds for an improved project; and,
- Conduct cost-effective hazard mitigation measures, regardless of whether the facility was damaged by the incident and whether the measures reduce the risk of future damage from the same type of incident or of the same type of damage caused by the incident.

Alternate project funds may be used for hazard mitigation provided that:

- Funding does not duplicate other FEMA mitigation funding; and,
- Measures reduce the risk of future damage to a facility that is otherwise eligible either under the PA or Hazard Mitigation Assistance (HMA) programs. If the measures are the same type as those eligible for HMA funding, they must meet a need for governmental services and functions or eligible PNP services and functions in the area affected by the incident.

If an alternate project involves construction, the applicant must obtain FEMA approval prior to the start of construction as FEMA must ensure that it complies with appropriate EHP laws, regulations, and EOs.[356] If the SOW to restore a facility includes PA mitigation, and the applicant elects to proceed with an alternate project, FEMA does not include costs related to the PA mitigation in the capped amount for the alternate project.

Applicants may not use alternate project funds to:

- Meet budget shortfalls;
- Create a new community plan;

[353] 44 C.F.R. § 206.203(d)(2)(ii) and (iii).
[354] 44 C.F.R. § 206.203(d)(2)(iv).
[355] For more information, refer to the National Flood Insurance Program section in this chapter).
[356] 44 C.F.R. § 206.203(d)(2)(v).

- Landscape;
- Pay for operating expenses;[357]
- Purchase supplies, furniture, or equipment costing less than $10,000 per unit;
- Pay the non-federal share of any PA project;[358]
- Fund buyouts for mitigation, such as acquisition of flood-prone property to create open space;
- Supplement funds on projects that utilize other federal agency grants; or
- Fund a project located in a FEMA-designated floodway.

V. Eligibility Considerations by Facility

This section details the types of facilities captured within each category (C-G) of permanent work along with specific eligibility criteria related to one or more of the facilities within each category. See Appendix I: Work Eligibility Considerations by Type of Facility for a summary of eligibility by facility type.

A. Roads and Bridges (Category C)

1. COMPONENTS

Roads may be paved, gravel, or dirt. Road components include, but may not be limited to:

- Surfaces;
- Bases;
- Shoulders;
- Ditches;
- Drainage structures, such as culverts, vegetated swales, and water bars,
- Low water crossings, inlets, outfalls, swales; and,
- Associated facilities, such as lighting, sidewalks, guardrails, and signs.

Bridge components include, but may not be limited to:

- Decking;
- Guardrails;
- Girders;
- Pavement;
- Abutments;
- Piers;
- Slope protection;
- Approaches; and,

[357] Ibid.
[358] 44 C.F.R. § 206.203(d)(2)(v).

- Associated facilities, such as lighting, sidewalks, and signs.

2. ROAD AND BRIDGE ELIGIBILITY FOR PERMANENT WORK

Public roads are any publicly-owned, non-federal aid street, road, or highway for which an eligible applicant has legal responsibility. Some private non-profit applicants may have eligible roads and sidewalks, such as on a school campus.

FEMA is prohibited from providing PA funding when another federal agency has specific authority to restore facilities damaged or destroyed by an event which receives a major disaster declaration. However, if a Tribal Nation has received funding from the Bureau of Indian Affairs (BIA) or FHWA for construction or maintenance of their roads, those roads are still eligible for PA funding under presidentially declared major disasters for debris removal, emergency protective measures and permanent restoration, if they meet the other eligibility requirements. Tribal roads that receive FHWA Emergency Relief (ER) Program[359] funding continue to be ineligible for PA funding for permanent restoration. Additionally, roads owned by a Tribal Nation are eligible for PA even if they are not open to the general public.

FHWA has authority to restore public roads and bridges under the Emergency Relief (ER) Program. Roads and bridges that are eligible for ER assistance are identified as federal-aid routes, which include highways on the federal-aid highway system and all other public roads not classified as local roads or rural minor collectors and includes all elements within the cross section of a highway that are damaged as a direct result of a qualifying disaster.

The ER Program is activated separately from presidential declarations under the Stafford Act and may not be activated for all incidents. Federal-aid routes and ancillary facilities are ineligible for permanent work even if the ER Program is not activated or if the program is activated but FHWA does not provide funding for the work. FHWA also has authority to assist with restoration of transportation facilities under the Emergency Relief for Federally Owned Roads (ERFO) Program, including tribal transportation facilities, federal land transportation facilities, and other federally owned roads open to public travel under the ERFO program.[360]

Private roads are those that are not owned or operated by or otherwise the legal responsibility of a federal or SLTT entity (including orphan roads, roads in gated communities, homeowners' association roads, etc.). These roads are ineligible.

3. TYPES OF DAMAGE

The repair of damage to eligible roads and bridges caused by the disaster event is eligible under the PA Program.

The incident may cause minor damage to roads that results in damage similar to that which may occur over time from other causes, such as the age of the road, traffic flow, and frequent rain. Costs related to maintenance of roads are ineligible. Work to repair potholes or fatigue cracking is usually ineligible as this

[359] For more information, refer to: Emergency Relief Program - Federal Highway Administration | dot.gov.
[360] For more information, refer to: Emergency Relief for Federally Owned Roads (ERFO) | dot.gov.

type of damage is rarely caused directly by one incident. Different types of damage to roads caused by flooding are discussed below.

i. Deterioration, Deferred Maintenance, Negligence

FEMA does not provide PA funding for repair of damage caused by deterioration, deferred maintenance, the applicant's failure to take measures to protect a facility from further damage, or negligence. When evaluating eligibility of reported road damage, in addition to evaluating how the incident caused the damage, FEMA reviews maintenance records or documentation establishing that the applicant has a routine maintenance program. In the absence of maintenance records, FEMA reviews material purchase invoices and activity logs and inspects other sections of the applicant's road system to confirm the performance of regular maintenance activities. More information on maintenance documentation requirements is available in Chapter 4: General Facility and Work Eligibility.

ii. Scour and Erosion

Work to repair scour and erosion damage to a channel or stream bank is only eligible if the repair is necessary to restore the integral ground of an eligible road, bridge, culvert, or drainage structure. Earthwork in a channel or stream embankment that is not related to restoring the structural integrity of an eligible facility is ineligible.

Work which involves replacing or upsizing drainage structures or culverts, or may have an adverse impact upstream or downstream, or on critical habitats, will require coordination with PA, EHP, and PA hazard mitigation staff to determine whether a hydrologic and hydraulic (H&H) study is needed. H&H studies are part of eligible permanent work projects and project costs (see Facility Located in or Impacting a Floodplain in this chapter).

4. INUNDATED AND SUBMERGED ROADS

Restoration of sections of road with disaster-related surface damage will follow the guidance described above for roads and bridges. The guidance provided in this section explains the eligibility of funding for roads for which disaster damage is due to flood water inundation as a direct result of a federally declared major disaster. A submerged or inundated road is defined as a section of road that is covered by flood waters for any period of time. The inundation must have occurred as a direct result of a federally declared major disaster. When roads are inundated or submerged from flooding, driving on them can compromise the integrity of the road. When damage occurs on roads that have been inundated by flood water, FEMA provides funding for the repair when an applicant can substantiate the following conditions:

- The road is a public road;
- The road has visible (after flood waters have receded) and quantifiable damage that is a direct result of the major disaster, such as washouts, collapses, and slips; and,
- Traffic-induced surface damage is the result of emergency vehicles performing eligible emergency work or the road is a single-access road that is required to be reopened due to lack of detour/alternate routes.

i. Inundated Roads with Visible Damage

Work to repair road surface damage caused by the declared event (including damage from saturation and flood water inundation) that is visible and quantifiable during inspection once flood waters have receded, and directly attributed to the declared event is eligible for PA funding.

Examples of major visible and quantifiable surface damage caused by the declared event includes, but is not limited to, major erosion, washouts, collapses, and slips. Minor surface damage to roads caused by the declared event is often similar to damage that may occur over time from other causes, such as the age of the road, traffic volume, and frequent rain.

Distinguishing between pre-existing damage and minor damage caused by the declared event may be difficult. Distress evident on the surface, such as potholes or fatigue cracking is generally ineligible for repair as this type of damage is rarely caused directly by one incident.

When evaluating whether eligibility of reported damage to a road that was inundated or submerged was caused by the declared event, FEMA will evaluate the pre-disaster condition of the road and how the incident caused the damage.

a. Documentation to Support Claimed Damage

The minimum documentation to support damage to inundated or submerged roads includes:

Table 23. Required Documentation and Information to Support Damage to Inundated or Submerged Roads

For Small and Large Projects
▪ Pre-disaster and post-event photos or videos of impacted sections of road, or other documentation to demonstrate pre- and post-event surface condition. ▪ Maintenance records or other documentation establishing that the applicant has a routine maintenance program. These maintenance records may include, if applicable: bridge inspection reports, public meeting or contract work records, documentation of a pavement evaluation program or pavement management system (e.g., a regular documented pavement inspection using standards found in Distress Identification Manual for the Long-Term Pavement Performance Program);[361] and, ▪ Documentation of any repairs following pre-disaster assessment, specific to each section of road claimed and/or documentation of any post-disaster repair work already completed, specific to each section of road claimed.

In the absence of those records, FEMA reviews material purchase invoices and activity logs (and whatever documentation is available) to determine if the damage was caused by the event. FEMA may review specific other sections of an applicant's road system to confirm the performance of regular maintenance activities and to assist in making an informed decision on the condition of the road at the time the disaster occurred.

[361] For more information, refer to: DOT's *Distress Identification Manual for the Long-Term Pavement Performance Program (Fifth Revised Edition)*.

FEMA does not provide PA funding for repair of damage caused by deterioration, deferred maintenance, an applicant's failure to take measures to protect a facility from further damage, or negligence.

ii. Inundated Roads without Visible Surface Damage

Restoration work for roads that have experienced inundation by flood waters as a direct result of a declared event is only eligible for PA funding if surface damage is visible and quantifiable during an inspection after the flood waters have receded. Claims of subsurface damage based on the findings of an inspection for sections of road without visible and quantifiable surface damage will not be considered eligible for PA funding. Accordingly, costs associated with methods of inspection on sections of road without visible and quantifiable surface damage are not eligible for PA reimbursement. This includes destructive and non-destructive methods of inspection, such as ground-penetrating radar, core sampling, soil boring, and falling weight deflectometers.

a. Projected Loss of Useful Service Life

Restoration work based on a projected loss of useful service life (that is the potential reduction in the road's remaining service life) is ineligible because it is not damage caused by the major disaster event. Service life is part of the design of roadways. Loss of useful service life is based on aging and use of the roadway.[362] For example, if an applicant is claiming subsurface deterioration of a section of road that has experienced inundation based on the findings of an inspection,[363] this alone does not constitute disaster-related damage eligible for PA funding since such deterioration is not caused by a single incident but is the result of the use of the road and normal weather conditions over time.

iii. Surface Damage Resulting from Reopening Roads Prematurely

To help avoid damage to roads that have been inundated or had underlying layers saturated, applicants should allow time for saturated underlying layers and soil to dry out prior to reopening roads to normal traffic. If saturated roads are re-opened prematurely, they may sustain traffic-induced damage. This damage is not a direct result of the disaster and may constitute negligence. Therefore, it is not usually eligible for PA funding.[364]

Exceptions include:

- Surface damage caused by vehicles performing eligible debris removal or other emergency work under PA necessary as a result of the declared event, or
- Single-access roads that an applicant determined were required to be reopened for emergency response purposes due to lack of detour/alternate routes.

[362] See Loss of Useful Service Life in Chapter 6.
[363] Including destructive and non-destructive methods of inspection, such as ground-penetrating radar, core sampling, soil boring, and falling weight deflectometers.
[364] See 44 C.F.R. §§206.223(a)(1) and (e).

In such cases, the applicant must provide documentation to justify reopening the road prematurely as described below:

Table 24. Required Information to Support Damage Resulting from Reopening Roads Prematurely

For Small and Large Projects
▪ An explanation/justification for reopening the road prior to allowing saturated soil to dry (such as emergency response, the performance of eligible PA emergency protective measures, or emergency access); ▪ For emergency response traffic, documentation of emergency call logs and a map showing the route taken by the emergency vehicle(s); or ▪ If claiming surface damage from normal traffic loads due to reopening a single-access road immediately following the declared event or once flood waters have receded, documentation to support that no detour or alternate route was available, and the road was required to reopen for emergency access.

iv. Closed Basin Flooding

Closed basin flooding[365] can result in roads that remain submerged indefinitely as water is not able to drain from closed basin areas. In such cases, waiting for flood waters to recede may not be feasible to assess potential damage and provide time extensions safely and effectively. PA funding may be used to raise the grades of eligible sections of road faced with long-term loss of use due to an unprecedented rise in closed basin water level when closed basin flooding is directly attributed to the declared event.

PA funding is generally limited to grade raises of highways and bridges of critical routes projected to experience long-term loss of use due to closed basin flooding, as demonstrated by an applicant. Only those routes that are critical to restoring traffic service are eligible for grade raises. Factors to evaluate whether individual routes are critical include: functional classification; provision of critical or essential community services (such as access for emergency response, schools, and mail/delivery vehicles); and availability of alternate routes and/or detours. FEMA, in coordination with the recipient and applicant, will determine if the claimed roadway is a critical route and eligible for grade raises based on the applicant's request for impacted sections of roads in closed basin flooding areas. It is not the intent of the PA Program to raise the grades in dips or other low spots along roadways that suffer inundation from chronic flooding problems.

If requested by an applicant, FEMA will also consider permanent reroutes to move roadways outside of closed basin flooding areas instead of grade raises if the applicant can demonstrate that a permanent reroute is more cost effective than grade raises. Reroutes are subject to relocation requirements as well as EHP review and approval to ensure the reroute does not have adverse impacts.

a. Documentation to Support Claimed Damage for Closed Basin Flooding

Permanent work, including raising the grade of the roadway, is only eligible if an applicant can demonstrate all of the following for closed basin flooding:

[365] For more information, refer to: FHWA Emergency Relief Manual | dot.gov.

Table 25. Required Documentation and Information to Support Closed Basin Flooding

For Small and Large Projects
▪ Information to support that the submerged section of road is in a closed basin flooding area; ▪ Information to support the closed basin flooding was directly attributed to the declared major disaster event and the long-term loss of use of critical routes; ▪ For long-term loss of use of critical routes, information demonstrating the length of time the roadway has been closed to traffic and is projected to remain closed to traffic based on the basin water level elevations that occurred as a direct result of the declared major disaster event; and ▪ For closed basin flooding as a direct result of the declared major disaster event: ○ Information showing that the water elevation in the closed basin has reached historically high levels; ○ The rise in the water level occurred during the designated incident period; ○ Historic water level elevation and rainfall intensity records; and/or, ○ Maintenance reports or other information that provides some historical perspective on events and water levels within the closed basin.

v. Gravel Roads

Gravel surface loss from damage or inundation is not assumed and cannot be based on projected or estimated loss. Applicants must be able to demonstrate actual gravel surface loss. This includes documentation indicating gravel loss directly attributed to the declared event (such as work logs and material invoices quantifying the amount of aggregate gravel placed in the damaged section within 12 months of the start of the incident period) and/or photographs or video of the field of displaced gravel.

If an applicant chooses to lay gravel on a longer section of the road, FEMA only reimburses for the portion of the road that was disaster damaged. Gravel laid on non-disaster damaged sections of the road are not eligible.

Corrugation of gravel roads is not eligible for repair or restoration. Corrugation (or "wash boarding") is associated with traffic in dry conditions and not attributable to inundation.

Terminology

Corrugation or "washboarding" comprises a series of ripples which occur with the passage of wheels rolling over unpaved roads at speeds sufficient to cause bouncing of the wheel on the initially unrippled surface.

Rutting of a roadway is a depression or groove worn into the surface of the road due to heavy traffic loads or wear over time. For gravel roads, rutting is generally removed by re-grading the road surface.

Any post event rutting of gravel roads may be the result of premature opening of the road. Consequently, the rutting is not eligible except under the limited circumstances outlined below.

a. Documentation and Information to Support Gravel Loss

Table 26. Required Documentation and Information to Support Gravel Loss

For Small and Large Projects
▪ Documentation indicating gravel loss directly attributed to the declared event (e.g., work logs and material invoices quantifying the amount of aggregate gravel placed in the damaged section within 12 months of the start of the incident period); and, ▪ Photographs or video of the field of displaced gravel.

b. Documentation and Information to Support Gravel Road Rutting

Table 27. Required Documentation and Information to Support Gravel Road Rutting

For Small and Large Projects
▪ For emergency response traffic, documentation of emergency call logs and a map showing the route taken by the emergency vehicle(s); and, ▪ If claiming rutting from normal traffic loads due to reopening a single-access road immediately following the declared event or once flood waters have receded, documentation, such as a work log, indicating that the rutted section of road was graded, and surface aggregate applied prior to the event.

5. DEMONSTRATING DISASTER-RELATED DAMAGE

Submerged roads should only be assessed for visible and quantifiable surface damage after flood waters have receded to avoid additional damage. Applicants must substantiate surface damage claims with supporting documentation as described below. FEMA will not accept a damage report simply based on a claim that a section of road has experienced inundation without demonstrating any resulting surface damage. Similarly, damage repair to an inundated or submerged road is not assumed to be eligible simply because estimated repair costs were included in a joint preliminary damage assessment.

B. Water Control Facilities (Category D)

Water control facilities are those facilities built for the following purposes:

- Channel alignment;
- Recreation;
- Navigation;
- Land reclamation;
- Irrigation;
- Maintenance of fish and wildlife habitat;
- Interior drainage;
- Erosion prevention;
- Flood control; or
- Storm water management.

They include:

- Dams and reservoirs;
- Levees and floodwalls;
- Lined and unlined engineered drainage channels;
- Canals;
- Aqueducts;
- Acequias
- Sediment and debris basins;
- Storm water retention and detention basins;
- Urban stormwater management infrastructure;
- Coastal shoreline protective devices;
- Irrigation facilities;
- Pumping facilities; and,
- Navigational waterways and shipping channels.

1. RESTORING THE CAPACITY OF CHANNELS, BASINS, AND RESERVOIRS

Restoring the pre-disaster carrying or storage capacity of engineered channels, debris and sediment basins, storm water detention and retention basins, and reservoirs is eligible, if the facilities were not constructed by a federal agency and if the applicant provides documentation to establish the following (see Table 28. Required Documentation and Information to Support Pre-Incident Capacity of Channels, Basins, and Reservoirs).

Table 28. Required Documentation and Information to Support Pre-Incident Capacity of Channels, Basins, and Reservoirs

For Small and Large Projects
▪ The pre-disaster capacity of the facility;[366] and, ▪ That the applicant maintains the facility on a regular schedule.   ○ Documentation supporting regular maintenance would be a written maintenance plan and/or activity logs documenting regular intervals of activity. Applicant logs documenting clearance of blockages in response to resident complaints are not sufficient to substantiate a regular maintenance schedule.

If the applicant chooses to remove non-incident-related material along with that deposited as a result of the incident, the project is considered an improved project.

[366] Survey data that is either recent or covers a multi-year period to substantiate the amount of new material reasonably attributable to the incident can be used to support pre-disaster capacity claims.

2. FLOOD CONTROL WORKS

Flood control works are those structures such as levees, flood walls, flood control channels, and water control structures designed and constructed to have appreciable effects in preventing damage by irregular and unusual rises in water levels.

Restoration of damaged flood control works that are under the authority of another federal agency are ineligible. Secondary levees riverward of a primary levee are ineligible unless the secondary levee protects human life. See Appendix I. Work Eligibility Considerations by Type of Facility. for more information.

C. Buildings and Equipment (Category E)

Facilities under category E include buildings, contents, equipment, and vehicles. Specific to category E, insurance is generally available for buildings, contents, equipment, and vehicles, for most perils such as flood, wind, and fire; therefore, insurance should be the primary source of recovery for PA applicants.

1. BUILDINGS

Buildings include all structural and non-structural components, including mechanical, electrical, and plumbing systems.

For buildings and building systems, distinguishing between damage caused by the incident and pre-existing damage may be difficult. Before making an eligibility determination, FEMA considers each of the following:

- Evidence of regular maintenance as described in Chapter 4: General Facility and Work Eligibility;
- Evidence of pre-disaster condition, such as interior water stains from a leaky roof (in such cases, FEMA evaluates whether the roof was repaired prior to the incident);
- The severity and impacts of the incident; and,
- Whether the applicant took prudent actions to prevent additional damage.

Mold remediation and removal of mud, silt, or other accumulated debris is eligible as permanent work when conducted in conjunction with restoration of the facility.

A public housing authority facility is only eligible for permanent work if Congress does not appropriate funds to the U.S. Department of Housing and Urban Development (HUD) for the facility's emergency capital needs.

i. Earthquake Damage to Welded Steel Moment Frame Buildings

FEMA has specific eligibility criteria for evaluating and repairing earthquake damage to buildings constructed with welded steel moment frames. For details, see Safety Inspections in Chapter 7. Generally, detailed analytical or experimental studies or Level 2 evaluations as described in Recommended Post-Earthquake Evaluation and Repair Criteria for Welded Steel Moment-Frame Buildings (FEMA-P-352),[367] are ineligible

[367] For more information, refer to: *Recommended Post-Earthquake Evaluation and Repair Criteria for Welded Steel Moment-Frame Buildings (FEMA-P-352)*.

unless FEMA provides approval before the applicant initiates the work. Repairs consistent with applicable International Existing Building Code[368] are eligible for reimbursement.

2. CONTENTS AND SUPPLIES

Building contents include furnishings, equipment, consumable or other supplies, files, records, research-related contents, animals, irreplaceable collections and individual objects, library books, publications and specialized items related to the function of the building and the service it provides. Contents can also include equipment on the property rather than within the building. Replacing destroyed supplies with the same number of comparable items is eligible. Applicants may replace supplies with different items used for the same general purpose and FEMA caps the eligible cost at the estimated amount for items comparable to those damaged. Contents damaged as a result of the disaster are eligible even if the building housing the contents is not damaged (e.g. basement flooding which does not result in structural damage, rain driven through open windows or vents). More information about contents eligibility is available in Appendix I. Work Eligibility Considerations for Contents.

i. Files

Eligible activities associated with the recovery of files include, but are not limited to:

- Recovery of damaged hard copies;
- Stabilizing the damaged hard copies;
- Sanitizing damaged hard copies;
- Photocopying or scanning damaged hard copies to re-establish files; and,
- Recovering data from water-damaged computer hard drives and portable or external drives.

Recovery of damaged hard copies includes labor and materials, such as bags, boxes, and containers. Stabilizing damaged hard copies includes freeze-drying. Photocopying or scanning includes labor and materials such as new folders and paper.

Not all activities are eligible. Examples of ineligible activities include:

- Establishing new information databases;
- Manually entering data that was lost in damaged computers;
- Scanning re-established hardcopy files into computers to create digital files; and,
- Deciphering photocopies of damaged hard copies.

ii. Library Books and Publications

Replacement of damaged or destroyed library books and publications is eligible based on the pre-disaster inventory of the quantities of the books and publications. Re-shelving, cataloging, and other work incidental to the replacement of library books and publications is also eligible.

[368] For more information, refer to: International Existing Building Code (IEBC) | iccsafe.org.

However, special library collections, including rare books, manuscripts, and other fragile materials, are only eligible for treatment, not replacement.

iii. Irreplaceable Collections and Individual Objects

Collections and individual objects are artifacts, specimens, artworks, archives, public records, and other items that are often considered irreplaceable because of their artistic, educational, historic, legal, scientific, or social significance. They are nonliving and, therefore, do not include animals or plant material, and are usually one-of-a-kind. Eligible collections and individual objects may be in storage or on display in a public or PNP facility and may include items located outdoors, such as sculptures and public art installations. Documentation of collections and individual objects generally include accession, catalog, and inventories.

Stabilization of damaged collections or individual objects is eligible. Stabilization is a series of treatment measures to maintain the integrity of a collection or object and to minimize deterioration. Stabilization involves taking the minimum steps necessary to return a collection or object to a condition in which it can function in the same capacity as it did prior to the incident. This includes:

- Treating damaged items utilizing environmental controls to achieve proper temperature and humidity; and,
- Chemical or mechanical cleaning to stabilize items to prolong their existence, maintain their integrity, and minimize further deterioration from the damaging effects of the incident.

Additional treatment beyond stabilization is eligible if it is necessary to maintain the integrity of the collection or object and return it to its pre-disaster function.

Terminology

Archives are materials created or received by a person, family, or organization, public or private, and preserved because of the enduring value they contain, or as evidence of the functions and responsibilities of their creator, especially those materials maintained using the principles of provenance, original order, and collective control.

Accession is a formal process used to legally accept and record a specimen or artifact as a collection item.

A **catalog** is a full record of information specific to an item and cross-referenced to other records and files, including identification and documentation of the material.

Stabilization is a series of treatment measures intended to maintain the integrity of a collection or object and to minimize deterioration. It involves the minimum steps necessary to return a collection or object to a condition in which it can function in the same capacity as it did prior to the disaster.

Special library collections include unique, rare, printed books, first editions (often author-signed), manuscripts, archives, artifacts, photos, engravings, graphics, music, and ephemera, as well as limited edition print runs of special collections of maps or other important topics.

In some cases, costs associated with restoring an item to pre-disaster condition as a result of the incident is eligible; however, restoring an item to original condition is ineligible. For example, repairing a tear in a painting that was a direct result of the incident may be eligible, whereas costs to remove signs of pre-disaster aging, such as layers of old varnish, are ineligible.

Costs associated with the development of a treatment plan for a damaged collection or individual object are eligible. Treatment needs to be conducted by a qualified conservation professional with the appropriate specialty and in accordance with the American Institute for Conservation Code of Ethics and Guidelines for Practice.[369] FEMA, in consultation with the recipient and applicant, may recommend no treatment when non-intervention best serves to promote the preservation of damaged items.

Replacement of destroyed irreplaceable collections or objects is ineligible. Collections and individual objects damaged to the extent that stabilization is not practicable or possible are considered destroyed.

Restoring materials, equipment, and exhibition furnishings associated with the storage, display, preservation, or exhibition of collections and individual objects is eligible. These may include, but are not limited to:

- Equipment regulating temperature or humidity;
- Exhibit panels;
- Models; and,
- Video and audio equipment.

iv. Research-Related Contents

Reagents and specimen collections are eligible for replacement based on the following criteria:

The number of reagent units eligible for replacement will be equal to the number lost or the number needed to restore basic research activities, whichever is lower. FEMA reimburses the purchase price based on the cost from either commercial sources or other institutions, using the lesser of the two. However, reagents that are unique and considered outcomes of a research program are not eligible for replacement. In terms of specimen collections, replacing a representative portion, though not necessarily the entire collection, may be eligible. To qualify for replacement, the specimen types must be available for purchase from commercial sources or other institutions and support an ongoing eligible educational or medical program.

Terminology

A **reagent** is a substance used in a chemical reaction to detect, measure, examine, or produce other substances. Some reagents are very common and available for purchase from commercial sources.

[369] For more information, refer to: Code of Ethics and Guidelines for Practice | culturalheritage.org.

A **specimen** is a portion or quantity of material for use in testing, examination, or study, including blood plasma and flesh tissue.

A **specimen collection** is a repository of specimens related to biomedical, marine, or agricultural research.

v. Animals

Animals housed or exhibited in an eligible facility are eligible for replacement with the same number of comparable animals if they are:

- Injured to the extent they are no longer able to function for the intended purpose;
- Killed;
- A destroyed specimen; or
- A damaged specimen that is not recoverable.

An animal is ineligible for replacement if a comparable animal is not available for purchase, or the applicant is unable to obtain a comparable one at a reasonable cost.

The replacement of animals on loan to an eligible facility at the time they are destroyed is eligible if the applicant substantiates legal responsibility.

Additionally, FEMA may provide PA funding for actions taken to save the lives of these animals as a category B emergency protective measure.

Examples: Animals Eligible for Replacement

Eligible animals may include, but are not limited to:

- Police animals;
- Trained and certified rescue dogs;
- Animals in museums, zoos, or publicly owned nature centers;
- Fish in fish hatcheries;
- Taxidermy specimens (animals preserved and mounted in lifelike representations);
- Animals used by rehabilitation facilities as part of diagnosis or treatment; and,
- Laboratory animals used in an active research program.

Determining Costs

The estimated cost to replace an animal is usually determined through market surveys. Costs associated with acquiring donated, loaned, or wild animals as replacement animals are eligible if they do not exceed the estimated cost of purchasing a comparable animal.

If a destroyed animal is replaced through a donation or loan of a comparable animal, the costs associated with purchasing a replacement comparable animal, will then become ineligible.

For laboratory animals, eligible costs associated with replacement include, but are not limited to, the replacement cost of a laboratory animal that is as genetically close as possible to, but does not exceed, the genetic progression of the lost animal AND can be reasonably procured commercially. If an identically genetic animal is not available, the eligible cost is based on a readily procured animal that is as genetically close as possible to the original animal. The applicant, using its scientific research staff, an independent member of the scientific community, or a certified expert, needs to make reasonable decisions on the genetic likeness of the replacement lab animals.

Ineligible costs associated with replacing laboratory animals include:

- The cost of reproducing a new animal with all the characteristics of the lost animal to re-establish research;
- The cost of using a laboratory to perform a breeding program to advance benchmark stock to the genetic changes lost because of the incident;
- The cost associated with surgery required to replace a surgically altered animal; and,
- The cost associated with the replacement of a laboratory animal when an animal of similar genetic characteristics can be obtained at no cost from other researchers or institutions.

If an applicant requests, and the recipient approves, other than in-kind and exact number of replacement animals, FEMA caps the federal share based on the estimated in-kind replacement costs.

3. EQUIPMENT

Equipment includes vehicles or standalone machinery as well as construction or heavy equipment. Repairing damaged or replacing destroyed equipment with the same number of comparable items is eligible.[370] Comparable items are similar in age, condition, and capacity. Applicants may replace equipment with different items used for the same general purpose. This may include instances when a similar item is not reasonably available. However, when a used item (within a reasonable cost, time, or distance) is not available or does not meet applicable national consensus standards, the purchase of a new item with similar capacity is eligible. FEMA caps the eligible cost at the estimated amount for items comparable to those damaged.

Terminology

National consensus standards are voluntary codes, specifications and standards that incorporate the latest hazard-resistant designs.[371] For a full list of FEMA's consensus-based codes, specifications, and standards, refer to Appendix M. Consensus-Based Codes, Specifications, and Standards.

If the cost to replace the item is less than the cost to repair it, FEMA limits PA funding to the replacement cost.

[370] 44 C.F.R. § 206.226(h).
[371] For more information, refer to: Section 1235(b) | Consensus-Based Codes and Standards | FEMA.gov.

4. VEHICLES

Vehicles include motorized on-road licensed vehicles and non-highway or off-road driven wheeled vehicles. When vehicles are not repairable, FEMA uses “blue book” values or similar price guides to estimate the eligible cost.

D. Utilities (Category F)

Utilities include:

- Water storage facilities, treatment plants, and delivery systems;
- Power generation, transmission, distribution, and storage facilities, including, but not limited to, wind turbines, generators, substations, anaerobic digestors, solar power installations, and power lines;
- Natural gas transmission and distribution facilities;
- Sewage collection systems and treatment plants; and,
- Communication systems.

1. POWER RESTORATION

For power restoration projects that meet both emergency work and the permanent work eligibility criteria (i.e., being necessary to reduce or eliminate an immediate threat to life, health or safety and restoring the facility in accordance with applicable codes, standards and EHP requirements) applicants may either claim the work as an emergency protective measure (category B) or as permanent work (category F). However, straight-time force account labor for budgeted employees is not eligible for reimbursement when power restoration is claimed under category B. Additionally, funding for PA hazard mitigation is only available when power restoration is claimed as category F permanent work.

2. RIGHT-OF-WAY CLEARANCE

It is the applicant’s responsibility to maintain its right-of-way (ROW). However, FEMA may fund limited clearance of incident-related debris from the ROW to enable the applicant or emergency workers to obtain access to the facility. Additionally, if trees in the vicinity of the facility were damaged by the incident and an arborist confirms that the trees cause an immediate threat of further damage to the facility (e.g., overhead power lines), FEMA may provide PA funding to remove those trees. Any further clearance of debris in the ROW is ineligible for FEMA funding.

3. POWER: TRANSMISSION AND DISTRIBUTION SYSTEM CONDUCTOR REPLACEMENT

For electrical transmission or distribution systems, determining the disaster-related damage to some components, such as poles, guys, and cross-arms, can usually be accomplished by visual inspection. However, determining the full extent of disaster-related damage to conductors is more challenging, particularly with older systems. A conductor is eligible for replacement when it is stretched beyond the point where it can be effectively repaired and re-sagged to meet appropriate clearances, sag, and tension, and to meet pre-disaster reliability.

Example: Conductor Spans

The number of conductor spans is calculated by multiplying the number of conductors per span by the number of spans.

For example, a three-phase line section with three spans has 12 conductor spans:

- 4 conductors x 3 spans = 12

If a single conductor span has damage in more than one location, it only counts as one damaged conductor span. Similarly, if more than one conductor is damaged, it still only counts as one damaged span.

A conductor is only eligible for replacement (reconductoring) when an applicant cannot effectively repair it because one of the following exists within a line section:

- Twenty-five percent or more of the conductor spans have visible damage, such as broken strands, splices, or sleeves (installed as a result of the incident) or severe pitting, burns, or kinks;
- Thirty percent or more of the line spans are visually stretched (out of sag), or do not meet clearance requirements such as conductor-to-conductor or conductor-to--ground clearance;
- Forty percent or more of the supporting poles need to be replaced or plumbed (straightened). A pole is considered to be in need of straightening if it is leaning such that it is unsafe to climb;
- Forty percent or more of the supporting structures (other than poles) have damage such as broken cross-arms, braces, ties, insulators, guys, pulled anchors, or bent pins. If more than one element of the support structure is damaged, it still only counts as one damaged support structure. If a pole is counted under the previous bullet, FEMA does not count the supporting structure under this criterion;
- Sixty-five percent or more of any combination of the damage described in the bullets above; or
- Evidence provided by a licensed professional engineer that demonstrates the conductor is damaged beyond repair.

If the applicant provides sufficient documentation establishing the pre-disaster condition and a line section of its system meets one of the six criteria above, that line section is eligible to be reconductored.

Terminology

A **line section** is a group of contiguous spans selected for evaluation. A span is the distance between two poles or structures.

The applicant has flexibility in defining a line section. A line section can be:

- A single span
- All the spans between two dead-end structures
- All the spans on a feeder
- All the spans on a tap; or
- Any other group of contiguous spans that are evaluated together.

The use of #2 Aluminum Conductor Steel Reinforced (ACSR) is considered a lower cost alternative to replacing conductor with equal or lesser amperage capacity such as copper weld conductor, hard and soft drawn copper wire, smaller ACSR, and Amerductor. Therefore, if a conductor with equal or lesser amperage capacity to #2 ACSR is eligible for reconductoring, the line section is eligible to be replaced with #2 ACSR. When an applicant replaces conductor with #2 ACSR, adjustments to other components of the electric distribution and transmission systems to accommodate #2 ACSR, including, but not limited to, adjusting span lengths between utility poles, and increasing pole heights and standards to meet appropriate design requirements are eligible. Applicants do not need to cite a code or standard for this additional work even though the appropriate design requirements may come from federal or SLTT codes or standards, including National Electrical Safety Code or Rural Utilities Service (RUS) standards.

The use of advanced conductors or other technologies that improve the resilience of power generation, transmission, and distribution facilities may also be eligible for reconductoring when the community has adopted applicable electrical codes and standards, as referenced in the Codes and Standards section of this chapter. Additionally, even where the community has not adopted applicable codes and standards, advanced conductors or other resilient technologies are eligible as an upgrade through PA mitigation where the community requests the upgrade and it meets the benefit-cost analysis (BCA), or through an improved project. The Department of Energy (DOE) has developed resources to support a more resilient nation and an improved awareness of advanced transmission technologies.[372] If the damage does not meet the criteria for replacement, only the repair of the damaged line section(s) is eligible.

To document the pre-disaster condition of a conductor, applicants must provide the following information:

Table 29. Required Documentation and Information to Support Pre-Disaster Conductor Condition

For Small and Large Projects
▪ A signed, dated, and stamped letter from a licensed professional engineer who has direct experience with the damaged electrical transmission or distribution system certifying the pre-disaster capacity and condition of the conductor along with records providing satisfactory evidence of the pre-disaster capacity and condition of the conductor;   ○ Records may include, but are not limited to, maintenance records, contract documents, work orders, inspection logs, or a description of past inspection and maintenance activities certified by a licensed professional engineer. ▪ If available, copies of construction work plans demonstrating the utility's past practices, as well as current and future projects; ▪ If required by RUS, a copy of any corrective action plans submitted to RUS in compliance with 7 C.F.R. §1730.25, Corrective action (RUS borrowers only); and, ▪ Staking sheets.

[372] For more information, refer to: *Department of Energy Advanced Transmission Technologies, December 2020.*

If an applicant provides the information above, FEMA does not require further documentation to establish pre-disaster condition. Applicants are not precluded from substantiating the pre-disaster condition with other documentation if they are unable to provide the documentation described above.

E. Parks, Recreational, Other (Category G)

Examples of eligible publicly owned facilities in this category include:

- Mass transit facilities such as railways;
- Beaches;
- Parks;
- Playground equipment;
- Swimming pools;
- Bath houses;
- Tennis courts;
- Boat docks;
- Picnic tables;
- Golf courses;
- Ball fields;
- Fish hatcheries;
- Ports and harbors;
- Piers; and,
- Other facilities that do not fit in categories C–F.

Unimproved natural features are ineligible. For more information and examples, see the Facility Eligibility section in Chapter 4.

Nature-based solutions, which include live fascines, vegetated geogrids, bioswales, and other features, are eligible when they are part of the restoration of an eligible facility for the purpose of erosion control, minimizing sediment runoff, reducing flood risk, protecting wetlands, improving water quality, and protecting coastal property. For more examples of eligible cost-effective nature-based solutions, see Appendix J: Cost-Effective Public Assistance Hazard Mitigation Measures.

Grass and sod replacement are eligible if it is an integral part of the restoration of an eligible recreational facility. Vegetation replacement is also eligible if necessary to restore the function of the eligible facility (e.g., if vegetation is a component of a sewage filtration system).

Plantings required to mitigate environmental impacts, such as those required to address impacts to wetlands or endangered species habitat, are eligible when required by a federal or SLTT codes, standards, or permit that meets the criteria described under the Permit Requirements section in this chapter.

Long-term monitoring to ensure vegetative growth is ineligible even if it meets the requirements above.

Replacement of damaged trees, shrubs and other vegetation during site restoration is eligible. Replacement of damaged crops, agricultural land, or other vegetation not at the site of an eligible facility is ineligible.

1. BEACHES

Replacement of sand on beaches is only eligible under certain conditions.[373] A beach is considered an eligible facility when all the following conditions exist:

- The beach was not constructed under the specific authority of USACE;[374]
- The beach was constructed by the placement of imported sand—of proper grain size—to a designated elevation, width, and slope;[375] and,
- The applicant has established and adhered to a maintenance program involving periodic renourishment with imported sand to preserve the original design or a specific engineered design, which is clearly justified and outlined in the maintenance program.[376] Placement of sand under the following circumstances does not meet this requirement:
    - Emergency or "one-time" nourishment, even if to a design;
    - Emergency or "as-needed" renourishments when the beach has eroded to a critical condition where all original nourishment is gone;
    - Partial renourishments or "hot-spot" nourishments; or
    - Renourishment using material from a channel maintenance project when dredge spoils do not meet compatibility design criteria and the amount placed is dependent on the amount dredged, not the beach design.

[373] 44 C.F.R. §§ 206.226(j) and 206.201(c).
[374] 44 C.F.R. § 206.226(a).
[375] 44 C.F.R. § 206.226(j)(2)(i).
[376] 44 C.F.R. § 206.226(j)(2)(ii).

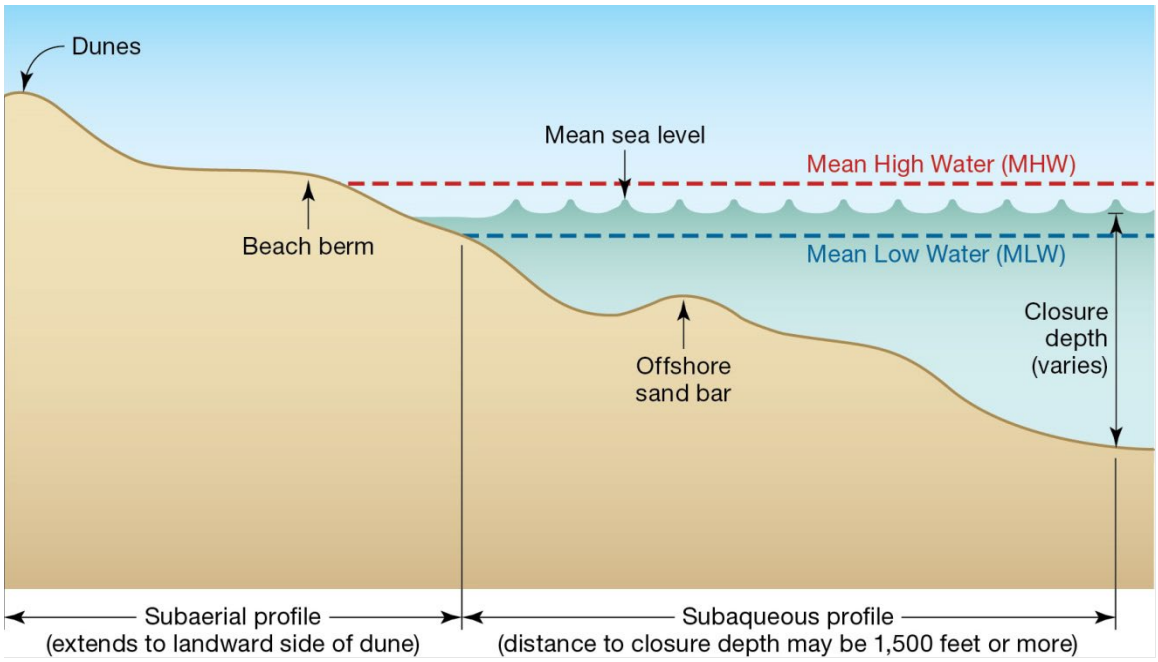

Figure 19. Typical Beach Profile

Sand replenishment for beaches under the specific authority of the USACE is not eligible for PA funding.

The amount of sand eligible for replacement is limited to the amount lost due to the incident. The applicant needs to substantiate the amount of sand claimed with pre-and post-incident profiles that extend at least to the seaward edge of the sub-aqueous nearshore zone (Depth of Closure) (see Figure 19. Typical Beach Profile). If pre-storm profiles are not available, documentation may include design documents and renourishment history. Applicants need to adjust quantities to account for any erosion that occurred between the pre- and post-incident profiles.

Replacing sand that eroded prior to the incident is ineligible. However, FEMA encourages applicants to renourish the project to maintain and achieve the design profile.

To document eligibility of a beach as a designed and maintained facility, applicants must provide the following information:

- Design studies, plans, construction documents, and as-builts for the original nourishment;
- Documentation and details of the maintenance plan, including how the need for renourishment is determined and funded; and,
- Renourishment history, design studies, and as-builts for every renourishment, including construction documents if applicable.

FEMA may request only a portion of this information if the beach was previously determined eligible.

Beach access crossover structures are eligible facilities for repair or replacement. Sand placement adequate for covering crossover footings is eligible, unrelated to eligible beach sand replacement.

F. Landslides and Slope Stabilization

If an eligible facility is located on a slope and is damaged as a result of a landslide or slope instability triggered by the incident, FEMA determines the stability of the slope that supports the facility before it approves PA funding to restore the facility. Restoration of the integral ground that supports the facility may also be eligible. The impact of slope stability on eligibility is as follows:

- If the site is stable, permanent restoration of the facility and its integral ground is eligible.
- If the site is unstable and there is no evidence of pre-disaster instability after the facility was constructed, permanent restoration of the facility and its integral ground is eligible, including measures to stabilize the integral ground.
- If the site is unstable and there is evidence of pre-disaster instability after the facility was constructed, restoration of the facility's integral ground is ineligible. Restoration of the facility is eligible only upon the applicant stabilizing the site and restoring the integral ground.

If permanent restoration of the facility is eligible based on above determination, additional funding to protect the facility from future damage is eligible as PA hazard mitigation as outlined in this chapter.

Site inspections and limited geotechnical assessments are eligible if they aim to determine site stability and to obtain a technical opinion of the cause of the slope failure. This is applicable when an eligible facility located on a slope is impacted due to a landslide or slope instability triggered by a declared incident.

Permanent repair to stabilize natural ground that is not integral to the function of an eligible facility or does not support an eligible facility is not eligible for funding. However, there are limited circumstances where a qualified individual may determine that the upslope makes a facility vulnerable to repetitive damage. In such cases, these repairs may be considered eligible. FEMA may approve permanent relocation of the facility if the facility is subject to repetitive heavy damage and relocation is cost effective. Eligible costs for relocation are described under the Relocation section in this chapter.

Applicants may request an alternate project if restoration of the facility is not feasible because of soil instability.

VI. Repair vs. Replacement

When evaluating whether a damaged facility is eligible for replacement, FEMA compares the estimated repair cost with the estimated replacement cost and evaluates the feasibility of repairing the facility.[377]

A facility is considered repairable when:

- The cost to repair the disaster-related damage does not exceed 50 percent of the cost to replace the facility based on its pre-disaster size, capacity, and function; and,
- It is feasible to repair the facility so that it can perform the pre-disaster function as well as it did prior to the incident.[378]

[377] 44 C.F.R. § 206.226(f).
[378] 44 C.F.R. § 206.226(f)(1).

The comparison of the repair cost to the replacement cost results in a fraction that expresses repair as a percentage of replacement. The percentage is calculated with the estimated repair cost as the numerator and the estimated replacement cost as the denominator. FEMA refers to this as the "50 percent rule."

The purpose of the 50 percent rule is to make an early determination on whether it is more prudent to repair or replace a facility. It is not intended to be a full calculation of all eligible project costs. FEMA does not perform the calculation when it is not feasible to restore the facility so that it can perform its pre-disaster function as well as it did before. If the restoration of the facility is not feasible, replacement is eligible.

The feasibility evaluation criteria is crucial in evaluating whether it is practical and technically feasible to repair a facility so it can perform to the same pre-disaster function from an engineering standpoint. Qualified professionals, such as professionally licensed individuals, qualified cost estimators, construction managers, and staff with other technical expertise, as necessary review feasibility studies and ancillary information provided to FEMA when a facility is not considered technically repairable under 44 C.F.R § 206.226(f)(2).

A floodplain manager's substantial damage determination is part of the NFIP eligibility process and is separate and distinct from the PA eligibility process for determining whether a facility is eligible for replacement or relocation. FEMA determines whether replacement costs are eligible for PA funding based on the 50 percent rule. The substantial damage[379] determination is used to determine whether certain floodplain management requirements are triggered in communities participating in the NFIP.

A. Calculation

The repair cost estimate (numerator) is the estimated cost of repairing disaster-related damage only and includes costs related to compliance with codes and standards that apply to the repair of the damaged elements only.[380] The numerator does not include costs associated with:

- Upgrades of non-damaged elements which are not directly associated with the method of repair of the damaged element, even if required by codes or standards (e.g., elevation of an entire facility triggered by repair);
- Selective demolition beyond that which is essential to repair the damaged elements;
- Site work;
- Soft costs;
- Contents;
- Hazard mitigation measures; or
- Emergency work.

Terminology

Site work is any exterior work at the site. Examples include:

[379] For more information, refer to: Substantial Damage Quick Guide | fema.gov.
[380] This includes consensus-based codes, specifications, and standards.

- Excavation;
- Backfill;
- Erosion control;
- Utility installation; and,
- Paving.

The replacement cost estimate (denominator) is the estimated cost of replacing the facility based on its pre-disaster design (size and capacity) and function in accordance with applicable codes or standards. The denominator does not include costs associated with:

- Demolition;
- Site work;
- Soft costs;
- Contents;
- Hazard mitigation measures; or
- Emergency work.

In order to support timely replacement determinations, rapid recovery, and streamline the process for 50 percent rule calculations, FEMA provides the option to not use higher consensus-based codes, specifications and standards in 50 percent rule calculations. Costs associated with compliance to meet existing federal, state, local, tribal, and territorial codes and standards must still be included in the calculation When applicable, consensus-based codes, specifications, and standards will be applied in the same manner as locally adopted codes, specifications, and standards for the purpose of calculating the 50 percent rule. Although certain costs are not included in the 50 percent rule calculation to determine whether the facility is eligible for replacement, the costs may be eligible for PA funding subjeft to all other eligibility requirements.

B. Request for Replacement

Applicants should submit their requests for replacement within one year of the declaration. The request should include both repair and replacement cost estimates with supporting documentation, prepared in accordance with the requirements described under the Applicant Estimates section in Chapter 9.

FEMA's professionally licensed engineers and architects, qualified cost estimators, construction managers, and staff with other technical expertise, as necessary, develop or review and validate the estimates used in the 50 percent rule calculations. Re-running the calculation is appropriate if there is an error in the initial calculation, or if costs associated with applicable codes and standards need to be added.

For any replacement requests over $5 million, FEMA submits the estimates to an independent third-party for an additional review of the estimates. FEMA considers the results of the third-party review prior to approving replacement.

C. Eligible Funding

If replacement is eligible either because it is not feasible to restore the facility so that it can perform its pre-disaster function as well as it did before or based on the 50 percent rule, the actual replacement cost is eligible. Alternatively, applicants may elect to repair the facility in conformance with applicable codes and standards. In this case, FEMA limits the eligible cost to the estimated cost of repair or replacement, whichever is less.[381]

Because the repair vs. replacement determination is made based on a subset of the total costs of what it would take to repair or replace a facility (see excluded costs above), it is possible that replacement would not be eligible under the repair vs. replacement determination even though the total cost to repair the facility would be greater than the total cost to replace it (once all costs were considered). In this case, FEMA would limit funding to the replacement cost since it is less than the cost to repair.

Eligible building projects that involve new construction, substantial improvement, or to address substantial damage in flood hazard areas must meet the minimum floodproofing or elevation standards set out in the Federal Flood Risk Management Standard (FFRMS).

The costs to floodproof or elevate a damaged facility are not included in the repair cost of the 50 percent rule calculation but are included in the replacement cost of the calculation. Therefore, the repair cost for the 50 percent rule calculation is estimated without regard to whether the facility receives a substantial damage determination or whether the facility contains a critical action. A floodplain manager's substantial damage determination is part of the NFIP eligibility process and is separate and distinct from the PA eligibility process for determining whether a facility is eligible for replacement or relocation. FEMA determines whether replacement costs are eligible for PA Program according to the criteria specified in the Repair vs. Replacement section within this chapter. FEMA determines whether relocation costs are eligible for PA funding based on the criteria under the Relocation and Hazard Mitigation sections in this chapter. Facilities eligible for replacement are subject to Federal Flood Risk Management Standard requirements, and compliance costs are eligible for PA funding.

Relocation is only eligible for PA funding if it meets the requirements under the Relocation section in this chapter. If compliance with a code or standard is not feasible without relocating a facility and relocation is not eligible for PA funding, FEMA caps the funding without including the costs related to relocation and considers it an improved project.

Costs associated with demolition of a facility that is eligible for replacement are eligible as part of the permanent work project to replace the facility. Eligible costs include removal, recycling, and disposition of the associated demolition debris.

PA mitigation can be applied to replacement projects. Specifically, cost-effective PA hazard mitigation funding will be eligible for inclusion on replacement projects (including improved projects involving relocation). The total eligible project cost is determined after PA hazard mitigation costs are added and all

[381] 44 C.F.R. § 206.226(f)(2).

reductions are accounted for. In cases where the eligible repair costs for a replacement project are fully covered by insurance, the PA hazard mitigation may still be eligible if the "total eligible project cost," including mitigation, meets or exceeds the minimum project threshold.

As discussed in Chapter 10: Environmental and Historic Preservation, if an applicable code or standard requires that a historic facility be restored in a certain manner and does not allow other options, the cost to restore the facility in accordance with the code or standard is eligible and may exceed the estimated replacement cost.[382] A historic facility is defined as one listed in, or eligible for listing in, the National Register of Historic Places.[383]

D. Replacement of Components of a Facility or System

FEMA does not apply the 50 percent rule to a facility's structural or mechanical components (e.g., windows; roofs; heating, ventilation, and air conditioning (HVAC); electrical; plumbing). For example, FEMA does not apply the 50 percent rule to a damaged HVAC system to determine whether the system should be repaired or replaced because it is a component of a building. If the HVAC system is repairable, as determined by an inspector or engineer with appropriate technical expertise, FEMA limits its funding to the repair of the system.

For facilities that are systems composed of multiple, easily segregated components, FEMA applies the 50 percent rule to individual components of the system, rather than the entire system.

Examples: FEMA's Application of the 50% Rule

The following are examples of facilities that are systems to which FEMA applies the 50% rule calculation to **individual components**:

- Drainage channel or irrigation system: A section from damaged node to damaged node, which is where there are intersections or connecting points.
- Water or sewer line system: A section of piping from damaged manhole to damaged manhole, a lift station, or a manhole structure.
- Water or wastewater treatment plant: A control building, clarifier, or sedimentation pond.
- Electrical distribution systems are evaluated for replacement based on the criteria under Power: Transmission and Distribution System Conductor Replacement in this chapter.

The following are examples of facilities to which FEMA applies the 50% rule to the **entire facility**:

- Bridges;
- Culverts;

[382] 44 C.F.R. § 206.226(f)(3).
[383] For more information, refer to: National Register of Historic Places | nps.gov.

- Buildings;
- Pumping stations;
- Piers;
- Pools, including integral pumping;
- Equipment; and,
- Lighting structures.

VII. Relocation

There are opportunities for relocating a facility utilizing PA funding.

A. FEMA-Directed Relocation

The Regional Administrator may approve funding for and require restoration of a destroyed facility at a new location when all of the following conditions apply:

- The facility is subject to repetitive heavy damage because of its location. For example, facilities located in a SFHA or wildland-urban interface and subject to repetitive heavy flood or fire damage;
- Project approval is not barred by other regulations; and,
- The overall project, including all costs, is cost-effective.
    - If the cost to relocate the facility is less than the eligible cost to replace the facility at its original location (the value of the land at the original site is not included as part of this evaluation) then the project is cost effective. In instances where the cost of relocation exceeds the cost to replace the facility at its original location FEMA uses its BCA process and software[384] to determine cost effectiveness.[385]

Terminology

The **wildland-urban interface (WUI)** is the area between wildland and urban land.

If the Regional Administrator requires an applicant to relocate, and the applicant does not feel that relocating would be in the best interest to the community it serves, the applicant can choose to use the flexibility of an alternate project.[386] An alternate project allows eligible funding to be used to repair or expand other public facilities, purchase capital equipment, or perform hazard mitigation measures unrelated to the original facility. For more information, see the Flexible Restoration (Capped Projects) section in this chapter. If relocation of a facility is not feasible or cost effective, the Regional Administrator shall disapprove federal

[384] For more information, refer to: Benefit-Cost Analysis.
[385] 44 C.F.R. § 206.226(g)(1).
[386] 44 C.F.R. § 206.226(g)(4).

funding for the original location when it is determined that restoration in the original location is not allowed. In such cases, an applicant may apply for an alternate project.[387]

B. Applicant-Driven: Repair vs. Replacement

When an applicant's facility is destroyed (i.e., eligible for replacement) and the Regional Administrator does not require the facility to be relocated, the applicant can request the facility be built at a different location through an improved project.

When an applicant's facility is repairable, the applicant can choose to relocate the facility through an improved project. The eligible funding will be capped based on the repair costs.

C. Code-Driven: Part 9 and Other Code and Standard Relocations

An applicable federal or SLTT code or standard, such as a floodplain management regulation, may also require that a damaged facility be relocated away from a hazardous area (e.g., floodway). If compliance with a code or standard is not feasible without relocating a facility and relocation is not eligible for PA funding, FEMA caps the funding for the cost to repair, without including the costs related to relocation, and considers it an improved project.

Cost-effective PA hazard mitigation funding is allowable on replacement projects (including improved projects involving relocations). Where relocation is not required by an applicable code or standard, an applicant can request FEMA fund a relocation as a mitigation measure if it meets the requirements identified in the Hazard Mitigation section of this chapter. In this case, FEMA evaluates the cost effectiveness using its BCA tool.

D. Eligible Work and Funding

Eligible work associated with relocation includes land acquisition and construction of necessary support facilities, such as roads, parking lots, and utilities. Demolition and removal of the original facility including costs for deconstruction and reuse of materials are also eligible if deemed necessary.[388] FEMA limits PA funding to the amount necessary to make the relocated facility and its associated components operational.

FEMA considers the proximity of the new site to utilities (water, sewer, and electric) and approves the least costly solution. Construction of an off-site support facility is only eligible if it is a utility that would serve the relocated facility exclusively.

For land acquisition, if the facility was located on 10 acres of land at the time of the incident, and FEMA determines that 10 acres is not necessary for the operation of the facility, FEMA limits PA funding to the necessary amount of land.

[387] 44 C.F.R. § 206.226(g)(5).
[388] 44 C.F.R. § 206.226(g)(2).

In situations where the applicant owns the facility, but not the land or the support facilities at the original location, the cost to purchase the land or build support facilities is ineligible.

When FEMA requires relocation, FEMA does not provide future PA funding for repair or replacement of the original facility or for other facilities at the original site unless the facility facilitates an open space use.[389] For example, if the applicant converts the original site to a park, FEMA may provide PA funding in the future for park components, such as benches, tables, restrooms, or gravel roads.

E. Sale or Lease of Property at Original Site

Applicants may sell or lease the original facility or the land on which a relocated facility was originally located. Applicants must inform the purchaser of the property that FEMA will not provide future PA funding for repair or replacement of the original facility or for other facilities at the original site unless the facility facilitates an open space use.

The property which the facility is relocated to, and the relocated facility itself, are subject to the real property provisions of 2 C.F.R. Part 200 including disposition and reporting requirements under 2 C.F.R. §§ 200.311 and 329, respectively.

For PA funds to be used for the original site, FEMA must complete an EHP review before an applicant can take a specific action, such as demolition.

VIII. Environmental and Historic Preservation Requirements

Applicants need to make every effort to afford FEMA the opportunity to perform environmental and historic preservation (EHP) reviews prior to starting any work that has the potential to impact the environment or historic properties. This includes, but is not limited to, demolition work, site preparation, and ground disturbing activities. Prompt compliance with EHP requirements can facilitate the processing of a PA project. Permanent work projects that restore a damaged facility to pre-disaster design are generally excluded from some EHP review. Projects that involve changes in location, footprint, alignment, or size of a facility may not fall under these exclusions. For more information on the EHP program, see Chapter 10: Environmental and Historic Preservation.

A. Floodplain Management and Wetland Protection

FEMA has a responsibility to consider and safeguard the benefits of floodplains and wetlands[390] when providing federal assistance. When providing PA funding for a project in or impacting a floodplain or wetland, several requirements apply.

Projects may not be located in a floodplain or wetland if there are other options that avoid construction in or disturbance to the floodplain or wetland. Applicants are responsible for securing and complying with any

[389] 44 C.F.R. § 206.226(g)(3).
[390] EO 11990, "Protection of Wetlands"; EO 11988, "Floodplain Management."

required permits[391] for work in areas designated as wetlands by the U.S. Army Corps of Engineers. Failure to do so may result in denial or deobligation of funding. New construction is not allowed in coastal high hazard areas unless the project helps manage natural areas like parks or low-impact recreational paths. New construction and substantial improvements are also not allowed in floodways.[392] These types of activities can result in continuing vulnerability to flood damage.

Terminology

Floodplain: The lowland and relatively flat areas adjoining inland and coastal waters including flood prone areas of offshore islands, including at a minimum, that area subject to a 1% or greater chance of flooding in any given year.

Coastal high hazard area (CHHA): An area of flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources.

Substantial improvement: Any repair, reconstruction, or other improvement of a structure or facility, which has been damaged in excess of, or the cost of which equals or exceeds, 50% of the market value of the structure or replacement cost of the facility.

Flood risk reduction requirements apply to PA-funded projects that:

- Are located in floodplains or wetlands;
- May affect floodplains or wetlands; and/or,
- Have the potential to be affected by floodplains or wetlands.

FEMA may also require other measures based on its 8-step decision-making process (see the 8-Step Decision-making Process section in this chapter).

B. The Federal Flood Risk Management Standard

The Federal Flood Risk Management Standard (FFRMS) applies to FEMA-funded projects involving new construction, or substantial improvements, or to address substantial damage. To ensure federally funded work on such structures and facilities lasts as long as intended, the FFRMS requires a higher elevation and corresponding floodplain to address the potential of both current and future flooding. The height to which all structures and facilities must either be elevated or floodproofed is identified as the FFRMS flood elevation.[393] The corresponding floodplain is the width to which the floodplain expands to meet the FFRMS flood elevation.

[391] Section 404 of the Clean Water Act; 33 U.S.C. § 1344.
[392] 44 C.F.R. § 9.11(d)(1).

Terminology

Federal Flood Risk Management Standard (FFRMS) Floodplain: The floodplain subject to FEMA's full implementation requirements of the FFRMS. ("how wide")

Federal Flood Risk Management Standard (FFRMS) flood elevation: The height facilities and structures must be either elevated or floodproofed to under FFRMS. ("how high")

Based on historical information, FEMA anticipates future flooding impacts to these structures and facilities and as such, the FFRMS requires a higher vertical flood elevation and corresponding horizontal floodplain than the area which has a 1 percent annual chance of flooding in any given year.

To establish the FFRMS flood elevation ("how high") and floodplain ("how wide"), FEMA uses three approaches: the Climate-Informed Science Approach, the Freeboard Value Approach, and the 0.2 percent-Annual-Chance Flood Approach (0.2PFA) (the 500-year floodplain). When applied to PA projects, these three approaches help to ensure that structures and facilities are more resilient to flooding. In deciding how to use these approaches, FEMA prioritizes criticality of the action, data availability, and the effects of results for the communities impacted.

As such, the Climate-Informed Science Approach is used where data and methods are available and actionable.[394] Where the Climate-Informed Science Approach is not available, FEMA uses a comparison of the remaining approaches.

Example: FFRMS Approaches

The Federal Flood Risk Management Standard authorizes three approaches to establish the FFRMS flood elevation and floodplain:

- The **Climate Informed Science Approach (CISA)** uses the best available, actionable data incorporating current and future changes in flooding.
- The **Freeboard Value Approach (FVA)** adds 2 feet to the base flood elevation (BFE) for non-critical actions (+2' FVA) and adds 3 feet to the BFE for critical actions (+3' FVA).
- The **0.2 Percent Annual Change Flood Approach (0.2PFA)** establishes the 0.2% annual-chance floodplain as the FFRMS floodplain.

For critical actions (such as the construction of fire and police stations, hospitals and facilities that store hazardous materials), FEMA will use the higher of the Freeboard Value Approach (3 feet above the 1 percent annual chance flood elevation) or the 0.2 percent-Annual-Chance Flood Approach (500-Year Floodplain).

[394] CISA instructions and resources are included in Appendix H of the *Guidelines for Implementing EO 11988 and EO 13690 | fema.gov*. The federal government may periodically publish new CISA resources to support determining the CISA FFRMS floodplain.

For non-critical actions, FEMA determines the FFRMS floodplain by using the lower of the Freeboard Value Approach (2 feet above the 1 percent annual chance flood elevation) or the 0.2 percent-Annual-Chance Flood Approach.

Terminology

1 percent Annual Chance Floodplain: The land area having a 1% chance of flooding in a given year (This area may change over time.) This term is often used interchangeably with the terms "base flood" or "100-year flood."

Base Flood: A flood which has a 1% chance of being equaled or exceeded in any given year. This term is used in the National Flood Insurance Program (NFIP) to indicate the minimum level of flooding to be used by a community in its floodplain management. This is often used interchangeably with the terms "1% annual-chance flood," or "100-year flood."

Base Flood Elevation (BFE): The computed elevation to which floodwater is anticipated to rise during the base flood. The BFE is also known as the 1% annual chance flood elevation or 100-year flood elevation.

1. CRITICAL ACTIONS

For critical actions,[395] structures and facilities in the FFRMS floodplain that are substantially damaged, substantially improved, or new construction must be elevated or floodproofed to the FFRMS flood elevation.

If the structure is nonresidential, applicants may opt to floodproof to the required level instead of elevating. For non-structure facilities, such as roads or bridges, elevation may not be feasible or appropriate. Applicants must apply appropriate resilience measures to protect the facility to the FFRMS flood elevation.

FEMA uses CISA to determine the FFRMS floodplain and FFRMS flood elevation for all locations when possible. For critical actions using CISA, the FFRMS floodplain must be at least as restrictive as the 0.2 percent annual chance flood elevation and corresponding horizontal floodplain. For locations where CISA is not available and actionable, the FFRMS floodplain is the area that would be inundated by the *higher* of:

- The 0.2 percent annual chance flood (500-year flood); or
- The BFE plus 3 feet. (In coastal areas, if the 0.2 percent annual chance flood elevation does not account for the effects of wave action, the BFE+3' must be used.)

i. Critical Actions Not Subject to the FFRMS

The minimum floodplain level for critical actions that do not involve substantial damage, substantial improvement, or new construction is the 0.2 percent annual chance floodplain (500-year floodplain).

[395] 44 C.F.R. § 9.4.

ii. Potential Critical Actions

If an action is not specified as a critical action in 44 C.F.R. § 9.4, FEMA determines whether a proposed action is deemed a critical action[396] by considering the following:

- The potential for additional impacts if the proposed project is flooded in a future incident (e.g., the structure or other facility contains volatile or toxic materials);
- The ability for occupants of buildings such as hospitals, schools, and nursing homes to evacuate in time to avoid loss of life and injury given the flood warning lead-time available in a future incident; and,
- The potential for emergency services and utilities to become inoperative, or essential and irreplaceable records to be lost if a facility is flooded in a future incident.

2. NON-CRITICAL ACTIONS

For non-critical actions, structures[397] and other facilities that are substantially damaged, substantially improved,[398] or new construction must be elevated or floodproofed to the FFRMS flood elevation.

FEMA uses the Climate-Informed Science Approach to determine the FFRMS floodplain and FFRMS flood elevation when possible. For locations where CISA is not available and actionable, the FFRMS floodplain is the area that would be inundated by the *lower* of:

- The 0.2 percent annual chance flood (500-year flood); or
- The base flood elevation (BFE) plus 2 feet.[399]

If the structure is nonresidential, applicants can choose to floodproof to the required level instead of elevating.[400] For non-structure facilities,[401] elevation may not be feasible or appropriate. Applicants must apply appropriate resilience measures to protect the facility to the FFRMS flood elevation.

i. Non-Critical Actions Not Subject to the FFRMS

For non-critical actions that do not involve repairs to substantial damage, substantial improvement, or new construction, the minimum floodplain for consideration is the 1 percent annual chance floodplain.

2. COASTAL HIGH HAZARD AREAS

New construction is prohibited in coastal high hazard areas except for projects that help with the management of natural areas like parks or other less-developed recreational areas. If the structure was substantially damaged, is substantially improved, or undergoes new construction in a coastal high hazard area, the applicant must elevate or floodproof the structure in accordance with the requirements

[396] For more information, refer to: *Guidelines for Implementing EO 11988 and EO 13690* | fema.gov.
[397] 44 C.F.R. § 9.4.
[398] Ibid.
[399] In coastal areas, if the 0.2 percent annual chance flood elevation does not account for the effects of wave action, the BFE+2' must be used.
[400] 44 C.F.R. § 9.11(d)(3)(iii).
[401] For purposes of complying with the FFRMS, "non-structure facility" is synonymous with the word "facility" as defined at 44 C.F.R. § 9.4.

summarized above. In coastal high hazard areas, structures must be elevated on open works (walls, columns, piers, piles, etc.) and anchored properly.[402]

3. REQUIREMENT FOR COMMUNITIES PARTICIPATING IN THE NATIONAL FLOOD INSURANCE PROGRAM.

FEMA manages the National Flood Insurance Program (NFIP),[403] which provides flood insurance that helps property owners, renters, and businesses recover faster. The NFIP works with communities required to adopt and enforce floodplain management regulations that help mitigate flooding effects.

A community that participates in the NFIP must adopt and enforce a floodplain management ordinance that meets or exceeds the minimum NFIP requirements.[404] This ordinance must contain requirements for new construction or substantial improvement of buildings located in an area with a 1 percent chance of flooding in any given year (also known as a special flood hazard area or "SFHA"). In addition to other requirements, the ordinance must require that new or substantially improved buildings be elevated so that the lowest floor is at or above the BFE or floodproofed to a level equal to or above the BFE.

Some communities have more restrictive ordinances that require elevation or floodproofing to greater levels. The requirements that a community adopts in order to participate in the NFIP may be different than FEMA's requirements. PA will fund the stricter requirements.

Building upgrades required for compliance with the floodplain ordinance are eligible as long as:

- The ordinance meets the eligibility criteria for codes and standards; and,
- The substantial improvements are disaster-related repairs.

Based on the floodplain ordinance, if the cost to repair a facility is greater than the cost to replace the facility, the eligible cost is capped at the replacement cost. There is an exception for facilities eligible for or on the National Register of Historic Places.[405]

IX. Facility Located in or Impacting a Floodplain

FEMA actions must comply with the regulations set forth in 44. C.F.R. Part 9 if they have the potential to affect floodplains or wetlands, or if they are subject to potential harm by location in floodplains. This includes funding of permanent restorations. When FEMA provides PA funding for restoration of a facility located in, or impacting a floodplain, FEMA must:

- Determine if an action is critical or non-critical; and,
- Require mitigating actions aligning with any minimization standards that apply.

[402] 44 C.F.R. § 9.11(d)(2) and (7).
[403] For more information, refer to: Flood Insurance | FEMA.gov.
[404] 44 C.F.R. § 60.3.
[405] 44 CFR Part 206.226(f)(3).

FEMA may create more stringent requirements than the current regulatory standards in order to minimize harm to or within the floodplain. PA-funded projects may also be required to demonstrate compliance with SLTT floodplain regulations in cases where a uniformly-applied SLTT code or standard is more stringent than the federal requirements.

A. 8-Step Decision-making Process

FEMA determines whether a PA project will have a negative impact on the floodplain.[406] To make this determination, FEMA uses the 8-step decision-making process defined in 44 C.F.R. § 9.6. This process is not required for projects where the repair cost is less than $18,000.[407]

Using the 8-step process, FEMA evaluates the impacts the project may have on the floodplain. FEMA also looks at viable alternatives for environmental, social, economic, technical, and legal factors.[408] It is possible for alternatives to be ineligible for PA funding. FEMA considers whether each alternative is eligible for PA funding and, if not, whether the applicant has economic or legal limitations[409]. Projects in the floodplain are only eligible if FEMA is unable to identify a viable alternative to restoring the facility in its current location.

Example: 8-Step Process Identified Alternatives

Some alternatives may not be eligible for PA funding. The 8-step review process may identify relocation of a facility as a viable alternative to repairing it. However, if the facility is ineligible for relocation as described under the Relocation section in this chapter, costs associated with relocating the facility are ineligible for PA funding.

For projects located within or that may affect a floodplain or wetland, FEMA must consider the following alternatives to meet FFRMS requirements:

- No action;
- Alternative locations; and,
- Alternative actions, including ones that use natural features or nature-based solutions.

Where possible, natural systems, ecosystem processes, and nature-based solutions must be used to meet the needs of the project. Using natural features and nature-based solutions enhances the natural benefits of floodplains and wetlands while also reducing flood risk. If natural features and nature-based solutions are not viable as an alternative on their own to meet the needs of the project, they may be incorporated into the project as minimization measures. Natural features and nature-based solutions may not be a reasonable alternative for replacing a structure on a school campus, but they could be incorporated into the project site through permeable pavement, native vegetation, and stormwater quality improvements.

[406] 1 percent annual chance floodplain, 0.2 percent annual chance floodplain, or FFRMS floodplain.
[407] 44 C.F.R. § 9.5(c)(9).
[408] 44 C.F.R. § 9.9.
[409] Ibid.

B. Hydrologic and Hydraulic Studies

Hydrologic and hydraulic (H&H) studies can help identify whether facilities located in a floodplain are likely to have an adverse impact upstream or downstream. Generally, an H&H study is necessary when:

- The facility is in a special flood hazard area;
- There is a potential adverse impact to the floodplain;
- There is a potential adverse impact to a federally listed threatened or endangered species, critical habitat, or essential fish habitat; or
- It is required to demonstrate compliance with the Clean Water Act (CWA).

PA, EHP, and PA hazard mitigation staff coordinate to determine whether an H&H study is needed. If so, FEMA requests the applicant retain a licensed civil, environmental, or hydrologic engineer to prepare the H&H study. FEMA staff can provide guidance on the general contents for such studies. H&H studies are eligible as part of the overall project.

These studies identify upstream and downstream impacts (such as stage, velocity, duration) of alterations to the floodplain by the proposed work. H&H studies are often requested when there will be new construction or alterations to bridges or culverts. These alterations include changes to the length, diameter, number of culverts, or modifications to exits and entrances (such as head walls, wing walls, rounding, grouted riprap).

H&H studies are not required:

- If water at a stormwater drainage or conveyance structure does not flow regularly or flows only seasonally; or
- If the project will return the facility back to its exact pre-disaster condition (in length, diameter, material, number of culverts, exit and entrance conditions), and stream morphology has not significantly changed.

C. Facility Located in a Special Flood Hazard Area

Special flood hazard areas (SFHAs)[410] are areas that are subject to inundation during a 1 percent annual chance flood (also known as the 100-year floodplain).

1. NATIONAL FLOOD INSURANCE PROGRAM

For a National Flood Insurance Program (NFIP) insurable facility located in an SFHA, FEMA must reduce PA funding when the facility is:

- Located in an area that FEMA has identified as an SFHA for more than 1 year;
- Damaged by flooding; and,
- Uninsured for flood loss.

If an applicant believes that its property is incorrectly identified on a flood insurance rate map (FIRM) as being located within the SFHA, it may request a letter of map amendment or letter of map revision from

[410] 44 C.F.R. § 206.251(e). Special flood hazard areas have special flood, mudslide, and/or flood-related erosion hazards, and shown on a flood hazard boundary map (FHBM) or the flood insurance rate map (FIRM) issued by FEMA as Zone A, AO, A1-30, AE, A99, AH, VO, V1-30, VE, V, M, or E. "Special flood hazard area" is synonymous with "special hazard area," as defined in 44 C.F.R. Part 59.

FEMA within 6 months of the disaster declaration. If the applicant's request is approved and FEMA determines that the property is not located in an SFHA, FEMA may reinstate PA funding. Costs incurred in pursuit of a letter of map amendment or letter of map revision are ineligible for PA funding.

Pursuant to Stafford Act section 406(d)(2), if an applicant does not have flood insurance for the facility or carries inadequate flood insurance for the insurable facility, FEMA reduces eligible project costs by the lesser of:

- The maximum amount of insurance proceeds that could have been obtained from an NFIP standard flood insurance policy for the building and its contents;[411] or
- The value of the building and its contents at the time of the incident.

FEMA does not apply this reduction to PNP facilities in communities that do not participate in the NFIP.[412] However, for FEMA to provide PA funding for the PNP facility, the community where the facility is located must agree to participate in the NFIP within 6 months of the declaration. Additionally, the PNP must purchase the required flood insurance; or the PNP must obtain and maintain flood insurance from another source.[413]

X. Requirement to Obtain and Maintain Insurance

Applicants that receive PA funding for permanent work to replace, repair, reconstruct, or construct a facility must obtain and maintain insurance to protect the facility against future loss.[414] Applicants must comply with this requirement as a condition of FEMA assistance. This requirement applies to insurable facilities or property (buildings, contents, equipment, and vehicles), including those funded as an alternate or improved project.[415] FP 206-086-1 Public Assistance Policy on Insurance[416] describes these requirements in detail.

Applicants must obtain and maintain insurance on damaged facilities with the types and extent of insurance reasonably available, adequate, and necessary to protect against future loss to the property. Recipients must provide assurance that the required insurance coverage will be maintained for the anticipated life of the restorative work or the insured facility, whichever is shorter.[417] The type of insurance refers to the hazard(s) that caused the damage and extent refers to the amount of insurance required, which is calculated based on the eligible costs prior to any reductions (including the non-federal share reduction).

The requirements of Stafford Act Section 311 are waived when eligible costs for an insurable facility do not exceed $5,000.[418]

Applicants may request that FEMA modify the insurance requirement when:

411 44 C.F.R. § 206.252(a).
412 44 C.F.R. § 206.252(b).
413 Ibid.
414 Stafford Act § 311; 42 U.S.C. § 5154; 44 C.F.R. § 206 Subpart I; 2 C.F.R. 200.310.
415 44 C.F.R. § 206.203(d).
416 For more information, refer to: Public Assistance Policy on Insurance (FP 206-086-1) | fema.gov.
417 Stafford Act § 311; 42 U.S.C. § 5154; 44 C.F.R. § 206.253(e).
418 44 C.F.R. § 206.253(d).

- The required insurance is not reasonably available; and,
- The required insurance is not necessary to protect against future loss to the property.

Additionally, FEMA does not require greater types and amounts of insurance than those certified as reasonably available, adequate, or necessary by the appropriate state or territorial insurance commissioner.[419] The state or territorial insurance commissioner cannot waive federal insurance requirements but may certify the types and extent of insurance reasonable to protect against future loss to an insurable facility.[420]

Applicants may comply with the insurance requirement for both flood and non-flood hazards with coverage available through commercial property insurance, which may include blanket insurance policies, standard flood insurance policies, insurance pools, or a combination of these sources.[421] In some cases, with FEMA approval, the applicant may comply with the insurance requirement using a self-insurance plan.[422]

A. Failure to Obtain and Maintain Insurance

If an applicant does not comply with the requirement to obtain and maintain insurance, FEMA will deny or deobligate PA funds related to the noncompliance from the current disaster. Additionally, the facilities for which the applicant failed to comply are ineligible for future PA funding.

If an applicant cannot insure a facility prior to grant approval (for example, if a building is being reconstructed), the applicant may provide a letter of commitment (LOC) stating that they agree to the insurance requirement and will obtain the types and extent of insurance required, followed at a later date by proof of insurance once it is obtained. If a facility is damaged in a subsequent disaster prior to work being completed from a previous disaster, the LOC for the O&M requirement allows the first disaster projects to remain open and allows the facility damaged in a subsequent disaster to be eligible for funding and proceed with the project formulation and insurance review process.

XI. Building Code and Floodplain Management Administration and Enforcement (Category I)

After a disaster, recovering communities face an increase of administration and enforcement work to ensure that repair and replacement of damaged facilities and infrastructure meet adopted regulatory requirements, such as those set forth in floodplain management regulations and building codes. Additional resources are spent reviewing permits, inspecting repair work, and enforcing adopted regulations.

The Disaster Recovery Reform Act (DRRA) of 2018 amended Sections 402 and 406 of the Stafford Act to authorize FEMA to provide communities PA funding to effectively administer and enforce building codes and floodplain management ordinances for a period of no longer than 180 days after the date of the major disaster declaration. FEMA reimburses costs for eligible work starting on the first day of the incident period

[419] 44 C.F.R. § 206.253(c).
[420] 44 C.F.R. §§ 206.252(d) and 206.253(c).
[421] 44 C.F.R. § 206.253(b)(2).
[422] Stafford Act § 311(c); 42 U.S.C. § 5154(c); 44 C.F.R. Part 75.

and up to 180 days following the date the major disaster declaration is amended to authorize PA permanent work. FEMA will not extend assistance beyond 180 days for these activities.

All communities that participate in the National Flood Insurance Program must adopt and enforce regulations that meet or exceed the minimum standards for participation. These standards apply in the community's regulated floodplain. All development in this area must be reviewed for compliance and approved by the local floodplain administrator. These regulations can be found in a variety of places, including stand-alone ordinances, zoning codes, sanitary and sewer regulations, and building codes.

In communities that have adopted building codes, the codes apply to the construction, repair, and rehabilitation of all structures in the community, not just those within the regulated floodplain.

In both cases, local officials review development, construction, and repair proposals for completeness and compliance and issue permits. It is the local official's responsibility to ensure that the developments are compliant through inspections and the receipt of final compliance documentation.

The principles of the DRRA Section 1206 amendments are:

1. Increase the overall speed of recovery by providing assistance to conduct building inspections, review disaster-related development in the floodplain, review applications for permits, and issue permits to adequately administer and enforce adopted building codes and floodplain ordinances.
2. Enhance compliance with state and local building codes and floodplain management ordinances by providing state, local, Tribal Nation, and territorial governments additional resources to carry out required activities after a disaster.

Communities that are suspended from or have been sanctioned for not participating in the National Flood Insurance Program (NFIP) are ineligible for category I activities. The *NFIP Community Status Book*[423] contains the current "NFIP status" of a community in the declared counties.

A. General Requirements

To be eligible, building code and floodplain management administration and enforcement field activities must be:

- Conducted in the designated areas as identified in the major disaster declaration;
- Within the applicant's jurisdiction;[424] and,
- Related to the repair, replacement, retrofit, or relocation of disaster damaged facilities. This may include public, private, and residential structures.

[423] For more information, refer to: Community Status Book | fema.gov.
[424] 44 C.F.R. § 206.223.

Activities to administer and enforce building code and floodplain management ordinances are eligible regardless of whether the building code or floodplain management ordinance in question meets PA's regulatory eligibility criteria for facility restoration.

Example: Building Code Administration

After a disaster is declared, a community decides to update its building code to require a four-foot freeboard for all buildings in the special flood hazard area. Work associated with administering and enforcing the four-foot freeboard for disaster-damaged buildings in the community is eligible under this policy. However, PA would not fund the physical repairs to a school building to meet the new four-foot freeboard requirement since the code was adopted after the date of the disaster declaration and therefore ineligible according to PA regulation and policy (FEMA would fund the repair work to meet the minimum code requirements as described in Chapter 8: Permanent Work Eligibility (Categories C-G) and 44 C.F.R. Part 9.11).

Work that is eligible under category I cannot:

- Be used as the basis for an alternate project;[425] or
- Have an associated hazard mitigation proposal (HMP).

B. Eligible Work

The activities below are eligible under category I. Activities not specifically listed here will be evaluated on a case-by-case basis for eligibility.

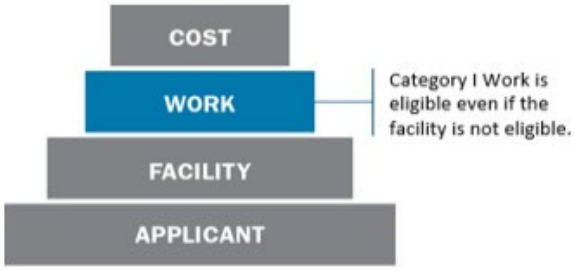

Figure 20. Category I Work Eligibility

1. BUILDING CODE ADMINISTRATION

- Review and process applications for the following:
  - Building permits;
  - Certificates of occupancy;
  - Certificates of compliance; and,
  - Associated plans, specifications, and construction documents for compliance with federal, state, and municipal building, housing, and life-safety codes and standards applicable to disaster-related repair, replacement, or retrofit.
- Process requests for building code variances;
- Collect fees;
- Hire, train, supervise, certify, and license staff, as required to conduct eligible activities;
- Contract for services (e.g., contract planning, initiation, solicitation, evaluation, and award);
- Provide training and information to staff, contractors, and the public on unique considerations for repair of disaster-damaged historic buildings;

[425] Stafford Act Section 406(c); 42 U.S.C. § 5172; 44 C.F.R. § 206.203(d)(2).

- Provide training and outreach to the public on building code and building permit requirements applicable to the repair, replacement, or retrofit of disaster-damaged buildings;
- Establish construction plan reviews and inspection processes, procedures, and instructions for permit holders;
- Monitor impacted areas for unpermitted construction activities; and,
- Coordinate building code administration and enforcement with floodplain management ordinance administration and enforcement, as appropriate.

2. CODE ENFORCEMENT

- Inspect structures under construction for compliance with approved plans, specifications, and all requirements of applicable codes, laws, and ordinances;
- Identify and carry out corrective action in cases where construction, design, and occupancy do not comply with codes and/or ordinances;
- Conduct and process condemnation determinations;
- Review and issue elevation certificates; and,
- Investigate complaints and assist in preparation of materials for abating violations of building codes and related ordinances.

3. FLOODPLAIN MANAGEMENT ORDINANCE AND ENFORCEMENT

- Enforce or administer standards for development according to community floodplain management regulations;
- Determine whether proposed disaster-related development activities are in areas regulated by the community's floodplain management ordinance or building code;
- Hire, train, supervise, certify, and license staff, as required to conduct eligible activities;
- Contract for services (e.g., contract planning, initiation, solicitation, evaluation, and award);
- Provide training and outreach to the public on floodplain permit requirements applicable to the repair, replacement, or retrofit of disaster-damaged buildings;
- Provide training and information to staff, contractors, and the public on unique considerations for repair of disaster-damaged historic buildings;
- Review disaster-related development proposals to ensure compliance with the requirements of applicable floodplain management ordinances;
- Process permits for disaster-related development in the floodplain associated with the declared disaster;
- Inspect all disaster-related development in the applicable jurisdiction;
- Monitor impacted areas for unpermitted construction activities;
- Process requests for floodplain management ordinance variances;
- Process, maintain, and track temporary occupancy permits and inspect temporary occupancy buildings;
- Provide information on flood hazards, floodplain map data, advisory flood data, and compliance to residents and property owners;
- Conduct inspections to ensure the removal of temporary fill and related materials used in flood fighting;
- Take corrective action necessary to ensure compliance with federal, state, and local floodplain regulations; and,

- Coordinate floodplain management ordinance administration and enforcement with building code administration and enforcement, as appropriate.

4. SUBSTANTIAL DAMAGE DETERMINATIONS

- Conduct initial field surveys to determine extent of damage;
- Establish damage trends to identify areas to focus building-specific assessment efforts;
- Prepare cost information on repairs and pre-disaster market value estimates for substantial damage estimates;
- Hire, train, supervise, certify, and license staff, as required to conduct eligible activities;
- Collect field data for damage assessments;
- Enter damage inventory administrative data into the Substantial Damage Estimator or comparable data collection software;
- Track cumulative substantial damage and repetitive loss for communities, if required;
- Conduct damage inventory of structures;
- Inform property owners of damage determination and provide compliance requirements;
- Perform inspections to ensure compliance with repair and substantial damage construction requirements;
- Determine whether proposed improvements are substantial improvements and trigger requirements for compliance, including a building permit;
- Determine if damaged structures have been designated as historic or that may be eligible for such designation; and,
- Review, adjudicate, and resolve substantial damage determination appeals.

C. Ineligible Work

Funding is limited to work that is required as result of the declared incident. The following are ineligible:

- Activities associated with non-disaster damaged structures or non-disaster-related development; and,
- Activities to update a community's laws, rules, procedures, or requirements, such as:
  - Adopting new or updating current building codes or floodplain management ordinances;
  - Adopting or updating zoning laws and requirements; and,
  - Developing new land use plans or requirements.

For category I activities, only overtime costs are eligible for budgeted labor. Straight-time and overtime costs are eligible for unbudgeted labor.

D. Required Documentation and Information for Category I Work

Applicants must submit the following to support claims for category I projects:

Table 30. Required Documentation and Information for Category I Work

For Small Projects	For Large Projects
▪ List of activities performed; and, ▪ Number of locations where activities took place (if applicable).	▪ List of activities performed; ▪ Documentation necessary to demonstrate work completed, such as activity logs or sign in sheets; ▪ Number of locations where activities took place (if applicable); ▪ Locations where activities were conducted, including addresses or GPS coordinates (if applicable); and, ▪ Copies of the rights-of-entry and agreements to indemnify and hold harmless the federal government (if applicable).

Chapter 9: Scoping, Costing, and Final Reviews

Damage and impact information is the foundation of the project because the scope of work (SOW) and cost eligibility are tied to the eligible damage. FEMA and the applicant should work together to reach an agreement on the disaster-related damage description and dimensions (DDD), emergency protective measures, and debris impacts before proceeding with SOW development. FEMA reviews applicant-provided information to develop or validate the SOW and cost estimate for each project, develop PA Hazard Mitigation Proposals (HMPs), and ensure compliance with applicable requirements. The "Public Assistance Program Delivery Guide"[426] provides an overview of these process steps. For cost estimate reviews, FEMA uses the checklist provided in Appendix L: Validation of Applicant-Provided Cost Estimates.

I. Scope of Work Development

The scope of work describes the method of repair of damaged elements. The method of repair refers to the specific approach or technique used to restore, replace, or repair damaged facilities or infrastructure. The scope of work necessary to repair the damage or address the impacts must be completely described and correspond directly to the cause of damage. Descriptions of repair work should be specific to elements of damage and defined in quantifiable (e.g., length, width, depth, and capacity) and descriptive terminology (e.g., brick, wood, asphalt, timber deck bridge).

Examples: Information to Provide for Scope of Work Development

To develop the scope of work, applicants should also provide the following for each site (not an all-inclusive list):

- Percentage of work completed;
- Who performed, or will perform, the work (e.g., force account, contract, mutual aid);
- Proposed or completed scope of work, including PA hazard mitigation measures, and identified consensus-based codes, specifications, and standards requirements; and,
- Technical studies, reports, and assessments.

A. Traditional Tribal Residential and Ceremonial Structures – Inspecting, Scoping, & Estimating

PA has well-established processes for determining damage along with scoping and estimating work to restore infrastructure for a wide range of facility types. These guidelines are often based on national standards and best practices. While the primary focus of PA is on public infrastructure like roads, bridges, schools, and utilities, it has provisions that extend to tribal-owned residential structures and tribal ceremonial buildings. Although PA can fund restoration to tribal-owned residential structures and tribal

[426] For more information, refer to: *Public Assistance Program Delivery Guide*.

ceremonial buildings, there are no PA processes that take into account traditional tribal structures that must be built in a manner consistent with maintaining their cultural, historical, governmental, or ceremonial construct, which can be traditionally made of adobe, mud, earth, clay, rock, and wood.

To address this disparity, FEMA will accept a Tribal Nation's certified damage assessment, scope of work for restoration, and estimated costs for traditional tribal residences or tribal ceremonial buildings. Additionally, PA supports Tribal Nations' ability to build back stronger by identifying available codes and standards applicable for traditional residential structures that Tribal Nations can consider adopting and that can be incorporated into restoration scopes of work in future disasters. Further, cost effective mitigation measures for traditional tribal residential structures and ceremonial buildings will be provided to tribal applicants and recipients to preserve the homes of indigenous people.

II. Cost Development

While FEMA or the recipient may assist the applicant with preparing project applications based on actual or estimated costs, the applicant is ultimately responsible for developing and documenting all costs.

A. Project Thresholds

FEMA establishes a minimum project threshold for each federal fiscal year. If a project application totals less than the minimum threshold, the project is ineligible for FEMA funding.[427] The project application total includes hazard mitigation costs and accounts for insurance proceeds and other reductions to avoid duplication of benefits. The threshold applies to incidents declared within that fiscal year and is based on the Consumer Price Index.[428]

The minimum threshold applies to each project application, not to each damage line item. FEMA does not combine work among several sites into one project application for the sole purpose of reaching the minimum threshold. Additionally, FEMA does not process project applications under the minimum threshold unless the applicant intends to appeal disputed scope of work or costs that would increase the project amount to *at least* the minimum threshold. The minimum threshold does not apply to donated resources or management costs; however, these projects are only eligible when the donated resources or management costs are related to an eligible project that meets the minimum threshold.

FEMA also establishes a dollar threshold[429] each federal fiscal year for the implementation of simplified procedures under Section 422 of the Stafford Act. This threshold defines a project as large or small.[430]

- A large project has costs equal to or greater than the threshold.
- A small project has costs below the threshold.[431]

[427] 44 Code of Federal Regulations (C.F.R.) § 206.202(d)(2).
[428] The project threshold amount is available at: Per Capita Impact Indicator and Project Thresholds | fema.gov.
[429] The project threshold amount is available at: Per Capita Impact and Project Thresholds | fema.gov.
[430] 44 C.F.R. § 206.203(c).
[431] Stafford Act § 422; 42 United States Code (U.S.C.) § 5189; 44 C.F.R. § 206.203(c).

FEMA administers funding for large and small projects differently. For large projects that are not capped, FEMA adjusts any estimated costs to the actual incurred amount so that the final approved funding is based on actual costs.[432] For small projects, FEMA does not adjust estimated costs to the actual incurred amount.[433] FEMA determines whether a project is large or small based on the final approved amount of eligible costs after any cost adjustments, including insurance reductions.

B. Expedited Projects for Emergency Work

FEMA may provide expedited funding for emergency work projects (category A or B) that meet or exceed the large project threshold. FEMA funds expedited projects at 50 percent of the federal share of the estimated project cost. Requests for expedited projects must be submitted to FEMA within 60 days of an applicant's recovery scoping meeting. To support its request, an applicant must provide enough information for FEMA to validate that the work and costs are eligible. FEMA will work to obligate funding within 90 days of receipt of the request.

FEMA's obligation of an expedited project is not an authorization for a recipient to advance funds without the documentation to support the drawn funds. Expedited advance payments are limited to the "minimum amounts needed" and for payments to be timed based on the "actual, immediate cash requirements" to perform the eligible work.

For the development and obligation of an expedited project, an applicant needs to provide the following, broken down by the applicant's monthly (or bi-weekly) operational periods:

- A detailed description of the work and documentation to substantiate that the work is eligible, including:
  - Description of immediate threat;
  - Detailed description of work activities performed or plans to perform;
  - Work locations; and,
  - For debris: estimated quantities by type of debris.
- The total estimated cost must be reasonable, supported by documentation and include the following:
  - Itemized cost estimate with basis for estimate (e.g., actual costs, historical unit costs, average costs for similar work in the area, or contractor or vendor quotes including pre-qualified contracts);
  - Insurance policies;
  - Labor including mutual aid:
    - Budgeted employees: Total regular and overtime hours with average rate for each type of employee;
    - Unbudgeted employees: Total regular and overtime hours with average rate for each type of employee;
    - Mutual aid: Total regular and overtime hours with average rate for each type of employee (e.g., mutual aid, National Guard, or prison labor); and,

[432] 44 C.F.R. § 206.205(b).
[433] 44 C.F.R. § 206.205(a); Stafford Act § 422; 42 U.S.C. § 5121.

        - Mutual aid agreement, memorandum of understanding or other written agreement.
    - Equipment:
        - Applicants own equipment: Equipment type, usage, and rate for each type of equipment;
        - Purchased equipment: Equipment type and cost; and,
        - Rented or leased equipment: Equipment type and rate for each type of equipment.
    - Supplies:
        - Purchased: Type, quantity, and cost for each type; and,
        - From stock: Type, quantity, and cost for each type;
    - For contract work:
        - Documentation to support the estimate (e.g., request for proposal(s), bid documents, or contracts including pre-qualified contracts).
- Debris monitoring information; and,
- Other emergency work costs:
    - Travel: Number of individuals, purpose, duration, and average rate;
    - Meals: Number of individuals, purpose, duration, and average rate; and,
    - Miscellaneous: Quantity, purpose, duration, and average rate.

If category A or B has an increased federal cost share for a limited timeframe, applicants need to separate work anticipated to be completed within the increased cost share timeframe from that to be completed after the increased cost share period (see Increased Federal Cost Share for a Limited Timeframe in Chapter 6).

FEMA estimates the cost of the work based on cost information provided by applicants. If an applicant does not provide sufficient cost information, FEMA may use average historical pricing. For contracted work, FEMA uses the unit cost from the contract if it determines the costs are reasonable; however, this is only for the purpose of expediting funding based on an estimate. FEMA reviews the applicant's procurement and contracting for compliance and addresses any noncompliance prior to or at final reconciliation and closeout of the project.

FEMA provides the federal cost share for the remaining 50 percent of the project cost once an applicant provides all documentation required to support the estimated project cost for a non-expedited project.

C. Costs for Projects with All Work Completed

For projects with all work complete, FEMA works with applicants to:

- Verify and collect programmatic, insurance, and hazard mitigation information;
- Ensure Environmental and Historic Preservation (EHP) grant conditions are met;
- Ensure vulnerable communities are not negatively impacted by the work completed;
- Verify information and documentation requirements; and,
- Address contextual information needed for supporting the applicant's claim for completed work.

When work for a large project is 100 percent complete, FEMA will provide funding based on actual costs. FEMA reviews the documentation submitted by the applicant and will make its eligibility determination based on the documentation received. FEMA will deny assistance for costs that are not supported by documentation. If actual cost documentation is not readily available and the applicant has provided sufficient documentation to define the scope of work completed, FEMA will provide funding for completed work based on a cost estimate.

There may be cases where, during review of the documentation submitted, FEMA determines additional information or explanation is required. In these instances, FEMA may generate a request for information (RFI) specifying a deadline for response. After a time determined appropriate by the Regional Administrator or Federal Coordinating Officer, a determination memorandum (DM) will be issued if documentation is not provided to fully support eligibility. For more information about the process, see Appeal Rights and Requirements in Chapter 2.

For small projects, FEMA may accept certification in lieu of documentation to support costs claimed and may process the project(s) based on estimated costs even if all work is completed if the applicant has provided sufficient documentation to define the completed scope of work.[434]

However, with exception of the scenarios listed under Small Projects in Chapter 12, small project estimates are not subsequently adjusted to reflect actual costs. Applicants must still retain documentation to request a net small project overrun appeal.

D. Estimating Emergency Work Projects with Work to be Completed

With the exception of debris removal and emergency repair projects, emergency work is often difficult to estimate due to the type of work conducted. Unlike permanent work, where a detailed scope of work is usually determined and estimated based on the damage, the detailed scope of work to address emergency response activities is often unknown and therefore difficult to estimate in advance. Additionally, emergency response activities generally do not have established unit pricing and other variables, which can impact pricing. If an applicant provides sufficient information, FEMA may process emergency work projects based on estimates.

E. Estimating Permanent Work Projects with Work to be Completed

When work is not yet complete, FEMA determines the amount of PA funding based on the estimated cost to restore the damaged facility to its pre-disaster design and function, including eligible codes and standards. The amount may include a reasonable amount of anticipated soft costs but does not include costs that are only related to, or only triggered by, changes to the pre-disaster design or function of the damaged facility. These include, but are not limited to, costs related to.

- Engineering and design;
- EHP compliance; and,

[434] Stafford Act § 422; 42 U.S.C. § 5189; 44 C.F.R. § 206.205(a).

- Work required by codes or standards identified by the applicant and verified by FEMA.

If FEMA develops the scope of work, it will also develop the associated cost estimate.

1. PROJECTS REQUIRING ENGINEERING ANALYSIS

Some projects may require an engineering analysis to determine the method of repair. In these cases, FEMA will provide PA funding for engineering and design services if requested by an applicant.

2. APPLICANT ESTIMATES

FEMA accepts an applicant-submitted cost estimate if the estimate:

- Is prepared by a licensed professional engineer or other estimating professional, such as a licensed architect or certified professional cost estimator who certifies that the estimate was prepared in accordance with industry standards;
- Includes certification that the estimated cost directly corresponds to the repair of the agreed upon damage;
- Is based on unit costs for each component of the scope of work and not a lump sum amount;
- Contains a level of detail sufficient for FEMA to validate that all components correspond with the agreed-upon scope of work;
- Is based on the current phase of design or construction inclusive of any known costs;
- Includes actual costs for work completed at the time the cost estimate is developed; and,
- Is reasonable.

Any foreseeable contingency costs such as security, staging, etc. should be included in an applicant-submitted cost estimate. FEMA evaluates applicant-submitted estimates for reasonableness based on the criteria under Reasonable Costs in Chapter 6.

3. FEMA ESTIMATES

When FEMA develops cost estimates for sites with permanent work that are less than 90 percent complete and total costs are expected to meet or exceed the large project threshold, FEMA uses the Cost Estimating Format (CEF) in accordance with the "CEF Instructional Guide."[435] The "CEF Instructional Guide" defines various factors and the range of percentage values that FEMA may apply to projects. In rare cases, a factor may need to be reviewed or adjusted. FEMA Headquarters has access to technical assistance to review the appropriate ranges for factors. Only FEMA Headquarters has the authority to approve the use of factors that exceed the CEF specified range or approve additional factors. However, for capped projects (improved and alternate projects), FEMA only includes the CEF contingency factor "Applicant Reserve for Change Orders" and does not include any additional factors or risk premiums.

4. INSURANCE REDUCTIONS

FEMA reduces the estimate to account for insurance coverage based on:

- Actual insurance proceeds, if known; or

[435] For more information, refer to: Cost for Large Projects Instructional Guide, Version 2.1 | fema.gov.

- Anticipated insurance proceeds based on the applicant's insurance policy if the amount of actual proceeds is unknown.

III. Compliance Reviews

FEMA conducts a series of reviews to ensure program compliance. FEMA reviews projects for quality assurance, insurance requirements, PA hazard mitigation eligibility, and EHP compliance.

IV. Obligation

FEMA obligates funding to recipients and transitions recovery roles and responsibilities.

A. Obtaining Funds

FEMA obligates the federal share of the eligible project cost to a recipient.[436] Once obligated, the project constitutes the official record of the approved scope of work. FEMA's authority to provide funding for small projects as one lump sum based on an estimate does not require recipients to obligate funding in the same manner. Recipients must expend and account for the federal award in accordance with its laws and procedures for expending and accounting for the state, Tribal Nation, or territory's own funds.[437]

B. Strategic Funds Management

Strategic funds management is FEMA's process for obligating PA funding based on an applicant's schedule to execute the work. If a permanent work project is greater than $1 million and the applicant does not need funds for more than 180 days from the time the project is ready for obligation, FEMA obligates funds based on the project completion schedule. FEMA's Strategic Funds Management Instruction (FEMA SOP 9570.24) addresses this obligation process in detail.[438]

The recipient is responsible for notifying the applicant that funds are available[439] and for distributing the funds to the appropriate subrecipient.[440] Funds that FEMA has obligated are available to recipients to pass through to the appropriate subrecipient.[441]

[436] 44 C.F.R. § 206.202(e).
[437] 2 C.F.R. § 200.302.
[438] For more information, refer to: *Strategic Funds Management Instruction (FEMA SOP 9570.24)*.
[439] 44 C.F.R. § 206.200(b)(2)(i).
[440] 44 C.F.R. § 206.202(a).
[441] 44 C.F.R. § 206.200(b)(2)(ii).

Chapter 10: Environmental and Historic Preservation

All federally funded projects are required to undergo a review process to assess potential impacts and compliance with applicable federal laws, regulations, and executive orders (EOs). This chapter is designed to inform applicants on the requirements and expectations of the environmental and historic preservation (EHP) compliance review process to ensure smooth communication and efficient progress throughout the PA Grant Lifecycle.

I. EHP Compliance

PA funded projects must comply with FEMA Directive 108-1, Environmental Planning and Historic Preservation Responsibilities and Program Requirements.[442] Additionally these projects must comply with all applicable EHP laws, implementing regulations, and EOs and address adverse impacts to environmental and historic resources through avoidance, minimization, or compensatory measures. These EHP requirements aim to protect various resources such as water, air, coastal areas, wildlife, land, agriculture, historic facilities, cultural resources, and minimize adverse effects on low-income and minority populations. When PA provides funding to applicants, these grants must comply with laws and regulations designed to protect natural, cultural, and historic resources. A greensheet is a tool, prepared by EHP at the beginning of each declaration, which discusses EHP information specific to the disaster declaration designated area(s).

EHP specialists assist applicants by providing technical expertise throughout the PA Program delivery process. They inform applicants of the legal requirements associated with their grant funding, such as:

- Acquisition of permits and letters of exemption;
- Contact information for local, state, and federal regulatory agencies; and,
- Simplified guidance on how to understand and meet any project-specific conditions of the record of environmental consideration (REC).

Applicants play a critical role in the EHP review by communicating any concerns and questions to the assigned PA and EHP specialist teams early and often. By providing complete and accurate information and addressing any potential changes to the scope of work, applicants can facilitate the project compliance review and reduce the amount of time for project obligation.

Terminology

A **record of environmental consideration (REC)** is a FEMA administrative document that records the application of a categorical exclusion (CATEX) or statutory exclusion (STATEX) to a specific proposed action (scope of work) and captures the compliance determinations made for all applicable EHP laws

[442] For more information refer to: *EHP Directive & Instruction (FEMA Directive 108-1 & Instruction 108-1-1).*

and EOs. The REC is also used to convey any conditions for compliance that have been placed on the project.

A. EHP Compliance Review

FEMA's goal is to assist applicants in their efforts to recover from a devastating incident and ensure all recovery work protects resources and minimizes adverse effects. To accomplish this, all PA funded projects are required to undergo an EHP review. EHP specialists need information about the work to determine what requirements apply to a project to complete the review. EHP specialists review an applicant's scope of work (SOW) and supporting documentation to understand what the applicant proposes to do, the locations of the work including equipment and material staging locations, and what natural or cultural resources may be impacted. See Chapter 9: Scoping, Costing, and Final Reviews for more information on how to create a complete SOW which includes all the necessary details for EHP to complete their review. During the review, EHP evaluates the potential impacts of the project on the natural and built environment. The findings are documented in a REC which is included in every project. An EHP specialist will inform the applicant of any consultation(s) with regulatory agencies needed and all project-specific compliance conditions.

For completed or partially completed work, applicants are required to provide all documentation and evidence to demonstrate compliance with any project-specific conditions. Documentation associated with the EHP review process may include items such as permits, certification of compliance with applicable conditions, post-construction surveys, etc. See Chapter 12: Final Reconciliation and Closeout for more information.

EHP review timeframes can vary depending on the complexity of the scope of work, resources affected, public notice requirements, and consultation with regulatory agencies.[443]

1. REQUIRED INFORMATION AND DOCUMENTATION

FEMA requires the applicant to provide information about the scope of work to support the EHP review. Applicants can support a smooth review process by providing the following commonly triggered information and documentation requirements during the project formulation process:

- Physical address, if applicable, and global positioning system (GPS) coordinates for specific work sites (e.g., equipment and material staging locations, ground disturbance locations, material fill source locations);
- Dimensions of all ground disturbance (area: length, width, and depth);
- Repair or restoration details (including type and quantity of materials, equipment, and supplies used);
- Original date of facility construction and subsequent renovations;
- Equipment and materials staging information;
- Temporary and final disposal site information for debris;

[443] For more information, refer to: Environmental Planning and Historic Preservation | fema.gov.

- Timeframe of work performed;
- Source of fill material;
- Maps or photographs to support the SOW;
- Plans, drawings, and/or blueprints to explain the SOW;
- Studies and surveys, if requested; and,
- Applicable permits, authorizations, and correspondence with regulatory agencies.

FEMA generates a request for information (RFI) for clarification or additional documentation if more information is needed to support EHP compliance review. See the Requests for Information section in Chapter 2 to learn more about the RFI Process.

B. Projects that Qualify for Streamlined EHP Review

All projects are subject to an EHP compliance review, however the timeframes for this review vary depending on the type of project. FEMA EHP collaborates closely with regulatory partners to create streamlined procedures and processes, such as programmatic agreements or consultations. These programmatic documents contain predetermined compliance decisions based on reviews that assess the potential impacts of projects or actions that are carried out repeatedly and are likely to have similar effects that can be assessed on a broader scale. These tools enable EHP specialists to make compliance determinations quickly, without the need for consultations with various multiple parties or regulatory agencies.

Examples: PA Projects that Qualify for Streamlined EHP Review

- Projects intended to restore the facility back to pre-disaster condition using in-kind or like materials;
- Projects with codes and standards upgrades;
- Projects involving replacement of contents, supplies, or equipment; and,
- Projects with minor repair, restoration, or construction on buildings or structures less than 45 years old and that are not listed or eligible for listing in the National Register of Historic Places.

C. Projects Requiring Complex EHP Review

Projects that have potential for impacts to natural and cultural resources will require more detailed information and longer compliance review time. These types of projects often require consultations or coordination with other resources or regulatory agencies, including:

- U.S. Fish and Wildlife Service (USFWS);[444]
- U.S. Environmental Protection Agency (EPA);[445]
- National Marine Fisheries Service (NMFS);[446]

[444] For more information, refer to: U.S. Fish and Wildlife Service (USFWS) | fws.gov.
[445] For more information, refer to: U.S. Environmental Protection Agency (EPA) | epa.gov.
[446] For more information, refer to: National Marine Fisheries Service (NMFS) | noaa.gov.

- U.S. Army Corps of Engineers (USACE);[447]
- State Historic Preservation Offices (SHPO);[448]
- Tribal Historic Preservation Offices (THPO);[449] and,
- Other applicable local, state, and territorial regulatory agencies.

Regulatory agencies have the authority to evaluate and approve projects through consultations or permitting decisions. When a project requires FEMA to consult with a regulatory agency, the estimated timelines are established by the responsible regulatory federal, state, and Tribal Nation resource agencies. See the Understanding EHP Laws and Executive Orders in this chapter for more information.

Examples: Projects with the Potential to Impact Natural and Cultural Resources

Examples of projects with the potential to impact natural and cultural resources include:

- New construction or changes in the location, footprint, or size of a facility;
- An increase in the size, alignment, or location of a road, bridge, or culvert;
- Hazard mitigation and codes and standards upgrades;
- Work affecting buildings, structures, sites, objects, or districts that are 45 years or older, historic landmarks of any age, and any work resulting in soil movement or change to the pre-disaster footprint;
- Work near or within a special flood hazard area (regulatory floodway or the 1% annual chance floodplain zone (100-year), or, for critical actions, in the 0.2% annual chance floodplain zone (500-year);[450]
- Work in or near environmentally sensitive areas such as barrier islands, conservation easements, fish hatcheries, preserves, state and national parks, and wildlife management areas;
- Work in or near beaches, canals, lakes, rivers, streams, wetlands, or other bodies of water including fishing piers;
- Staging and disposal (or recycling) of debris including, but not limited to, vegetative, construction and demolition (C&D), and hazardous materials as a result of either the disaster event or the project work; and,
- Actions that may result in disproportionately high and adverse effects to low income and minority populations per EO 12898.

Projects requiring complex EHP review are broken out by PA project type in the paragraphs below.

1. EMERGENCY WORK (CATEGORIES A AND B)

While FEMA's statutory exclusions under Section 316 of the Stafford Act exempt most emergency actions from review under the National Environmental Policy Act (NEPA), compliance with other laws, such as the

[447] For more information, refer to: U.S. Army Corps of Engineers (USACE) | USACE.army.mil.
[448] For more information, refer to: State Historic Preservation Offices (SHPO) | nps.gov.
[449] For more information, refer to: Tribal Historic Preservation Offices (THPO) | nps.gov.
[450] For more information, refer to: Floodplain Management and Wetland Protection.

Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), the Resource Conservation and Recovery Act (RCRA), the State Solid Waste Laws, the Clean Air Act (CAA), the Clean Water Act (CWA), and Executive Orders 11988 (Floodplain Management), and 13112 (Invasive Species), is still required.

2. DEBRIS REMOVAL (CATEGORY A)

Although debris removal is usually statutorily excluded from the NEPA review, FEMA must ensure compliance with other EHP-related federal laws, regulations, and EOs prior to funding the work. Accordingly, FEMA must ensure that the applicant's debris removal operations avoid impacts to such resources as floodplains, wetlands, federally listed threatened and endangered species and their critical habitats, and historic properties (including maritime or underwater archaeological resources if waterways are impacted). Additionally, debris removal operations must avoid impacts that contribute to hazardous gas release and water supply contamination. Applicants must ensure they follow conditions established by state, local, Tribal Nation, and territorial authorities and must stage debris at a safe distance from property boundaries, surface water, floodplains, wetlands, structures, wells, and septic tanks with leach fields. Additional coordination may be necessary for debris removal from waterways, stump removal, and use of fill.

Applicants are responsible for permits and compliance with federal, state, Tribal Nation, and territorial requirements. The applicant needs to work with the disaster EHP staff to gain clarity on compliance requirements and permits for debris-related operations. Upon completion of debris removal, recycling, and disposal, site remediation may be necessary at staging sites and other impacted areas.

3. EMERGENCY PROTECTIVE MEASURES (CATEGORY B)

Although emergency protective measures are usually statutorily excluded from NEPA review, FEMA must ensure compliance with other EHP-related federal laws, regulations, and EOs prior to funding the work. Accordingly, FEMA must ensure that the applicant's emergency protective measures, where possible: 1) avoid impacts to resources such as federally listed threatened and endangered species and their critical habitats, and historic properties; and 2) consider impacts to and from floodplains and wetlands.

For emergency work that occurs in or near impacted areas that have natural and cultural resources, FEMA encourages applicants to coordinate prior to conducting work to front-load any applicable EHP considerations in a timely manner. For work that is complete at the time the project application is submitted to FEMA, documentation is still needed to facilitate the EHP review of emergency work projects and to demonstrate EHP compliance even if it is after-the-fact. See Chapter 12: Final Reconciliation and Closeout for more information.

Examples: Emergency Work Projects that have the Potential to Impact EHP Resources

Examples of emergency work projects that have the potential to impact EHP resources include:

- Burning of debris;
- Debris removal from waterways and shorelines;
- Mold remediation;

- Mosquito abatement;
- Construction of temporary access roads, levees, and emergency berms;
- Demolition of unsafe structures;
- Purchase or construction of temporary facilities for essential community services; and,
- Temporary actions in coastal areas.

4. PERMANENT WORK (CATEGORIES C-G)

Permanent work projects that involve changes in location, footprint, alignment, or size of a facility or that occur in or affect natural and cultural resources often require a more intensive EHP review and trigger more compliance requirements. These projects often include alternate or improved projects, projects that involve significant changes to the pre-disaster configuration or the relocation of a facility, projects that incorporate codes and standards upgrades, or projects that incorporate hazard mitigation. It is important to understand EHP requirements for these types of permanent work projects.

Examples: Permanent Work Projects that have the Potential to Impact EHP Resources

Examples of permanent work projects that have the potential to impact EHP resources include:

- Upsizing culverts and redesigning water conveyance structures;
- Replacing or relocating of a bridge;
- Modifying to the interior or exterior of a historic building;
- Reconstructing of a waterfront boardwalk or pier;
- Relocating and/or burying utility lines;
- Beach renourishment projects;
- The relocation of facilities to undisturbed areas;
- Repairs to substantially damaged structures within the floodplain; and,
- New structures or facilities.

i. Disposition of Original Facility

For alternate and alternative procedures projects, if the applicant does not repair, replace, or sell the damaged facility for which the capped project funding was based, and that facility is unsafe if not repaired, the applicant must render the facility safe and secure (e.g., by restricting access, locking doors and windows, constructing a fence around the property) or demolish it and provide the necessary assurances to document compliance with special requirements.[451]

[451] 44 C.F.R. § 206.203.

If an applicant receives funds for salvaged components of the facility, FEMA adjusts the capped project funding by the value or anticipated fair market value of salvaged materials less the estimated costs necessary to demolish the facility, grade the site, or make the facility safe and secure.

For any work proposed by an applicant using PA funds at the original site, such as making the damaged facility safe and secure or demolishing it, FEMA must conduct EHP compliance review. When no PA funding is used for work proposed at the original site, FEMA will require the applicant, as a condition of the grant funding for alternate and alternative procedure projects, to coordinate with necessary agencies including the state historic preservation officer or tribal historic preservation officer (SHPO/THPO), U.S. Fish and Wildlife Service, National Marine Fisheries Service, or the U.S. Army Corps of Engineers, to determine if the proposed work will adversely affect any historic properties and/or natural resources, and consider any measures recommended by the agencies to avoid, minimize, treat, or otherwise address adverse effects identified. The applicant must provide FEMA with documentation of its coordination with the agencies, and any agreed upon measures to address adverse effects. The applicant is responsible for all costs associated with said coordination and agreed upon measures unless they are directly related to the restoration of disaster-related damage. See Appendix D: Environmental and Historic Preservation Compliance for a description of common EHP laws, regulations, and executive orders (EOs).

If an applicant opts to keep a damaged facility for a later use, the facility is eligible for PA funding in future incidents, provided the applicant repaired the facility in accordance with current codes and standards, and completed any mitigation measures, or other requirements that FEMA included in the original SOW prior to the incident. The applicant must also maintain and obtain insurance according to the requirement placed on the original project.

D. Navigating the EHP Compliance Process

While FEMA EHP provides technical assistance and guidance to applicants in each step of the application process, there are some things applicants can do to help ensure a timely and efficient EHP review. Below are some guidelines to help applicants navigate the EHP compliance process:

- Provide detailed information for assessing potential impacts, including a complete and clear scope of work to minimize requests for clarification and information.
- Provide maps or sketches of work details, photographs, site plans, and area descriptions of pre-disaster conditions and proposed or completed work to reduce requests for information from EHP.
- Obtain any necessary permits and/or authorizations prior to construction.
- Provide any pre-existing permits and/or authorizations. FEMA may be able to expedite the EHP compliance review based upon existing and applicable permit and/or authorization documentation.
- Document and keep copies of any correspondence with federal or state agencies regarding permits and/or authorizations. Attach those copies to the grant application.
- Adhere to permit and/or authorization conditions for implementing work and utilize identified best management practices as specified by regulatory agencies. Verify conditions were met if work is completed.

E. Understanding EHP Laws and Executive Orders

The most commonly encountered federal laws FEMA reviews for EHP compliance include: the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, Executive Order 11988 Floodplain Management, Executive Order 11990 Wetlands Protection, the Coastal Barrier Resources Act, and the Clean Water Act (CWA). More information about these laws is provided in the sections below.

Depending on the project location and type of work, compliance with other laws, such as the Coastal Zone Management Act (CZMA), the Resource Conservation and Recovery Act, or the Marine Mammal Protection Act may be required. See Appendix D: Environmental and Historic Preservation Compliance for descriptions of additional EHP laws and Executive Orders (EOs) that are not covered in this section.

1. NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of NEPA is to ensure that environmental factors are weighted equally when compared to other factors in the decision-making process undertaken by federal agencies. NEPA requires that the effects of proposed actions and alternatives on the human environment be shared with the public and considered by an agency before deciding on the proposed action. The human environment includes the natural and physical environment and the relationship of people within that environment.

EHP considers the statutory necessity and likelihood of environmental consequences of a proposed action or connected actions when determining the appropriate level of NEPA review:

- **Statutory exclusion (STATEX)** means the work (proposed action) is exempt from NEPA review because actions covered by STATEX are required in the aftermath of a disaster to return facilities to their pre-disaster condition and therefore have little or no impact on the environment.
- **Categorical exclusion (CATEX)** is a form of NEPA compliance that applies to actions that do not need to undergo a detailed NEPA review because the agency has evaluated and demonstrated that these types of work (actions) do not normally have the potential to have a significant effect upon the environment. Moreover, CATEXs are applied to projects that have no extraordinary circumstances present, which would require a more detailed NEPA review (environmental assessment or environmental impact statement).
- **Environmental assessments** are prepared for projects that do not fall under a STATEX or CATEX and when it is unlikely or unknown whether the proposed project would cause significant environmental and/or historic impacts. This is a more detailed examination of the project and requires an evaluation of alternatives and public involvement component. Environmental assessments can result in the following:
  - A **finding of no significant impact** means the action will not have significant impacts and is not highly controversial in terms of environmental impacts.
  - A **notice of intent (NOI)** to prepare an environmental impact statement (EIS) means that the action may have significant impacts or controversy in terms of environmental impacts, and an EIS that results in a record of decision should be prepared.
- **Environmental impact statement (EIS)** examines a major federal action that significantly affects the quality of the human and natural environment. It is a detailed impact study that requires extensive agency and public coordination.

2. NATIONAL HISTORIC PRESERVATION ACT

Emergency protective measures, debris removal, and permanent work to repair, restore, or replace disaster-damaged facilities may impact historic properties, including buildings, structures, sites, including archaeological resources, objects, and districts. Section 106 of the National Historic Preservation Act (NHPA)[452] requires FEMA to assess if PA-eligible work will affect such properties and consult with the state historic preservation officer (SHPO) and/or tribal historic preservation officer (THPO), and other consulting parties, including the applicant and recipient, to resolve any adverse effects to identified properties through avoidance, minimization, or compensation measures. Through the execution of programmatic agreements with the SHPO/THPO and recipient, FEMA ensures streamlining of the Section 106 compliance process while integrating historic preservation considerations into the formulation and implementation of PA projects.

3. ENDANGERED SPECIES ACT

Under the Endangered Species Act (ESA), the federal government (including FEMA) has the responsibility to protect endangered species (species that are likely to become extinct throughout all or a large portion of their range), threatened species (species that are likely to become endangered in the near future) and critical habitat (areas vital to the survival of endangered or threatened species). Under Section 7 of the ESA, all federal agencies including FEMA are required to review their actions or funded actions, including PA projects, for potential effects to federally-listed species or critical habitat. If FEMA determines there will be an effect to species or their critical habitat, they must consult with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service on that action. The consultation may be informal or formal depending on the level of effects to species or critical habitat. Consultation may result in the application of project-specific conditions such as timing restrictions or construction best practices that an applicant must follow in order to be compliant with the ESA.[453]

4. EXECUTIVE ORDERS 11988 & 11990: FLOODPLAIN MANAGEMENT AND WETLANDS PROTECTION

FEMA actions, including PA projects, must conform to 44 Code of Federal Regulations (C.F.R.) Part 9, which incorporates the requirements of EO 11988, as amended, and EO 11990. Applicants must review all proposed actions to determine whether they are in the floodplain or wetland. In accordance with EO 11988, as amended, and EO 11990, FEMA must complete an 8-step decision-making process for proposed actions located in the floodplain or wetland, as well as proposed actions that have the potential to affect or be affected by a floodplain or wetland. The applicable floodplain for the action is determined by the type and criticality of the action.

As part of the eight-step decision-making process, FEMA must consider alternative locations and actions, including the use of natural features and nature-based solutions, to determine whether the floodplain or wetland is the only practicable location for that action. Applicants should document alternatives considered as part of their application process to assist FEMA in facilitating this decision-making process. If the floodplain or wetland is the only practicable location, applicants must avoid or must minimize adverse

[452] For more information, refer to: National Historic Preservation Act | fema.gov.
[453] For more information, refer to Endangered Species Act | fws.gov.

impacts to the floodplain or wetland and also be in compliance with any more restrictive federal, state, or local floodplain management standards.[454]

See the Environmental and Historic Preservation Requirements section in Chapter 8 for more information.

5. COASTAL BARRIER RESOURCES ACT

In accordance with the Coastal Barrier Resources Act (CBRA), FEMA may assist projects in otherwise protected areas if they do not require flood insurance after project completion.[455] The CBRA designates relatively undeveloped land along the Atlantic and Gulf Coast as part of the John H. Chafee Coastal Barrier Resources System (CBRS) that are ineligible for most new federal assistance. Projects in a John H. Chafee CBRS unit are eligible only if they qualify for one of the exceptions in Section 6 of the CBRA[456] and comply with FEMA's CBRA regulations that provide further information on the restrictions for funding specific to disaster recovery.[457]

Terminology

Otherwise, protected areas consist of conservation or recreation areas such as national wildlife refuges, state and national parks, local conservation areas, and private conservation areas, although they may also contain private areas that are not for conservation.

All projects that occur in or adjacent to CBRS units must meet one of the CBRA exceptions and require that FEMA consult with the appropriate U.S. Fish and Wildlife Service Ecological Services field office.

Proposed actions carried out within or adjacent to an "otherwise protected area" do not require consultation with the U.S. Fish and Wildlife Service.

6. CLEAN WATER ACT

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into Waters of the United States (WOTUS) and regulating the quality of surface waters. Together with the Rivers and Harbors Act (RHA) of 1899, the CWA helps define the federal government's jurisdiction over, and approach to, managing waters under its jurisdiction. These laws give the U.S. Army Corps of Engineers (USACE), U.S. Coast Guard, U.S. Environmental Protection Agency (EPA), and other agencies permitting authority over certain activities affecting "navigable waters of the United States" subject to federal jurisdiction under the RHA and "navigable waters" subject to federal jurisdiction under the CWA, which are defined as "waters of the United States."

[454] 44 C.F.R. § 9.11(d).
[455] Congress reauthorized the Coastal Barrier Resources Act with the Coastal Barrier Improvement Act of 1990 (Public Law 101-591 [Nov. 16, 1990], expanding the CBRS to include undeveloped costal barriers along the Florida Keys, Great Lakes, Puerto Rico, and the U.S. Virgin Islands. It also added a new category of undeveloped barriers called Otherwise Protected Areas.
[456] 16 United States Code (U.S.C.) § 3505.
[457] 44 C.F.R. § 206 Subpart J.

It is the responsibility of an applicant to obtain any required CWA Section 401 water quality certification and CWA Section 402 National Pollutant Discharge Elimination System permits whenever there is the work in waterways or the potential for discharge of wastewater pollutants (including sediment) to surface waters (e.g., wetlands, ponds, lakes, streams, and rivers). FEMA typically conditions grant approval upon an applicant obtaining all relevant certifications and permits required for the project.

CWA Section 404 establishes a program to regulate the discharge of dredged or fill material into WOTUS, including wetlands. Section 404 requires that a permit be obtained before dredged or fill material may be discharged into WOTUS, unless the activity is exempt from Section 404 regulation. It is the responsibility of an applicant to obtain a Section 404 permit, declare the use of a non-reporting nationwide permit (NWP), or provide documentation that no permit is required.

Examples: Projects That Can Trigger CWA Section 404 Permitting Requirements

Examples of projects that can trigger CWA Section 404 permitting requirements include:

- Dredging wetlands or placement of fill in wetlands;
- Culvert or bridge replacements in WOTUS;
- Shoreline revetments;
- Embankment armoring;
- Repair or replacement of docks and piers; and,
- Beach renourishment.

F. Coordination with Other Federal Agencies

When multiple federal agencies are conducting, supporting (including funding), or permitting projects in the same geographic area, early coordination is essential to avoid the potential for conflicting EHP standards being applied within the same geographic area or on the same project. Accordingly, when FEMA is funding an action with or in the same area as another federal agency, FEMA will coordinate with the applicable federal agencies as early in the planning process as possible to promote streamlining of EHP compliance reviews. For example, public housing agencies (PHAs) are eligible to receive PA funding for projects involving their public housing portfolio. When public housing receives PA funding, FEMA EHP will reach out to the U.S. Department of Housing and Urban Development (HUD) to coordinate on the environmental and historic preservation review process.

1. UNIFIED FEDERAL REVIEW

FEMA has committed to expediting and unifying environmental reviews. The Unified Federal Review (UFR) process[458] offers additional coordination opportunities for FEMA and other federal agencies. The UFR allows for higher-level resolution in instances where agreement on a common approach reaches an impasse.

[458] For more information, refer to: Unified Federal Environmental and Historic Preservation Review | fema.gov.

G. Partnerships and Resources

1. HERITAGE EMERGENCY NATIONAL TASK FORCE

The Heritage Emergency National Task Force (HENTF),[459] a partnership between FEMA's Office of Environmental Planning and Historic Preservation (OEHP) and the Smithsonian Cultural Rescue Initiative (SCRI), strives to protect state, local, Tribal Nation, and territorial (SLTT) cultural and historic resources from the damaging effects of disasters. HENTF supports the Natural & Cultural Resources (NCR) Recovery Support Function (RSF) in developing recovery needs assessments by identifying issues, impacts, and unmet needs of private nonprofit cultural institutions such as museums, libraries, historical societies, city/town clerk offices, and performing arts organizations.

HENTF's 60-plus members – federal agencies and private nonprofit national service organizations – represent expertise in the arts, culture, historic preservation, emergency management, and tribal affairs. HENTF can serve as a technical assistance resource for field staff to address issues specific to applicants in the arts and culture sector, by identifying resources, advising on conservators and allied professionals, and evaluating scopes of work for treatment of objects.

HENTF actions during disaster operations include:

- Coordinating the collection and sharing of incident-specific information to support the federal response;
- Coordinating with its members, state cultural agencies, state, and regional library/archives/museum/arts associations, and SLTT cultural heritage emergency networks for situational awareness; and,
- Aiding in dissemination of PA information and updates via HENTF network to reach stakeholders at the local level.

H. Resource Links

- Environmental & Historic Preservation Grant Preparation Resources
- EHP Tools for Practitioners
- The Heritage Emergency National Task Force (HENTF) | FEMA.gov

[459] For more information, refer to: Heritage Emergency National Task Force (HENTF) | culturalrescue.si.edu.

Chapter 11: Project Monitoring and Amendments

Post award project monitoring includes managing projects, ensuring subrecipients use funds in alignment with the approved scope of work (SOW), adhering to set deadlines, and meeting compliance requirements. Recipients are responsible for assessing the risk of non-compliance for each subrecipient and, if necessary, imposing additional conditions or requirements. Monitoring subrecipients is essential to ensure compliance with federal regulations and the achievement of performance goals, which includes reviewing financial and progress reports.

PA staff support recipients and track the overall progress of disaster operations. PA staff also manage requests for changes in scope, time extensions, project closeouts, appeals, audits, and arbitration. The "Public Assistance Program Delivery Guide"[460] provides an overview of these process steps.

I. Post Award Change in Scope of Work

Subrecipients must ensure PA funding is used exclusively for eligible work specified in the approved project. If a change to the SOW becomes necessary, subrecipients should promptly consult with both the recipient and FEMA to allow sufficient time for FEMA to review the proposed changes for eligibility.

To request a change, subrecipients must submit a written request to the recipient, including both a detailed justification why the change is necessary and supporting documentation for FEMA to substantiate the eligibility of the proposed revision.[461] Subrecipients should include the information outlined in Table 31. Required Documentation and Information to Support Scope of Work Changes to facilitate FEMA's evaluation. If the request involves previously unreported damage, subrecipients must also provide documentation linking the work to the disaster. The recipient then forwards the request and its recommendation to FEMA for review.

Commonly eligible reasons for SOW changes include:

- Alternate repair method is more cost-effective than the original proposed repair method;
- Original repair method is no longer technically feasible;
- Upgrades needed per codes and standards;[462]
- Increase in previously approved quantities due to errors or omissions;
- Discovery of hidden incident-related damage during construction; or
- The subrecipient wishes to pursue an improved or alternate project.

[460] For more information, refer to: *Public Assistance Program Delivery Guide*.
[461] 44 C.F.R. § 206.204(e); 2 C.F.R. § 200.308.
[462] For more information, refer to Codes and Standards in Chapter 8.

Table 31. Required Documentation and Information to Support Scope of Work Changes

Required Documentation and Information to Support Scope of Work Changes for Small and Large Projects

▪ Detailed change(s) to scope of work;
▪ Cost estimate;
▪ Reason for changes:
  ○ Cost estimate if more cost-effective repair method;
  ○ If the original scope of work is not feasible, supporting documentation such as technical reports or surveys;
  ○ If hidden damage (must be found during performance of eligible work):
  – Documentation substantiating the damage is related to the declared incident; and,
  – Photographs documenting damage.
▪ Construction timeline/project schedule:
  ○ Time extension if scope of work change will result in a project delay causing work to be conducted outside the approved period of performance.

II. Work Completion Deadlines

FEMA provides PA funding only for work completed and costs incurred[463] within specified regulatory deadlines (see Figure 21. Work Completion Deadlines). For emergency work, the deadline is six months from the disaster declaration date.[464] For most permanent work, the deadline is 18 months, except for category I projects, which have a 180-day limit. FEMA considers these timelines as the approved period of performance (POP) for a project, defining work completion as fulfilling all tasks in the approved SOW and meeting compliance requirements. This does not include payments for invoices, warranty periods, or grant management activities, such as submitting closeout documentation, reconciling finances, or requesting payment. If additional time is needed, subrecipients must submit a written request to the recipient for a time extension, with the following information:

Deadlines for Completion of Work	
Type of Work	**Timeframe**
Emergency Work	6 Months
Permanent Work	
Categories C-G	18 Months
Category I	180 Days

Figure 21. Work Completion Deadlines

- Dates and justification for all previous time extensions;[465] and,
- A detailed justification for the delay.[466]

Recipients have authority to grant time extensions due to extenuating circumstances. Recipients may extend emergency work up to an additional six months and permanent work up to 30 months on a project-by-project

[463] 2 C.F.R. § 200.309; 44 C.F.R. § 206.204(d)(2).
[464] 44 C.F.R. § 206.204(c)(1).
[465] Ibid.
[466] 44 C.F.R. § 206.204(c)(1).

basis, with the exception of temporary relocation and category I projects. Any extensions beyond these limits require FEMA approval, and recipients must notify FEMA of approved extensions either through the Grants Portal system or official correspondence. FEMA has authority to grant further extensions if justified by extenuating circumstances,[467] which generally include delays caused by permitting or Environmental and Historic Preservation (EHP) requirements, atypical limitations like narrow construction windows, adverse weather preventing site access, or shortages of materials, equipment, or contractors. However, FEMA does not consider circumstances such as delayed permit requests, lack of funding, administrative changes, or cost documentation compilation as valid reasons for time extensions.

A. Project Schedule

Creating and following a well-structured project schedule is critical for managing projects effectively and ensuring that work is completed within the period of performance or for identifying when a time extension is necessary. Scheduling serves as the backbone of project management, particularly in construction, by systematically planning, organizing, and controlling the allocation of resources, tasks, and activities. An effective schedule improves time management by defining and sequencing work tasks, ensures that resources such as time, budget, and staffing are appropriately allocated, and supports risk management by identifying potential roadblocks and delays early on. It also enables monitoring of project progress, making budgeting more predictable and manageable. Without a clear schedule, projects are more vulnerable to delays and cost overruns.

III. Large Project Quarterly Progress Reports

Funding for PA large projects is based on estimated costs, contracted costs, or a combination of both for an approved scope of work, with grant funds obligated accordingly. Since actual costs become clear only upon project completion, they often vary from initial estimates. To ensure responsible management of public funds, regular reviews, and timely identification of any changes in project costs are essential.

The large project Quarterly Progress Report (QPR) is a tool for tracking project expenditures relative to completion percentage, comparing completed work costs against obligated funding, monitoring the drawdown of funds by recipients, and assessing whether a project is underfunded or overfunded. The QPR also includes the status of projects pending final federal payment and highlights any issues that could lead to noncompliance with grant conditions. Quarterly reporting is not required for small projects.

FEMA requires recipients to report on the status of all open large projects each quarter.[468] Subrecipients and recipients must meet specific reporting requirements outlined in Table 33. Required Documentation and Information for Quarterly Progress Reports. Recipients must submit QPRs to FEMA within 30 days of each fiscal quarter's end. The Regional Administrator and recipient negotiate the date for submission of the first report.[469]

[467] 44 C.F.R. § 206.204(d).
[468] 44 Code of Federal Regulations (C.F.R.) § 206.204(f).
[469] 44 C.F.R. § 206.204 Project performance.

Table 32. Deadlines for Submitting Quarterly Progress Reports

Quarter	Dates	Report Due Date
1	October 1 – December 31	January 30
2	January 1 – March 31	April 30
3	April 1 – June 30	July 30
4	July 1 – September 30	October 30

Table 33. Required Documentation and Information for Quarterly Progress Reports

Responsible Point of Contact	Project Type	Required Documentation
Subrecipient	Large Projects with an Incomplete Scope of Work (Work is Still In-Progress)	▪ A brief description of known problems or circumstances that are expected to cause a deviation from the approved scope of work, cost, delay project completion or delay project closeout; ▪ Status of the project (either construction phase or percent complete); ▪ Whether the work is complete (per definition under Work Completion Deadlines in this chapter); ▪ Project period of performance end date; ▪ Projected completion date per definition under Work Completion Deadlines in this chapter); and, ▪ Status of time extension, if applicable.
Subrecipient	Large Projects with Complete Scope of Work (Work is Completed)	▪ Date work was completed; and, ▪ Entity responsible for the action in the closeout process (FEMA, recipient, subrecipient).
Recipient	Large Projects with Complete Scope of Work (Work is Completed)	▪ Total amount disbursed to the subrecipient; ▪ Whether final payment was made; ▪ Whether time extensions were approved; and, ▪ Latest approved work completion deadline.

IV. Financial Status Reports

Recipients submit the *Federal Financial Report* (SF-425) quarterly to the respective FEMA Regional Office.[470] The reports provide the status of funds for the prime award, the recipient's expenditure drawdowns, and whether the recipient is meeting its cost-share requirements.

[470] 2 C.F.R. § 200.328.

V. Federal Funding Accountability and Transparency Act

The Federal Funding Accountability and Transparency Act (FFATA) requires that FEMA manage and administer awards in a manner so as to ensure that federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, federal law, and public policy requirements. These requirements include, but are not limited to those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination. FEMA must communicate to recipients all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the award.[471]

Recipients are responsible for complying with all requirements of the award. For all federal awards, this includes the provisions of FFATA, which includes requirements on executive compensation, and also requirements implementing the Act for the non-federal entity at 2 C.F.R. Parts 25 and 170.[472]

FFATA requires recipients to register in the FFATA Subaward Reporting System[473] and report on all awards and subawards equal to or greater than $30,000.

VI. Audits

Recipients and subrecipients are subject to federal and non-federal audits. Records are subject to audit by state or territorial government auditors, FEMA, the U.S. Department of Homeland Security Office of Inspector General (OIG), and the U.S. Government Accountability Office (GAO) or any of their authorized representatives.[474] FEMA may adjust project funding due to audit findings.

A. Single Audits

A recipient or subrecipient that expends $1 million or more in federal funds during its fiscal year must perform a single or program-specific audit.[475]

B. Government Accountability Office

The Government Accountability Office (GAO) is the investigatory arm of Congress and is under the direction of the Comptroller General of the United States. GAO is an independent, nonpartisan agency that investigates how the federal government spends taxpayer dollars. Its mission is to help improve the performance and accountability of the federal government. Although the GAO usually audits FEMA programs, it has authority to audit any project.

C. Office of the Inspector General

The Department of Homeland Security's Office of Inspector General (OIG) conducts independent audits and investigations on FEMA programs, operations, activities, and functions; how recipients and subrecipients

[471] 2 C.F.R. § 200.300(a).
[472] 2 C.F.R. § 200.300(b).
[473] For more information, refer to: Federal Funding Accountability and Transparency Act Subaward Reporting System | fsrs.gov.
[474] 2 C.F.R. § 200.337.
[475] 2 C.F.R. § 200.501.

expend federal funds; and oversight of non-federal audits such as single audits. The OIG evaluates activities to identify, deter, and address fraud, waste, and abuse. The OIG has authority to audit any project.

1. REPORT FRAUD

FEMA award recipients and subrecipients play a critical role in helping to identify fraud and are highly encouraged to report suspicious activities at any time during the procurement process by contacting the FEMA Fraud and Investigation Division,[476] the DHS OIG Hotline,[477] FEMA Suspension and Debarment [478].and the U.S. Department Justice National Center for Disaster Fraud.[479]

D. FEMA Office of Civil Rights

FEMA's Office of Civil Rights (OCR) has the authority to conduct investigations and compliance reviews based on discrimination. OCR has the authority to request and review documentation related to programs receiving FEMA financial assistance and FEMA programs and has monitoring and oversight requirements in connection with recipient compliance with federal civil rights laws. OCR conducts investigations on complaints received from the public alleging civil rights violations from FEMA, FEMA programs, and recipients of FEMA financial assistance.[480] OCR may conduct a full investigation and render a decision on the complaint, or they may refer the complaint to another agency. OCR conducts compliance reviews of FEMA programs and recipients of FEMA financial assistance to ensure compliance with civil rights before, during, and after disasters. Prior to conducting a compliance review, OCR seeks to provide technical assistance related to civil rights, as its mission is to fully integrate civil rights into all aspects of FEMA's culture and work.

E. Recovery of Improper Payments

FEMA conducts audit assessments on drawdowns to recover payments identified as improper in accordance with the Payment Integrity Information Act.[481] In 2019, FEMA implemented the Validate as You Go (VAYGo) review process for several major disaster declarations in an effort to comply with improper payment reporting requirements and to reduce project closeout documentation requirements for recipients with proven effective internal control processes. In December 2020, FEMA expanded VAYGo to all PA and Fire Management Assistance Grant (FMAG) disasters. The goal of VAYGo is to improve internal control processes by consistently assessing payment error rates to identify potential payment integrity issues. FEMA's "Validate as You Go (VAYGo) Guide"[482] provides guidance on the implementation and delivery of the FEMA VAYGo grant payment review process.

[476] The FEMA Fraud and Investigation Division can be reached at: FEMA-OCSO-Tipline@fema.dhs.gov or 1-866-223-0814.
[477] The DHS OIG Hotline can be reached at: DHS OIG Hotline Complaint Form or 1-800-323-8603.
[478] FEMA Suspension and Debarment can be reached at: femas&d@fema.dhs.gov.
[479] The U.S. Department Justice National Center for Disaster Fraud can be reached at: National Center for Disaster Fraud or 1-866-223-0814.
[480] Information on filing a complaint with the Office of Civil Rights can be found at: Filing a Complaint | fema.gov.
[481] For more information, refer to: Payment Integrity Information Act of 2019 | congress.gov.
[482] For more information, refer to: Validate As You Go Guide | fema.gov.

Chapter 12: Final Reconciliation and Closeout

I. Project Reconciliation and Closeout

FEMA requires timely and complete project-level information from a recipient as work is completed to facilitate efficient and effective closeout of the recipient's prime award. This section defines requirements for project-level closeout. To initiate project-level closeout, subrecipients must inform the recipient that their project is complete and the date the work was completed. The "Public Assistance Program Delivery Guide"[483] provides an overview of these process steps.

A. Small Projects

Under simplified procedures,[484] FEMA bases awards for small projects on cost estimates rather than final accounting. This approach streamlines project closeout and expedites FEMA's processing of PA grant funding by reducing the administrative burden typically associated with large projects. Simplified procedures save both time and resources on small projects, while still providing financial oversight for the bulk of PA funding. Recipients without statutory audit requirements also benefit from these efficiencies in managing PA grants.

For small projects, FEMA obligates funds based on available information when the project is documented, whether based on estimated, actual costs, or a combination. To close these projects, recipients must submit a small project completion certification, confirming that:

- The subrecipient completed the approved scopes of work (SOW) for all small projects in compliance with the FEMA-state/territory/tribe agreement, and
- The recipient has issued all payments according to this agreement.

Once a small project is obligated, FEMA does not adjust the funding amount unless specific conditions are met, such as:

- The subrecipient did not complete the approved scope of work;
- FEMA approves a change in SOW, including additional hazard mitigation;
- The subrecipient received funding not previously deducted to prevent a duplication of benefits (e.g., when actual insurance proceeds exceed the estimated amount deducted);
- When actual insurance proceeds are less than the estimated amount deducted;
- Errors or omissions;
- Hidden damage;
- Non-compliance with applicable laws, regulations, and executive orders; or

[483] For more information, refer to: *Public Assistance Program Delivery Guide*.
[484] Congress enacted Section 422 of the Stafford Act to enhance the administrative efficiency of the PA Program. This section authorizes simplified procedures for projects that fall under the large project threshold. For more information, refer to Simplified Procedures in Chapter 2.

- Fraud, waste, or abuse.

In these cases, FEMA only adjusts the specific cost items affected.

1. NET SMALL PROJECT OVERRUN APPEAL REQUEST

Subrecipients can request additional funding if the combined actual cost of all their small projects exceeds the total amount obligated for all their small projects. FEMA refers to this as a net small project overrun (NSPO) appeal request. Subrecipients must submit a request through the appeal process, described under Appeal Rights and Requirements in Chapter 2, within 60 days of the latest work completion date of all its small projects.[485] If all of a subrecipient's small projects have not been obligated at that time, then the subrecipient has 60 days from the date FEMA obligated its last small project to submit an appeal. The appeal must include actual cost documentation for all approved small projects.[486] For more information regarding the NSPO appeal, see Appeal Rights and Requirements in Chapter 2.

2. SMALL PROJECT CLOSEOUT

If a subrecipient is not requesting an NSPO, the subrecipient must submit a certification of completion for all small projects to the recipient within 90 days of the last small project completion date, or the last approved completion deadline for all of its small projects, whichever is sooner. If work on the last small project was completed prior to obligation, the 90-day timeline begins on the date of obligation.

A recipient must submit certification of completion of its own small projects within 90 days of the latest small project work completion date, or the approved deadline of its last small project, whichever is sooner. If work on the last small project was completed prior to obligation, the 90-day deadline begins on the date of obligation.

B. Large Projects

With exception of capped projects, the final eligible amount for a large project is the actual documented cost incurred to complete the approved scope of work.[487] Subrecipients must provide documentation to support the actual costs within 90 days of work completion.[488] If work on the project was completed prior to obligation, the 90-day timeline begins on the date of obligation. Recipients must submit a large project expenditure report and completion certification and must certify that:[489]

- All incurred costs are associated with the approved scope of work;
- The subrecipient completed all work in compliance with the FEMA-state/territory/tribe agreement and any relevant policies or regulations; and,
- It made all payments in accordance with 2 C.F.R. § 200.305.

A recipient must submit its certification of a subrecipient's completion of each large project with the final claim for PA funding for the project and supporting documentation to FEMA within 180 days of the work

[485] 44 C.F.R. § 206.204(e)(2).
[486] 44 C.F.R. § 206.204(e).
[487] 44 C.F.R. § 206.205(b).
[488] 44 C.F.R. § 206.205(b)(1).
[489] 44 C.F.R. § 206.205(b)(1).

completion date or the project completion deadline, whichever occurs first. If work on the project was completed prior to obligation, the 180-day deadline begins on the date of obligation. The recipient must submit its certification for each of its own large projects within 180 days of the work completion date or the project completion deadline, whichever occurs first. If work on a large project is complete prior to obligation, a recipient's certification and final payment of claim is due within 180-days from the date of obligation.

At a minimum, large project closeout packages must include all applicable documentation to support the work and costs including:

Table 34. Required Documentation and Information to Support a Large Project Closeout Request

Required Documentation and Information to Support a Large Project Closeout Request

▪ Final inspection report;
▪ Summary of scope of work performed;
▪ Summary of expenditures;
▪ Project-related documents to support claimed costs (invoices, timesheets, work orders, trip tickets, etc.), if not previously provided, including:
  ○ Force account labor;
  ○ Force account equipment;
  ○ Materials and supplies; and,
  ○ Contracted work.
▪ Procurement documentation, if applicable (e.g., advertisements, bid tabulations, evaluation);
▪ Mutual aid agreements;
▪ Insurance documentation (final statement of loss);
▪ Project-related correspondence with regulatory agencies;
▪ Change orders;
▪ Personnel pay policies;
▪ All codes and standards incorporated into the scope of work;
▪ Documentation to substantiate compliance with all terms and conditions of the award (e.g., Environmental and Historic Preservation (EHP) compliance documentation, impartial delivery to vulnerable communities' requirements, and any funding that may duplicate benefits); and,
▪ Photos of completed project, required for categories C-G.

Prior to closing large projects, FEMA:

- Verifies there are no outstanding appeals, audits, or arbitration cases;
- Reviews invoices and other documentation related to the work performed to validate it was consistent with the approved SOW, including completion of any approved PA hazard mitigation (not required at closeout if project was obligated at 100 percent complete based on actual costs);
- Determines whether the subrecipient completed the work within the approved deadline (FEMA limits reimbursement to costs incurred within the deadline);
- Ensures no duplication of funding exists (e.g., with insurance or costs in any other related projects);

- Validates compliance with cost principles, including, but not limited to:
  - Equipment and property disposition;
  - Procurement and contracting (not required at closeout if project was obligated at 100 percent complete based on actual costs); and,
  - Reasonableness of costs.
- Validates compliance with all terms and conditions of the award, including, but not limited to:
  - Code and standard requirements;
  - EHP requirements;
  - Civil rights requirements; and,
  - Insurance obtain and maintain requirements.

If the work is 100 percent complete at the time the project is obligated, the following compliance reviews do not need to be repeated during closeout:

- Determining whether the subrecipient completed the work within the approved deadline;
- Procurement and contracting;
- Reasonableness of costs;
- Code and standard requirements; and,
- EHP requirements.

If FEMA obligated the project at 100 percent complete based on actual costs, the reviews were completed prior to obligation and therefore the reviews do not need to be repeated at closeout. If the project was not 100 percent complete at obligation, FEMA reviews and verifies the accuracy of the actual costs and evaluates and reconciles any cost overruns or underruns. FEMA uses the Public Assistance Sampling Procedure to review documentation supporting claims at closeout. For projects with funding changes, FEMA prepares a project amendment and obligates additional funds or reduces funding based on actual costs to complete the eligible SOW.[490]

FEMA does not re-evaluate the cost-effectiveness of PA mitigation based on the final actual costs of the project and approved PA mitigation measures. If the subrecipient did not complete any of the mitigation SOW, FEMA designates the project as an improved project, reviews the project for compliance, and depending on the evaluation result, either deobligates or caps funding for only the repair/restoration SOW.[491]

For capped projects, subrecipients must provide documentation to support that they used the funds in accordance with the eligibility criteria described under Flexible Restoration (Capped Projects) in Chapter 8.

[490] 44 C.F.R. § 206.205(b)(2).
[491] 44 C.F.R. § 206.203(d)(1).

If a subrecipient did not comply with any of the conditions of the grant, FEMA may deobligate either all or a portion of the funding. Once FEMA completes its review and funding adjustments, FEMA closes the project and notifies the recipient in writing.

C. Subrecipients

Recipients request that FEMA close each subrecipient once all of its respective projects have been completed and closed for the disaster. Recipients may either request this in the same submittal as a subrecipient's last project closeout request or may submit a separate request. The request should include a project completion certification report listing all of the subrecipient's projects.

If all of a subrecipient's projects are closed and there are no outstanding audits, FEMA closes the subrecipient and notifies the recipient in writing.

II. Stafford Act Section 705

Stafford Act Section 705 imposes a 3-year limit on FEMA's authority to recover payments made to state, local, Tribal Nation, and territorial (SLTT) government recipients and subrecipients unless there is evidence of fraud.[492] FEMA must provide notice of intent to recover payments within 3 years from the date that the recipient submitted the certification of project completion to FEMA. Section 705 does not apply to private nonprofits (PNPs). Section 705 also prohibits FEMA from recovering payments for a project within the 3-year statute of limitations if the recipient or subrecipient meet certain criteria.[493] To ensure consistent application of the provisions contained in Section 705, FEMA issued the *Stafford Act Section 705, Disaster Grant Closeout Procedures* policy,[494] which describes the limitations and requirements in detail.

III. Public Assistance Award Closeout

A recipient must submit its final *Federal Financial Report* (SF-425) with a written request to close the PA award. FEMA and the recipient certify that all work was completed, all eligible costs have been reimbursed and financially reconciled. The PA award is programmatically closed when FEMA ensures that all PA projects awarded for the incident met statutory and regulatory requirements. For FEMA to close the PA award, the following conditions must be met:

- FEMA has issued final determinations on all appeals;
- FEMA has obligated all eligible PA funding;
- All recipient and subrecipient projects are closed;
- The recipient has passed through all obligated funds appropriately and submitted its final expenditure report to FEMA;
- FEMA has adjusted the funding level for the program, as appropriate; and,
- Both FEMA and the recipient have completed all administrative actions related to the PA Program.

[492] Stafford Act § 705(a)(1)(2); 42 U.S.C. § 5205.
[493] Stafford Act § 705(c)(1)(2)(3); 42 U.S.C. § 5205.
[494] For more information, refer to: Stafford Act Section 705, Disaster Grant Closeout Procedures (FP 205-081-2 Version 2) | fema.gov.

Recipients must liquidate all obligations within 120 days of the end of the prime award period of performance. FEMA extends the deadline if the recipient submits a written time extension and provides a reasonable justification for the delay.[495]

Terminology

Final expenditure report - The report a recipient submits to FEMA for all of a subrecipient's projects, certifying that the grant terms and conditions have been met and project costs are reconciled.

IV. Documentation Retention Requirements

Subrecipients must maintain all source documentation for each project[496] for 3 years after the date of transmission of the final expenditure report for project completion as certified by the recipient.[497] A recipient must keep all financial and program documentation for 3 years after the date it submits the final SF-425. There are several exceptions to this timeframe that may require longer retention periods, including exceptions relating to real property and equipment disposition, audits, and litigation.[498] Additionally, SLTT government laws may require longer retention periods.

[495] 44 C.F.R. § 200.344(c).
[496] 2 C.F.R. § 200.302.
[497] For more information, refer to: *Public Assistance Policy on Stafford Act Section 705, Disaster Grant Closeout Procedures | fema.gov*.
[498] 2 C.F.R. § 200.334.

Appendix A. References and Resources

I. Public Assistance Program References

- Assistance for Governments and Private Non-Profits After a Disaster
- Archived Policy Documents
- Archived Publications
- *Building Community Resilience with Nature-Based Solutions*
- *Cost Estimating Format (CEF) for Large Projects Standard Operating Procedure* (FEMA SOP 9570.8)
- *Preliminary Damage Assessment Guide*
- *Debris Estimating Field Guide* (FEMA 329)
- *Direct Reimbursement for Host-State Evacuation and Sheltering Costs* (FEMA SOP 9570.1)
- *Environmental and Historic Preservation Directive* (FEMA Directive 108-1)
- *Environmental and Historic Preservation Instruction* (FEMA Instruction 108-1-1)
- *Environmental and Historic Preservation (EHP) Fact Sheet for Debris Removal Activities*
- Equipment Rates
- Federal Flood Risk Management Standard
- *Infectious Disease Event Fact Sheet* (FP 104-009-001)
- *FEMA Recovery Policy, Public Assistance Management Costs (Interim)* (FP 104-11-2)
- *Field Manual (Procurement Information for FEMA Public Assistance Award Recipients and Subrecipients)*
- *Mission Assignments for ESF #10* (FEMA 9523.8)
- Small Business Administration Loans
- *Recipient-Led Public Assistance Guide*
- *Strategic Funds Management* (FEMA SOP 9570.24)
- *Public Assistance Building Back Better Fact Sheet*
- *Public Assistance Management Costs Interim Policy Fact Sheet*
- *Public Assistance Management Costs Standard Operating Procedures*
- *Public Assistance Policy on Insurance* (FP 206-086-1)
- *Public Assistance Policy, Stafford Act Section 705, Disaster Grant Closeout Procedures* (FP 205-081-2)
- *Public Assistance Recovery of Improper Payments Standard Operating Procedures* (FEMA SOP 9570.16)
- *Recommended Post Earthquake Evaluation and Repair Criteria for Welded Steel Moment Frame Buildings* (FEMA 352)
- *Safe Rooms for Tornadoes and Hurricanes, Guidance for Community and Residential Safe Rooms* (FEMA P-361)

II. Public Assistance Forms and Templates

- Public Assistance FEMA Forms (FF)
- *Application for Federal Assistance and Assurances* (SF-424)
- *Federal Financial Report* (SF-425)

III. Statutes

- The Robert T. Stafford Disaster Relief and Emergency Assistance Act, as Amended (Stafford Act)
- Americans with Disabilities Act (ADA)

IV. Code of Federal Regulations

- 2 C.F.R. Part 200, Uniform Administrative Requirements, Cost Principles, and Audit
- 7 C.F.R. § 1730.25, Corrective action (Rural Utilities Service [RUS] borrowers only)
- 15 C.F.R. Part 774, The Commerce Control List
- 22 C.F.R. Part 121, The United States Munitions List
- 40 C.F.R. Part 261, Identification and Listing of Hazardous Waste
- 40 C.F.R. Parts 1500–1508, NEPA Regulations
- 44 C.F.R. Emergency Management and Assistance
- 44 C.F.R. Part 9, Floodplain Management and Protection of Wetlands
- 44 C.F.R. Part 201, Mitigation Planning
- 44 C.F.R. Part 204, Fire Management Assistance Grant (FMAG) Program
- 44 C.F.R. Part 206, Federal Disaster Assistance
- 48 C.F.R. Subpart 2.1, Federal Acquisition Regulation

V. Environmental Protection Laws

- Clean Air Act (CAA)
- Clean Water Act (CWA)
- Coastal Barrier Resources Act (CBRA)
- John H. Chafee Coastal Barrier Resources System (CBRS)
- Coastal Zone Management Act (CZMA)
- Comprehensive Environmental Response Compensation and Liability Act (CERCLA)
- Endangered Species Act (ESA)
- Farmland Protection Policy Act (FPPA)
- Fish and Wildlife Coordination Act
- Magnuson-Stevens Fishery Conservation and Management Act

- Migratory Bird Treaty Act
- National Environmental Policy Act (NEPA)
- Resource Conservation and Recovery Act (RCRA)
- Wild and Scenic Rivers Act

VI. Executive Orders

- EO 11988, Floodplain Management
- EO 11990, Protection of Wetlands
- EO 12898, Environmental Justice
- EO 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input
- EO 13717, Establishing a Federal Earthquake Risk Management Standard
- EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- EO 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis
- EO 14008, Tackling the Climate Crisis at Home and Abroad
- EO 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All

VII. Historic Preservation Laws and Tools

- Advisory Council on Historic Preservation
- American Institute for Conservation Code of Ethics and Guidelines for Practice
- Heritage Emergency National Task Force (HENTF)
- National Historic Preservation Act (NHPA)
- National Register of Historic Places

VIII. Federal Emergency Management Agency References

- FEMA
- *FEMA Stafford Act Declaration Process Fact Sheet*
- Fire Management Assistance Grants (FMAG) Program
- *FMAG Program Guide* (FEMA P-954)
- Federal Insurance and Mitigation Administration (FIMA)
  - National Flood Insurance Program (NFIP)
  - Hazard Mitigation Assistance (HMA) Programs
  - HMA Guidance
  - Hazard Mitigation Grant Program (HMGP)

IX. Other Federal Agencies

Appendix B. Acronyms

ABA	Architectural Barriers Act
ACSR	Aluminum Conductor Steel Reinforced
ADA	Americans with Disabilities Act
ARC	American Red Cross
BCA	Benefit-Cost Analysis
BFE	Base Flood Elevation
BIA	Bureau of Indian Affairs
CAA	Clean Air Act
CATEX	Categorical Exclusion
CBCA	Civilian Board of Contract Appeals
CBRA	Coastal Barrier Resources Act
CBRS	Coastal Barrier Resource System
CDBG	Community Development Block Grant
CDC	Centers for Disease Control and Prevention
CEF	Cost Estimating Format
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
C.F.R.	Code of Federal Regulations
CISA	Climate-Informed Science Approach
CMS	Consumable Medical Supplies
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
DDD	Damage Description and Dimensions
DFA	Direct Federal Assistance
DM	Determination Memorandum
DME	Durable Medical Equipment
DOE	Department of Energy
DOJ	Department of Justice
DRRA	Disaster Recovery Reform Act
DSA	Data Sharing Addendum
EHP	Environmental and Historic Preservation
EIS	Environmental Impact Statement
EMAC	Emergency Management Assistance Compact

EO	Executive Order
EOC	Emergency Operations Center
EPA	U.S. Environmental Protection Agency
ER	Emergency Relief (Program)
ERFO	Emergency Relief for Federally Owned Roads (Program)
ESA	Endangered Species Act
ESF	Emergency Support Function
EWP	Emergency Watershed Protection Program
FCO	Federal Coordinating Officer
FEMA	Federal Emergency Management Agency
FFATA	Federal Funding Accountability and Transparency Act
FFRMS	Federal Flood Risk Management Standard
FHSZ	Fire Hazard Severity Zone
FHWA	Federal Highway Administration
FIRM	Flood Insurance Rate Map
FMAG	Fire Management Assistance Grant
FSA	FEMA-State Agreement
FTA	FEMA-Tribal Nation Agreement
GAO	Government Accountability Office
GAR	Governor Authorized Representative
GPS	Global Positioning System
HEPA	High-Efficiency Particulate Air
HENTF	Heritage Emergency National Task Force
HHS	U.S. Department of Health and Human Services
HMA	Hazard Mitigation Assistance
HMGP	Hazard Mitigation Grant Program
HMP	Hazard Mitigation Proposal
HOW	Houses of Worship
HUD	U.S. Department of Housing and Urban Development
HVAC	Heating, Ventilation, and Air Conditioning
ISAA	Information Sharing Access Agreement
IA	Individual Assistance
IEBC	International Existing Building Code
IHP	Individuals and Households Program
LOC	Letter of Commitment

NCEI	National Centers for Environmental Information
NCR	Natural & Cultural Resources
NCS	Non-Congregate Sheltering
NDRF	National Disaster Recovery Framework
NEPA	National Environmental Policy Act
NFIP	National Flood Insurance Program
NGO	Non-governmental Organization
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NRCS	Natural Resources Conservation Service
NRF	National Response Framework
NWS	National Weather Service
NWP	Nationwide Permits
OCR	Office of Civil Rights
OFA	Other Federal Agencies
OIG	U.S. Department of Homeland Security Office of Inspector General
O&M	Obtain and Maintain
PA	Public Assistance
PAPPG	Public Assistance Program and Policy Guide
PDA	Preliminary Damage Assessment
PDG	Program Delivery Guide
PHA	Public Housing Agency
PNP	Private Nonprofit
PDMG	Program Delivery Manager
PII	Personally Identifiable Information
PL	Public Law
POP	Period of Performance
PPDR	Private Property Debris Removal
PPE	Personal Protective Equipment
RA	Regional Administrator
REC	Record of Environmental Consideration
RCRA	Resource Conservation and Recovery Act
RHA	Rivers and Harbors Act
RIP	Rehabilitation and Inspection Program

RFI	Request for Information
RFP	Request for Proposal
ROW	Right-of-Way
RPA	Request for Public Assistance
RSF	Recovery Support Function
RUS	Rural Utilities Service
RV	Recreational Vehicle
SBA	U.S. Small Business Administration
SCRI	Smithsonian Cultural Rescue Initiative
SF	Standard Form
SFHA	Special Flood Hazard Area
SHPO	State Historic Preservation Officer
SLTT	State, Local, Tribal Nation, and Territorial
SOP	Standard Operating Procedure
SOW	Scope of Work
STATEX	Statutory Exclusion
SSD	Substantial Structural Damage
SWL	Stillwater Level
STT	State, Tribal Nation, and Territory
T&E	Time-and-Equipment
T&M	Time-and-Materials
TAR	Tribal Authorized Representative
THPO	Tribal Historic Preservation Officer
TRAQ	Tree Risk Assessment Qualification
TSA	Transitional Sheltering Assistance
TWL	Total Water Level
UFR	Unified Federal Review
USACE	U.S. Army Corps of Engineers
U.S.C.	United States Code
USCG	U.S. Coast Guard
USDA	U.S. Department of Agriculture
USFWS	U.S. Fish and Wildlife Service
VAYGo	Validate as You Go
WFPO	Watershed and Flood Prevention Operations
WOTUS	Waters of the United States

WUI	Wildland-Urban Interface

Appendix C. Terms and Definitions

Alternate project - A project where an applicant determines that the public welfare is not best served by restoring the function of the damaged facility and request FEMA's approval to apply PA funding toward a different facility (or facilities).

Animal - Any living or dead member of the animal kingdom, including any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate or any part thereof.

Applicant - A non-federal entity submitting an application for assistance under a recipient's federal award.

Assistance animal - An animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates identified symptoms or effects of a person's disability. Although dogs are the most common type of assistance animal, other animals can also be assistance animals.

Award (federal) - The financial assistance that a non-federal entity receives either directly from a federal awarding agency or indirectly from a pass-through entity; or the cost-reimbursement contract under the Federal Acquisition Regulation that a non-federal entity receives directly from a federal awarding agency or indirectly from a pass-through entity.

Budgeted (labor) - Employee labor costs an applicant budgets for and incurs regardless of a disaster occurring.

Coastal zone - The coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of coastal states, including islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. This includes areas in Great Lakes waters per 16 U.S.C. § 1453.

Commercial property - Any property, structure, or portion of a structure, used for the purpose of conducting commerce or as a rental unit (e.g., industrial parks, golf courses, cemeteries, apartments, condominiums, or trailer parks).

Consensus-based codes, specifications, and standards – National or international voluntary codes, specifications and standards that incorporate the latest hazard-resistant designs.

Conservation - The preservation of a collection or object for the future. Conservation activities include examination, documentation, treatment, and preventive care, supported by research (e.g., scholarly and technological, x-rays, paint sampling) and education.

Critical action - An action for which even a slight chance of flooding is too great. The minimum floodplain of concern for critical actions is the 0.2 percent annual chance floodplain (also referred to as the critical action floodplain).

Current fair market value - The value of equipment and supplies determined by selling them in a competitive market or by researching advertised prices for similar items on the used market.

Duplication of benefits - Funding received from two sources for the same item of work.

Durable medical equipment - Reusable medical equipment including, but not limited to: oxygen equipment, wheelchairs, walkers, hospital beds, and crutches.

Educational institution - Any elementary school as defined by section 801(c) of the Elementary and Secondary Education Act of 1965; any secondary school as defined by section 801(h) of the Elementary and Secondary Education Act of 1965; or any institution of higher education as defined by section 1201 of the Higher Education Act of 1965.

Emergency - Any occasion or instance for which the president determines federal assistance is needed to supplement SLTT efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

Emergency protective measure - An action taken by a community before, during, and after an incident to save lives, protect public health and safety, and prevent damage to improved public and private property.

Emergency work - Work that must be done immediately to save lives, protect improved property, protect public health and safety, or avert or lessen the threat of a major disaster.

Equipment - Tangible personal property, including information technology systems, having a useful life of more than 1 year and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization level established by the non-federal entity for financial statement purposes, or $10,000.

Exigency - The existence of a need to avoid, prevent or alleviate serious harm or injury, financial or otherwise, to an applicant.

Facility - Any publicly or privately-owned building, works, system or equipment—built or manufactured—or an improved and maintained natural feature. Land used for agricultural purposes is not a facility.

Federal agency - Any department, independent establishment, government corporation, or other agency of the executive branch of the federal government, including the United States Postal Service, but not including the American National Red Cross.

Federal share - The portion of the total project costs that are paid by federal funds.

Flood control work - A structure such as a levee, flood wall, flood control channel, or water control structure that was designed and constructed to have appreciable effects in preventing damage by irregular and unusual rises in water level.

Flood fighting - An activity or measure (e.g., sandbagging, buttressing) intended to prevent or stop flooding, at levels above flood stage, or to prevent structural failure.

Force account - An applicant's own labor forces and equipment.

Hazard - An emergency or disaster resulting from a natural disaster or an accidental or man-caused event.

Hazard mitigation - Any cost-effective measure that will reduce the potential for damage to a facility from a disaster event.

Hazard-resistant – Designs which take into account the probability of occurrence of hazards, within a reasonable recurrence interval, to decrease vulnerabilities.

Immediate threat - The threat of additional damage or destruction from an event that can reasonably be expected to occur within 5 years.

Improved project - A project that restores the pre-disaster function of a facility and incorporates improvements or changes to the pre-disaster design.

Improved property - A structure, facility, or item of equipment that was built, constructed, or manufactured. Land used for agricultural purposes is not improved property.

Incident - Any condition which meets the definition of major disaster or emergency which causes damage or hardship that may result in a presidential declaration of a major disaster or an emergency.

Incident period - The time span during which the disaster-causing incident occurs.

Integral ground - The ground necessary to physically support a facility. Integral ground may be natural or improved ground upon which an eligible facility is located and that is essential to support the structural integrity and utility of the facility.

Large project - A project for which the final obligated (federal and non-federal) amount is equal to or *greater* than the annually adjusted cost threshold for small project grants.

Local government - A county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments(regardless of whether the council of governments is incorporated as a nonprofit corporation under state law), regional or interstate government entity, or agency or instrumentality of a local government; an Indian tribe or authorized tribal organization, or Alaska Native village or organization that does not meet the definition of Indian Tribal Nation; or a rural community, unincorporated town or village, or other public entity, for which an application for assistance is made by a state or political subdivision of a state.

Major disaster - Any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, for which the president determines causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as Amended to supplement the efforts

and available resources of SLTT governments and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

Management cost - Any indirect cost, any direct administrative cost, and any other administrative expense associated with a specific project under a major disaster or emergency.

Museum - A facility that preserves and exhibits a documented collection of artistic, historic, scientific, or other objects.

Mutual aid agreement - A written or oral agreement between and among agencies/organizations and/or jurisdictions that provides a mechanism to quickly obtain assistance in the form of personnel, equipment, materials, and other associated services. The primary objective is to facilitate the rapid, short-term deployment of support prior to, during, and/or after an incident.

Natural disaster - Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, or other catastrophe in any part of the United States which causes, or which may cause, substantial damage or injury to civilian property or persons.

Natural features - Characteristics of a particular environment (e.g., barrier islands, sand dunes, wetlands) that are created by physical, geological, biological, and chemical processes and exist in dynamic equilibrium. Natural features are self-sustaining parts of the landscape that require little or no maintenance to continue providing their ecosystem services (functions) (44 CFR § 9.4).

Nature-based solutions – Nature-based solutions are sustainable planning, design, environmental management, and engineering practices that simultaneously provide benefits for people and the environment to build resilient communities and mitigate the impact of natural hazards. FEMA uses the term "nature-based solutions" to refer to an umbrella of strategies, including nature or nature-based features. Other agencies may also use the term "engineering with nature" or "nature-based approaches".

Non-commercial property - A property, structure, or portion of a structure, used by the property owner as their primary residence, such as a house or condominium unit in which the owner resides.

Non-federal entity - An institution of higher education, nonprofit organization, local government, Indian tribe, or state that carries out a federal award as a recipient or subrecipient.

Orphan road – A road that an applicant or public entity does not have the legal responsibility to maintain.

Overtime (labor) - Time worked beyond an employee's scheduled working hours, as set by an applicant's pre-disaster written labor or pay policy.

Period of performance - The time during which the non-federal entity may incur new obligations to carry out the work authorized under the federal award.

Permanent work - Restorative work that must be performed through repairs or replacement to restore an eligible facility on the basis of its pre-disaster design and current applicable codes and standards.

Pet (household) - A domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes, can travel in a commercial carrier, and can be housed in a temporary facility. Examples are dogs, cats, birds, rabbits, rodents, and turtles. Household pets do not include reptiles (except turtles), amphibians, fish, insects, arachnids, farm animals (including horses), or animals kept for racing purposes.

Pre-disaster - In effect prior to the incident start date identified in the approved presidential disaster declaration.

Pre-disaster design - The size or capacity of a facility as originally designed and constructed or subsequently modified by changes or additions to the original design. It does not mean the capacity at which the facility was being used at the time the major disaster occurred if different from the most recent designed capacity.

Pre-disaster function - The function the facility was performing immediately prior to the disaster.

Private nonprofit organization (PNP) - Any nongovernmental agency or entity that currently has an effective ruling letter from the U.S. Internal Revenue Service, granting tax exemption under Sections 501(c), (d), or (e) of the Internal Revenue Code, or satisfactory evidence from the State that the nonrevenue producing organization or entity is a nonprofit one organized or doing business under State law.

Private roads - Roads that are not owned or operated by or otherwise the legal responsibility of a federal or SLTT entity (including orphan roads, roads in gated communities, homeowners' association roads, etc.).

PNP custodial care facility - A building, structure, or system, including those for essential administration and support, that is used to provide institutional care for persons who require close supervision and some physical constraints on their daily activities for their self-protection, but do not require day-to-day medical care.

PNP educational facility - Classrooms plus related supplies, equipment, machinery, and utilities of an educational institution necessary or appropriate for instructional, administrative, and support purposes.

PNP emergency facility - A building, structure, equipment, or system used to provide emergency services, such as fire protection, ambulance, or rescue, to the general public, including the administrative and support facilities essential to the operation of such emergency facilities, even if not contiguous.

PNP medical facility - A hospital, outpatient facility, rehabilitation facility, or facility for long-term care as such terms are defined in Section 645 of the Public Health Service Act (42 U.S.C. § 291o) and any similar facility offering diagnosis or treatment of mental or physical injury or disease, including the administrative and support facilities essential to the operation of such medical facilities even if not contiguous.

Project - A logical grouping of work required as a result of the declared major disaster or emergency.

Public facility - Any of the following facilities owned by an SLTT government: any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility; any non-federal aid, street, road, or highway; and any other public building, structure, or system, including those used for educational, recreational, or cultural purposes; or any park.

Real property - Land, including land improvements, structures, and appurtenances thereto, but excludes moveable machinery and equipment.

Recipient - A non-federal entity that receives a federal award directly from a federal awarding agency to carry out an activity under a federal program.

Reasonable cost - A cost is 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. In other words, a reasonable cost is a cost that is both fair and equitable for the type of work being performed.

Rehabilitation facility - A facility that primarily provides diagnosis and treatment for rehabilitation of injuries, disabilities, or illness. (Consistent with the definition of "comprehensive outpatient rehabilitation facility" in 42 U.S.C. § 1395x(cc)(2)).

Regulatory floodway - The area regulated by federal, state or local requirements to provide for the discharge of the base flood so the cumulative increase rise in water surface elevation is no more than a designated amount (not to exceed one foot as set by the National Flood Insurance Program) above the base flood elevation.

Request for public assistance - The form a public entity or PNP organization uses to apply for assistance under the Public Assistance Program.

Retreat - Establishments that promote health and wellbeing by providing services for the preservation and maintenance of physical, mental, and emotional health.

Resilience - The ability to prepare for threats and hazards, adapt to changing conditions and withstand and recover rapidly from disruptions.

Scope of work - A description of the eligible work necessary to be done immediately to address an immediate threat or to restore a facility to its pre-disaster design, function, and capacity and to current applicable standards, documented in the project and reflecting the damage description and dimensions. A scope of work may also be documented for an alternate or improved project or with a PA Hazard Mitigation Proposal.

Service animal - A dog that is individually trained to do work or perform tasks for people with disabilities or access and functional needs. The task(s) performed by the dog must be directly related to the person's disability.

Site - An individual building, structure, or system section. Examples include: an individual building or structure inclusive of its contents and supplies; a beach or park inclusive of equipment and other items within the area that are not structures or buildings, such as benches or playground equipment; a lift or pump station; a dam; and a section of roadway that has damage within a reasonable distance throughout that section.

Small project - A project for which the final obligated (federal and non-federal) amount is less than the annually adjusted cost threshold for small project grants.

Soft costs - Costs that are not considered as direct construction costs, including: architectural costs, engineering costs, project management costs, financing, and legal fees.

Special flood hazard area - The land area subject to inundation during a flood having a 1 percent chance of being equaled or exceeded in a given year (also referred to as the base flood or 100-year flood). Special flood hazard areas are shown on FIRMs published by FEMA.

State - Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Straight-time (labor) - An employee's regular pay rate when working normal hours.

Subaward - An award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a federal program.

Subrecipient - A non-federal entity that receives a subaward from a pass-through entity to carry out part of a federal program. It does not include an individual that is a beneficiary of such program. A subrecipient may also be a recipient of other federal awards directly from a federal awarding agency.

Substantial damage - Damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

Supply - Any tangible personal property other than that meeting the definition of equipment.

Temporary (labor) - A full-time or part-time employee working on a permanent and ongoing basis, as set by an applicant's written labor or pay policy.

Tribal Nation - Any federally recognized governing body of an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Tribe List Act of 1994, Title 25 of the U.S. Code (U.S.C.) 479a. This does not include Alaska Native corporations, the ownership of which is vested in private individuals.

Trust land - Land, the title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

“Trust or restricted interest in land” or “trust or restricted interest in a parcel of land” means an interest in trust land. Collectively referred to as “trust lands.”

Unbudgeted (labor) – The employee labor costs an applicant does not budget for and incurs only as the direct result of a disaster.

Underserved communities - Populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life.

Wetland - An area that is saturated by water with a frequency sufficient to support or, under normal hydrologic conditions would support, a prevalence of vegetation or aquatic life typically adapted to saturated or seasonally saturated soil conditions (e.g., swamp, fresh and saltwater marsh, bog, fen).

Work completion date - The date the applicant completes all work associated with the approved SOW including meeting all compliance requirements. It does not include invoice payments, warranty periods, or grant management activities (e.g., compiling and submitting documentation, financial reconciliation, requesting payment).

Zoo - Any facility maintained under the care of a Doctor of Veterinary Medicine, in which live animal(s) are kept for public exhibition or education. Aquariums and wildlife or zoological parks may meet this definition.

Appendix D: Environmental and Historic Preservation Compliance

The following laws and Executive Orders (EOs) are commonly encountered federal requirements that were established to help protect the environment and preserve the Nation's historic and archaeological resources. FEMA reviews each PA project to ensure the work complies with applicable federal environmental and historic preservation (EHP) laws, their implementing regulations, and applicable EOs. Compliance with all federal and state, local, Tribal Nation, and territorial (SLTT) laws is a requirement of every FEMA award. SLTT laws, such as hazardous material management laws, vary by location and are not included in this appendix.

FEMA prepares a greensheet at the beginning of each emergency or disaster declaration with specific information relevant to each state and area. These greensheets are FEMA's disaster-specific guidance for applicants about key aspects of EHP reviews. Greensheets briefly discuss the relevant laws and project types that might trigger application of those laws and informs applicants of federal and SLTT laws that must be followed.

I. National Environmental Policy Act

Section 102 of the National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision-making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions.[499] The White House Council on Environmental Quality publishes its NEPA regulations in Title 40 of the Code of Federal Regulations (C.F.R.) Parts 1500–1508. The U.S. Department of Homeland Security publishes policies and procedures for implementing NEPA and provides specific processes that FEMA must follow before funding a project. The NEPA process ensures consideration of environmental consequences of the project before decisions are made and involves the public.

II. National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA)[500] requires FEMA to consider the effects an undertaking will have on historic properties and provide the Advisory Council on Historic Preservation the opportunity to comment on the effects of the undertaking.[501] Historic properties include buildings, structures, sites, including archaeological resources, objects, and districts included in, or eligible for inclusion in, the National Register of Historic Places.[502] FEMA fulfills its Section 106 responsibilities through consultation with outreach to the State Historic Preservation Office (SHPO), Tribal Historic Preservation

[499] 42 United States Code (U.S.C.) § 4332.
[500] For more information, refer to: National Historic Preservation Act
[501] 16 U.S.C. § 470f.
[502] For more information, refer to: National Register of Historic Places (U.S. National Park Service).

Office (THPO), and other consulting parties, including the subrecipient and recipient, and in many cases FEMA is able to streamline and accelerate the compliance process through utilizing programmatic agreements executed with the SHPO/THPO and the recipient. When FEMA funded undertakings result in adverse effects to historic properties, Section 106 of NHPA requires FEMA to consult with the SHPO/THPO and other consulting parties to resolve the adverse effects through avoidance, minimization, or compensation measures.

III. Endangered Species Act

The Endangered Species Act (ESA) requires federal agencies to use their authorities to conserve federally listed threatened and endangered species (listed species) and critical habitats. FEMA must also consult with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS), also known as NOAA Fisheries, to ensure that proposed projects will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat for listed species.[503]

IV. Clean Water Act

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants in the waters of the United States (e.g., rivers and streams, lakes and ponds, coastlines, wetlands, estuaries) and sets quality standards for surface waters. The CWA makes it unlawful to discharge any pollutant from a specific source into navigable waters without the appropriate CWA permits from the U.S. Army Corps of Engineers (USACE) or state regulatory agency.[504] In addition, the CWA requires authorization for dredging or filling in waters (including disposal of dredged material). Applicants must ensure applicable permits are acquired prior to beginning work. Documentation of this must be provided to FEMA and may include statements of compliance with nationwide permits (NWPs) or Individual Section 404 permits. Common work activities that may require permits under the Clean Water Act include those that involve the repair of bridges, stream crossings, docks, piers, and/or marinas.

V. Rivers and Harbors Act

The Rivers and Harbors Act requires that authorization be obtained from USACE to construct any structure in or over any navigable water, including authorization for projects involving constructing or modifying bridges and causeways over navigable waters or constructing any dam or dike in a navigable water. Typically, requests for this type of authorization are handled together with requests for authorization of projects under Section 404 of the CWA. Common work activities that may require permits under the Rivers and Harbors Act include those that involve the repair of docks, piers, and/or marinas.

[503] 16 U.S.C. § 1536; Endangered Species Act Section 7.
[504] 33 U.S.C. § 1251 et seq.

VI. Safe Drinking Water Act

The purpose of the Safe Drinking Water Act is to protect public health by ensuring the quality of drinking water. The law authorizes the U.S. Environmental Protection Agency (EPA) to, among other things, set standards for the levels of individual contaminants allowed in drinking water. Additionally, it allows the EPA to designate as aquifers that serve as the sole or principal source of drinking water for a particular area as "sole source aquifers". For any financial assistance project that has the potential to contaminate an aquifer and that is located in the identified review area for a "sole source aquifer", FEMA must consult with EPA before funding the project.

VII. Clean Air Act

The Clean Air Act (CAA) protects the Nation's air through the reduction of smog and atmospheric pollution. Air quality compliance often requires specific measures to be implemented, such as dust abatement, vehicle emissions control, fuel storage, and distribution procedures. There may be additional requirements in "nonattainment areas" (defined as those areas that do not meet national standards for air quality and, therefore, require more rigorous compliance measures).[505] For projects where there is an impact to air quality, applicants should coordinate with and obtain any permits from applicable state or local environmental agencies approving the action.

VIII. Coastal Barrier Resources Act

The Coastal Barrier Resources Act (CBRA)[506] established the John H. Chafee Coastal Barrier Resources System (CBRS), which consists of relatively undeveloped coastal barriers along the Atlantic, Gulf, Great Lakes, and Caribbean coasts. CBRA minimizes adverse impacts to these areas by restricting federal assistance that encourages development within the CBRS. USFWS publishes maps designating these areas.[507] FEMA must consult with USFWS prior to providing PA funding for work within the CBRS.[508]

IX. Migratory Bird Treaty Act

The Migratory Bird Treaty Act makes it unlawful to pursue, hunt, take, capture, kill, or sell migratory birds listed in the statute without a waiver from USFWS.[509] The statute does not discriminate between live or dead birds and also grants full protection to any bird parts including feathers, eggs, and nests. FEMA consults with USFWS regarding projects likely to trigger compliance with this Act.

[505] 42 U.S.C. § 7401 et seq.
[506] 16 U.S.C. § 3501 et seq.
[507] 16 U.S.C. §§ 3501 and 3503. The U.S. Fish and Wildlife Service publishes Coastal Barrier Resource System maps at: http://www.fws.gov/.
[508] 16 U.S.C. § 3505.
[509] 16 U.S.C. §§ 703–712.

X. Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act prohibits any person from pursuing, capturing, killing, wounding, disturbing, or otherwise taking bald eagles or golden eagles, including their parts (e.g., feathers), nests, or eggs, unless authorized by a permit from the USFWS. The prohibition on disturbance applies to nests and previously used nest sites when eagles are not present, if, an eagle were to return, such alterations would lead to injury, death, or nest abandonment. FEMA consults with the USFWS regarding projects where impacts to bald or golden eagles may occur.

XI. Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act is the primary law for managing and maintaining sustainable fisheries in waters of the United States. The Magnuson-Stevens Fishery Conservation and Management Act protects essential fish habitat, which includes the waters and substrate necessary to maintain healthy fisheries. FEMA must consult with NMFS when any proposed PA project could have an adverse effect on "essential fish habitat" (defined as any impact that reduces quality or quantity of essential fish habitat).[510]

XII. Marine Mammal Protection Act

The Marine Mammal Protection Act prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters or by U.S. citizens on the high seas. The law prohibits attempts to hunt, capture, kill, or harass any marine mammals. The law authorizes NMFS or USFWS (depending on the species in question) to issue incidental take permits and incidental harassment authorizations. FEMA will consult with the USFWS/NMFS regarding projects where impacts to marine mammals may occur.

XIII. National Marine Sanctuaries Act

The National Marine Sanctuaries Act (NMSA), which is part of the Marine Protection, Research and Sanctuaries Act, authorizes the Secretary of Commerce to designate and manage areas of the marine environment as National Marine Sanctuaries (NMS), which NOAA administers. Activities within each NMS are governed by regulations. A "sanctuary resource" is defined as any living or nonliving resource of a NMS that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary. The National Marine Sanctuaries Act prohibits destroying, injuring, or causing the loss of any "sanctuary resource". A permit is required to conduct any activity within a sanctuary that is otherwise prohibited.

[510] 16 U.S.C. §§ 1801–1884.

XIV. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) provides for the management of the Nation's coastal resources. The CZMA establishes a voluntary partnership between the federal government and coastal and Great Lakes states. It requires participating states to develop state coastal zone management plans. PA projects located in, or near, established coastal zone management areas must be consistent with the enforceable policies of the state's federally approved coastal zone management program.[511] Before approving a project in a coastal zone management area, FEMA consults with the state agency overseeing the implementation of the CZMA plan to ensure the project is consistent with the program's provisions.

XV. Farmland Protection Policy Act

The Farmland Protection Policy Act is intended to minimize the extent to which federal programs contribute to the conversion of prime or unique farmland, or land of statewide or local importance, to nonagricultural uses and to ensure that federal programs are administered in a manner that, to the extent practicable, will be compatible with state, local, and private programs and policies to protect farmland. The Farmland Protection Policy Act and U.S. Department of Agriculture (USDA) implementing procedures require FEMA to evaluate whether projects it funds irreversibly convert such farmland to nonagricultural uses and to consider alternative actions that could avoid adverse effects. For projects that have the potential to irreversibly convert such farmland, FEMA must consult with the USDA Natural Resources Conservation Service (NRCS) to identify potential impacts to that farmland.[512]

XVI. Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act protects the free-flowing condition of rivers and tributaries that are part of the National Wild and Scenic Rivers System (System) or are under study for inclusion in the System because of their scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. Note: the rivers and tributaries under study are listed on the Nationwide Rivers Inventory or have been formally identified as Study Rivers. If a proposed project is located on a river or tributary covered by the Wild and Scenic Rivers Act whether as a designated river, a Study River, or a river on the Nationwide Rivers Inventory, FEMA must review it for compliance with the Wild and Scenic Rivers Act and consult with the managing agency for the affected designated river or tributary.[513]

XVII.Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) established a framework for federal, state, and local cooperation for controlling the management of hazardous and non-hazardous solid waste. EPA's role is to establish minimum regulatory standards, usually implemented by the states, which can establish their own requirements for solid waste management. RCRA requires the safe disposal of waste materials, promotes

[511] 16 U.S.C. § 1451 et seq.
[512] 7 U.S.C. § 4201 et seq.
[513] 16 U.S.C. § 1271 et seq.

the recycling of waste materials, and encourages cooperation with local agencies.[514] FEMA may require proof of compliant disposition in the form of state debris management permits/forms, landfill permit information, written statements from appropriate authorities, or project specific permits and plans.

XVIII. Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as Superfund, authorizes the federal government to respond to releases or threatened releases of hazardous substances into the environment through short-term removals and long-term remedial response actions. Superfund also triggered the development of the National Priorities List, a list of national priorities among the sites with known or threatened releases of hazardous contaminants. The 1986 amendments to CERCLA included the Emergency Planning and Community Right-to-Know Act (EPCRA) which, among other things, creates mechanisms to help local communities plan for chemical emergencies. FEMA will consult with EPA on projects affected by a Superfund site.

XIX. Executive Order 11988, Floodplain Management

EO 11988 requires federal agencies to minimize or avoid, to the extent possible, the long- and short-term adverse impacts associated with occupancy and modifications of floodplain and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative. It requires federal agencies to use a systematic decision-making process to evaluate the potential effects of projects located in, or affecting, floodplains; document each step of the process; and involve the public in the decision-making process. This process is designed to:

- Reduce flood loss risks;
- Minimize the impacts of floods on human safety, health, and welfare; and,
- Restore and preserve the natural and beneficial functions of floodplains.

FEMA publishes its implementing regulations for EO 11988 in 44 C.F.R. Part 9, Floodplain Management and Protection of the Wetlands. These regulations set forth the policy, procedures, and responsibilities to implement and enforce the EO, including the decision-making process, which is referred to as the 8-step process.[515]

XX. Executive Order 11990, Protection of Wetlands

EO 11990 requires federal agencies to avoid to the extent possible, the long- and short-term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. To meet these objectives, EO 11990 requires federal agencies to use a systematic decision-making process to evaluate the potential

[514] 42 U.S.C. § 6901 et seq.
[515] 44 C.F.R. § 9.6.

effects of projects in, or affecting, wetlands; document each step of the process; and involve the public in the decision-making process.

FEMA publishes its implementing regulations for EO 11990, Protection of Wetlands in 44 C.F.R. Part 9, Floodplain Management and Protection of the Wetlands. These regulations set forth the policy, procedures, and responsibilities to implement and enforce the EO, including the decision-making process, which is referred to as the 8-step process.

XXI. Executive Orders 12898 and 14096, Environmental Justice

EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations[516] and EO 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All,[517] make clear that the pursuit of environmental justice is a duty of all federal agencies and should be incorporated into their missions. EO 14096 supplements the foundational efforts of EO 12898 to address environmental justice. EO 14096 also includes, a whole of government definition of environmental justice.

If FEMA determines that a proposed project would have disproportionately high and adverse effects on minority or low-income populations, then FEMA will work with an applicant to revise the scope of work to avoid the impacts or condition of a project with mitigation measures to alleviate the impacts.

XXII. Executive Order 13112, Invasive Species

EO 13112 requires agencies to use their programs and authorities to help prevent the introduction, establishment, and spread of invasive species; respond to invasive species outbreaks; restore native species in areas invaded by invasive species; promote public education related to invasive species control; and avoid authorizing, funding, or carrying out activities that promote the introduction, establishment, or spread of invasive species. FEMA will consult with state and local environmental and debris management agencies to ensure projects are in compliance with EO 13112.

Appendix E: Private Nonprofit Facility Eligibility Examples

Below are examples of private nonprofit (PNP) facility eligibility determinations.

I. Facility Owned by PNP – PNP Leases Portion of Facility to For-Profit Service

Parkland Hospital is an eligible PNP that owns a medical office building and leases a portion of it to doctors and laboratories that are providing for-profit services. The for-profit leases are for 70 percent of the floor space, excluding the common area floor space, as defined in this policy.

Analysis

The building is ineligible because more than 50% of the building space is leased to an ineligible applicant.

II. PNP Recreational Center Providing Eligible Services

The PNP Springtown Recreation Center claims that it provides eligible essential social services in addition to its recreation activities and should be eligible for assistance. The organization claims that its services now include day care for elderly adults, senior citizen center programs, programs for families of domestic abuse, and shelter workshops. These programs are provided by the recreation center staff and offered 5 days a week. Recreation activities are limited to evenings and weekends. The entire center is used for the eligible services.

Analysis

The organization would not appear to be eligible based upon its name and presumed mission. A detailed examination is necessary to determine the eligibility of the organization and its facility based upon the eligible services provided. In cases where space is not dedicated to any specific activity, the amount of time dedicated to eligible purposes in such spaces determines eligibility and the level of assistance. Therefore, even though the entire facility is used for eligible purposes, FEMA prorates PA funding based on the proportion of the total time it is used for eligible services.

III. Support Facility Owned by PNP

A parking garage is owned by an eligible PNP hospital to support its nearby hospital facility. The ground floor is leased to retail businesses and totals 15 percent of the total space of the garage.

Analysis

Title 44 of the Code of Federal Regulations (C.F.R.) § 206.221(e), Private nonprofit facility, authorizes assistance for administrative and support facilities essential to the operation of medical facilities and emergency facilities, which in this example includes the parking garage. Because the hospital uses more than 50% of the parking garage, the facility is eligible based on primary use. FEMA assistance would be prorated based on the percentage of space used for the eligible parking purpose. The parking garage is eligible only because of its association with the hospital.

IV. Facilities Owned by PNP Homeowners' Association

The Woodlands Homeowners' Association is a PNP organization responsible for providing certain services for a 200-home development. The Homeowners' Association is responsible for the local neighborhood streets, water system, sewage system, fire station, medical clinic, neighborhood park, community center, and a recreational lake and dam.

Analysis

The Homeowners' Association provides eligible critical services and therefore is an eligible PNP. The eligibility of each service is considered separately. The lake, dam, and park are not eligible PNP facilities because they provide primarily recreational services. The water and sewage systems meet the definition of a utility and are eligible for assistance. The fire station and medical clinic are eligible as emergency and medical facilities. The streets which support provision of any critical services directly by the PNP are eligible facilities. However, the eligibility of street-related work depends on whether the streets have restricted access and the type of work involved. The community center is considered more closely. If it is primarily used as a gathering place for a variety of social, educational enrichment, and community service activities, it is eligible because it provides noncritical but essential social services. To be eligible, it must serve the general public outside the Homeowners' Association community.

V. Recreational Center – Primarily Athletic Services

Westover Recreation Center sponsors a variety of activities. The center is available for rental on Friday, Saturday, and Sunday evenings to companies, religious groups, clubs, and civic organizations. It is offered as a location for league parties, office parties, seminars, conferences, and holiday celebrations. The center has rooms set aside for seniors' bridge and other card games, along with occasional workshops for photography, pottery and ceramics, and art. However, the center is primarily oriented to athletics, as exemplified by a large indoor pool and locker room, a half dozen squash/racquetball courts, a weight/exercise room, and a 9,200-square-foot gymnasium/basketball court.

Analysis

Although Westover Recreation Center offers some eligible noncritical essential social services, it is, first and foremost, a recreation center. In contrast to the definition of an eligible community center, it is neither established nor primarily used as a gathering place for a variety of social, educational enrichment, and community service activities, even though it does offer some of these.
Facilities established or primarily used for athletic (or) recreational activities are ineligible community centers. The Articles of Incorporation filed with the state verify that Westover was established for recreational purposes. It is not necessary to calculate the percentage of time or space devoted to community activities versus athletic and recreational activities, because Westover is on its face overwhelmingly athletic and recreational. For these reasons, a PNP facility similar to Westover would not be eligible.

VI. Mixed Use Community Center – Nominal Fee

Somerset Community Center consists of several meeting rooms, a lending library, social services room, health services room, dining room, activity area with games and a wide-screen TV, darkroom, pianos for practice, ceramics lab, woodshop, computer room, sewing machines, exercise room, and a large foyer. Outside are a fitness trail, garden plots, an outdoor basketball court and softball field, a gazebo, and picnic area.

A nominal membership fee is charged. Classes are offered in piano, bridge, arts and crafts, and cooking. The center sponsors numerous seniors' activities, which include trips, luncheons, and recreational and educational activities. A lunch program is offered for seniors and their spouses. Some exercise classes are also offered. Health screenings and immunizations are regularly offered. Door-to-door transportation is provided to those who need it.

Analysis

By virtue of the wide range of eligible community center activities, Somerset Community Center would be an eligible community center. Although it does offer athletic and recreational activities, these are minimal in the time and space allocated to them; therefore, it is not a recreational center. As the fee is nominal, it is open to the public.

VII. School Operated by a Religious Institution

The Community Church operates a state-certified private school offering first through eighth grades. The teaching curriculum includes math, science, English, history, physical education, and religious doctrine. The school has an average attendance of 500 students. The campus consists of three buildings: one used primarily for the secular curriculum, one used primarily for religious instruction, and a chapel primarily used for religious worship. Admissions to the school are restricted to members of Community Church.

Analysis

Evaluate the three buildings separately. The two buildings used, respectively, for secular and religious education are eligible as educational facilities. As educational facilities, they are considered to provide critical services and therefore Community Church does not need to apply to SBA to receive funding for permanent work on those buildings. The chapel is eligible as a house of worship. Houses of worship provide noncritical services, so Community Church is required to apply for an SBA loan for the chapel. The restricted admissions process does not affect eligibility. Pursuant to Stafford Act Section 102(11)(B), no PNP facility is excluded from eligibility because leadership or membership in the organization is limited to people that share a religious faith or practice.

VIII. Religious Institution with a Dock, a Church, and a Pastor's Residence

A religious institution owns multiple structures within its campus. One of the structures is a dock primarily used for recreation. The buildings include a church that provides worship services and a pastoral residence.

Analysis

Evaluate the structures separately. The dock is ineligible because its use is primarily recreational, which is an ineligible service. The church is eligible because its primary use is as a house of worship. The residence is not eligible because a private residence is not an eligible PNP service. The applicant must apply for an SBA loan for repairs to the church as it provides a noncritical service.

Appendix F: Mosquito Abatement

FEMA provides reimbursement for mosquito abatement measures at the written request of the state, local, Tribal Nation, and territorial (SLTT) public health officials after FEMA consults with the Centers for Disease Control and Prevention (CDC), based on any of the following:

- Evidence of:
  - Higher levels of disease transmitting mosquitoes in the impacted area following the incident;
  - A significant number of disease-carrying mosquitoes in the area due to the increase in incident-related standing water; or
  - The potential for disease transmission and human exposure to disease carrying mosquitoes based on the detection of arboviral diseases in sentinel organisms (poultry, wild birds, mosquito pools) in the impacted area prior to the incident, discovered during surveillance as part of mosquito abatement activities, or reported human cases in which transmission occurred prior to the incident.
- A determination that a significant increase in the mosquito population and/or the change of biting mosquito species poses a threat to emergency workers who are required to work out-of-doors, thereby significantly hampering response and recovery efforts or represent a threat to public health and safety.
- Such evidence may include an abnormal rise in landing rates or trap counts, significant changes in species composition or estimate of infection rates, when compared to pre-incident surveillance results.
- Verification from medical facilities within the affected area that an increase in the general public's exposure to mosquitoes has directly resulted in secondary infections, especially among those with weakened immune systems such as the elderly, the very young, or the sick. This may occur when increased numbers of residents in impacted areas with extended power outages are forced to open buildings for air circulation.

Terminology

- An **arbovirus** is a virus utilizing arthropods as vectors and is transmitted via their feeding to a definitive host.
- The **landing rate**, expressed as number of mosquitoes landing per minute, is used as an adult mosquito surveillance measure utilizing human volunteers as bait.
- **Methoprene briquettes** are formulated with methoprene (compound that mimics the action of an insect growth-regulating hormone and prevents the normal maturation of insect larvae) growth inhibitor and a timed-release carrier that resembles a charcoal briquette.
- A **sentinel organism** is an organism, usually fowl, purposely exposed to mosquito bites outdoors to monitor pathogen transmission by mosquitoes.
- **Seroconversion** is the development of detectable antibodies in the blood of a sentinel organism directed against an infectious agent.
- **Trap count** is the number of female mosquitoes captured in a trap receptacle each night the traps are set.

Where possible, a determination of the need for vector control measures should be based on surveillance data provided by local agencies, or on surveillance conducted as a component of the emergency response. Similarly, termination of control efforts should be based on mosquito density and disease transmission monitoring, and on the degree of exposure to mosquitoes of residents and responders. Information useful in determining the need for emergency mosquito control measures includes:

- The local jurisdiction's mosquito population density estimates pre- and post-disaster, including information about species composition;
- Arbovirus transmission activity indices, including information about the location of surveillance activities; indices may consist of:
  - Infection rates in mosquitoes;
  - Seroconversion in sentinel chickens;
  - Equine cases; or
  - Human cases.
- The amount and type of flooding (e.g., saltwater/freshwater, coastal/inland);
- The extent and location of damage to housing;
- The extent, location, and anticipated duration of power interruption;
- The anticipated extent and duration of cleanup and recovery operations; and,
- A description of the type of mosquito management required (e.g., aerial or ground- based adulticide applications, larvicide applications), and duration of application to reduce the threat and the areas where the interventions are needed and cost estimates to justify the chosen mosquito management option is necessary and reasonable.

To be eligible for PA funding, insecticide formulations must be among those approved and registered by the U.S. Environmental Protection Agency for use in urban areas for mosquito control and must be applied according to label directions and precautions by appropriately trained and certified applicators. Furthermore, mosquito abatement measures must comply with all federal and SLTT laws, ordinances, and regulations concerning vector control and align with CDC.gov guidance for mosquito abatement measures. Mosquito abatement measures include, but are not limited to: adulticiding, larviciding, and breeding habitat removal or alteration.

Terminology

Adulticiding – The ground or aerial spraying of insecticides to kill adult mosquitoes.

Larviciding – The application of chemicals, including methoprene briquettes, by ground or air to kill mosquito larvae or pupae.

Breeding habitat removal or alteration – The modification of potential breeding habitat to make it unsuitable for mosquito breeding or to facilitate larval control, including:

- Draining or removing standing water in close proximity to homes, schools, sheltering facilities, and businesses;

- Increased dewatering through the pumping of existing drainage systems; and,
- Dissemination of information in an accessible and effective manner (e.g., inserting flyers with resident's water bills, public service announcements, newspaper campaigns) to direct residents to remove the mosquito breeding habitat.

Appendix G: Alternative Procedures for Permanent Work

Alternative procedures offer applicants maximum flexibility in how they use PA funds to restore damaged facilities. Under standard procedures, applicants receive PA funding based on the pre-disaster size, capacity, and function of a damaged facility. However, Section 428 of the Stafford Act authorizes FEMA to award PA funding based on estimates which are "fixed" or capped for large permanent work projects through alternative procedures. These procedures can only be applied to large projects.

Alternative procedures projects enable applicants to actively shape their recovery outcomes by considering the community's hazards, risks, exposure, and vulnerability and how they can be mitigated. There are several benefits for applicants when they choose alternative procedures, including less itemized cost tracking and increased flexibility of funding and restoration. This structure allows applicants to focus on long-term recovery, make strategic use of available funds, and maximize opportunities for hazard mitigation and resilience improvements.

I. Differences Between Standard and Alternative Procedures

Table 35. Differences Between Standard and Alternative Procedures

Consideration	Standard Procedures	Alternative Procedures
Funds	▪ Actual cost project. No retention of excess funds associated with the approved project; and, ▪ Can only use funds toward the specific work identified in each specific project.	▪ Fixed-cost project with use of excess funds; and, ▪ May use funds across all alternative procedures projects.
Tracking	▪ Must track costs specific to each work item within each individual project; and, ▪ Must track all work specific to each individual project.	▪ Do not need to track costs to specific work items. Only need to track the total costs associated with the alternative procedures projects; and ▪ Do not need to track work to specific projects. Only need to substantiate that the work is related to the approved scope of work (SOW) covered in the alternative procedures projects.

Consideration	Standard Procedures	Alternative Procedures
Amendments	▪ After FEMA approves a SOW, FEMA requires approval for any change to the SOW; and, ▪ Must track costs associated with all changes to the SOW.	▪ After FEMA approves a SOW, FEMA only requires approval for changes that involve buildings or structures that are 45 years or older, ground disturbing activities, or work in or near water; and, ▪ Do not need to track costs associated with changes to the SOW.

II. Fixed Cost Estimate

Under alternative procedures for permanent work, FEMA funds large projects based on a fixed cost estimate instead of the actual costs reconciled at closeout. FEMA, recipients, and applicants must agree to the damage description and dimensions (DDD), Scope of Work (SOW), and resilience initiatives through hazard mitigation for a project before the fixed cost estimate is developed either by FEMA or provided by the applicant.

FEMA caps PA funding for an alternative procedures permanent work project based on the aggregate federal share of the approved estimated cost:

- To restore the damaged facilities to pre-disaster design and function in accordance with eligible codes and standards; and,
- For cost-effective PA mitigation measures associated with the actual restoration SOW that the applicant will perform.

The following are allowable costs for the cost estimate.

A. Architectural, Engineering, Environmental Review, and Design Fees

FEMA provides funding to support the development of complex projects that require an architectural, engineering, or environmental design. FEMA develops a project that includes the description, parameters, and cost estimate of the required design which is ultimately included in the fixed cost estimate for the associated project. FEMA also includes any design fees for services necessary to complete the restoration project SOW in the cost estimate.

B. Construction and Other Restoration Costs

FEMA includes all eligible construction costs or other costs necessary to complete the eligible SOW, including:

- Required permitting fees;
- Costs for necessary project and/or construction management services;
- Funding required for:

- Codes, specifications, and/or standards or industry standards;[518]
- Any applicable consensus-based code, specification; and/or standard that the applicant identifies for the facility; and/or,
- Any approved industry standard as applicable under the Bipartisan Budget Act[519].

C. Public Assistance Hazard Mitigation

PA hazard mitigation funds can be added to project funding for repairs on disaster-damaged facilities to help prevent future damage. When applicants repair the function of a facility but adjust its pre-disaster capacity, the proposed PA mitigation SOW is based on the actual work being done. However, cost-effectiveness is assessed according to the fixed amount set for restoring the facility to its pre-disaster condition. If the facility's capacity is increased, the mitigation SOW and costs are limited to what is needed to protect the facility at its original, pre-disaster capacity.

Approved mitigation proposals are included as a separate fixed cost amount within the subaward and must align with the actual recovery work planned. This hazard mitigation SOW and cost estimate are separate from the repair project itself. If the approved PA mitigation is not completed, FEMA will reduce the fixed cost amount by the portion intended for hazard mitigation.

III. Fixed Cost Offer

To develop the fixed cost offer FEMA engages with qualified engineers and architects, cost estimators, construction managers, and other technical experts as necessary to develop or validate cost estimates for large permanent work projects.

FEMA transmits the cost estimate as a fixed cost offer to the applicant via PA Grants Manager/Grants Portal for consideration. If applicants accept the fixed cost offer, the project is considered an alternative procedures project. The deadline for accepting the fixed cost offers is described below under Fixed Cost Offer Deadlines.

FEMA considers the fixed cost amount reasonable and eligible if there is no evidence of fraud and the applicant complies with federal grant conditions, including procurement requirements. Fixed cost estimates must also be reduced by all applicable credits, such as insurance proceeds and salvage values.[520] Obligation of the project constitutes FEMA's acceptance of the fixed cost amount. Once an applicant accepts a fixed cost offer, the project cannot revert to standard procedures.

Once FEMA, the recipient, and the applicant agree to the fixed cost estimate for the subaward, there will be no further adjustment, except for insurance adjustments and adjustments for approved SOW changes associated with hazard mitigation. FEMA's cost estimating format includes contingency factors for hidden damage, unforeseen environmental and permitting requirements, and other unidentified circumstances.

[518] For more information, refer to Codes and Standards in Chapter 8.
[519] For more information, refer to: BBA Policy (September 2018).
[520] Stafford Act § 312, 42 U.S.C. § 5155, and 2 C.F.R. § 200.406.

If the final actual costs are more than the approved fixed cost award, FEMA will not approve additional funds. If the final actual costs are less than the subaward, the applicant may use the excess funds as described below under the Excess Funds section of this appendix.

A. Fixed Cost Offer Deadlines

FEMA, the recipient, and the applicant must reach a fixed cost agreement within 18 months of the declaration date. Recipients and applicants have a combined total of 30 days to accept fixed cost offers from the date of FEMA's transmittal. If fixed cost offers are not accepted within 30 days, If the applicant does not accept the fixed cost offer, the project is processed utilizing standard procedures and final funding will be based on actual costs. The flexible use of funds and the use of excess funds are not available under standard procedures.

Any time extensions to accept fixed cost offers must be approved by FEMA's Assistant Administrator for Recovery before the deadline. If an applicant is requesting a project for only architecture and engineering (A&E), it must determine the actual SOW to be performed before a fixed cost offer is transmitted.

IV. Use of Funding

Applicants may share funds from the fixed cost subaward across all alternative procedures for permanent work projects for:

- Repair, restoration, or replacement of disaster-damaged facilities and equipment;
- Construction of new facilities to include land acquisition;
- Purchase of equipment; or
- Cost effective hazard mitigation measures that reduce future risk.

If funds for PA hazard mitigation are included in the fixed cost subaward, applicants must complete the approved scope of work of the hazard mitigation in order to retain the mitigation funding. If an applicant is considering abandoning or demolition of the original facility see Chapter 10: Environmental and Historic Preservation for more information on the limitations and requirements.

A. Excess Funds

Applicants request to use the funds for designated activities in the "Eligible with Fixed Cost Funds" column in Table. Eligible Work and Costs for Use of Fixed and Excess Funds below. Once FEMA approves – and applicants complete – the SOW associated with these activities, applicants may use any excess funds for the expanded list of eligible activities listed under the "Eligible with Excess Funds" column.

Any excess funds remaining after the approved SOW is complete may be used for cost-effective activities that reduce the risk of future damage, hardship, or suffering from a major disaster, and activities that improve future PA operations or planning. Applicants must submit a proposed SOW for use of any excess funds, along with a project timeline, to the recipient within 90 days of completing its last alternative procedures project. Recipients must forward the request to FEMA within 180 days of date the last

alternative procedures project was completed. Applicants can submit a request for a time extension to this deadline to FEMA for consideration.

FEMA evaluates the proposed use of excess funds for reasonableness to ensure prudent use of funds. FEMA also evaluates the submitted project timeline and approves an appropriate deadline for work completion, not to exceed the overall disaster period of performance.

The following table lists examples of eligible and ineligible types of work and costs when using fixed cost funds and excess funds. All work must otherwise be eligible for PA.

Category I projects cannot be included in an alternative procedures for permanent work project.

Table 36. Eligible Work and Costs for Use of Fixed Cost and Excess Funds

Type of Work or Cost	Eligible with Fixed Cost Funds?	Eligible with Excess Funds?
Restoration of disaster-damaged facilities and equipment	Yes	Yes
Alternate projects (e.g., purchasing equipment, constructing new facilities, improvements to undamaged facilities such as shelters and emergency operation centers) in declared areas	Yes	Yes
Cost-effective hazard mitigation measures for undamaged facilities	No	Yes
Covering future insurance premiums, including meeting obtain and maintain (O&M) insurance requirements, on damaged or undamaged facilities	No	Yes
Work on facilities that are ineligible due to a failure to meet previous O&M requirements	No	No
Conducting or participating in training for response or recovery activities, including federal grants management or procurement courses	No	Yes
Planning for future disaster response and recovery operations, such as developing or updating plans (e.g., debris management plans, hazard mitigation plans, pre-disaster recovery plans, emergency management plans), integrating these plans into other plans, preparedness activities, exercises, and outreach	No	Yes
Salaries for PA or emergency management staff (e.g., staff performing PA award or subaward administration, monitoring, and closeout activities for other PA disaster awards, and staff developing or updating disaster plans)	No	Yes

Type of Work or Cost	Eligible with Fixed Cost Funds?	Eligible with Excess Funds?
Paying down debts	No	No
Covering operating expenses	No	No
Covering budget shortfalls	No	No
Covering the non-federal cost share of FEMA projects or other federal awards	No	No

III. Scope of Work Changes

Once the scope of work is approved and a fixed cost offer is accepted, applicants must notify FEMA prior to making scope of work changes that involve:

- Buildings or structures that are 45 years of age or older;
- Ground disturbing activities; or
- Work in or near waterways.

With exception of buildings or structures that are 45 years of age or older, applicants do not need to notify FEMA when they intend to make changes that substantially conform to the approved scope of work. Changes that substantially conform include items, such as:

- Substitutions in material type (e.g., pre-cast concrete vs. steel beam, stainless steel vs galvanized fasteners); or
- Interior floor plan reconfigurations (e.g., adding, moving, or removing rooms/features).

If applicants wish to change the scope of work to the extent that it changes the hazard mitigation or if the scope of work of the hazard mitigation requires an adjustment for any other reason, such changes must be approved within the 18-month deadline and the fixed cost offer amount will be adjusted to reflect the cost of the revised hazard mitigation scope of work.

IV. Closeout Requirements

Work must be completed by the end of the approved alternative procedures project work completion deadline and the recipient must certify that all incurred costs are associated with the approved SOW. Additionally, recipients must certify that subrecipients have completed all work in accordance with FEMA regulations and policies. Recipients must submit their certifications to FEMA within 180 days of the subrecipient completing its last alternative procedures project or the latest alternative procedure project deadline, whichever occurs first, for the subrecipient to retain and use any excess funds.

The closeout certification must include a final report of alternative procedures project costs and documentation to support the following:

- Summary of actual work completed;
- Mitigation measures achieved, if applicable;

- Compliance with EHP requirements;
- Compliance with civil rights and equity requirements;
- Compliance with the obtain and maintain insurance requirement;
- Summary of total actual costs to complete the alternative procedure projects;
- Compliance with federal procurement procedures; and,
- Actual insurance proceeds received.

Subrecipients do not need to track costs to specific work line items. Subrecipients only need to substantiate and certify that all claimed costs are related to the overall work deemed eligible for the alternative procedure projects.

V. Other Considerations

A. Requirement to Obtain and Maintain Insurance

Applicants that receive PA funding for permanent work to replace, repair, reconstruct, or construct a facility must obtain and maintain insurance to protect the facility against future loss.[521] Applicants must comply with this requirement as a condition of FEMA assistance. This requirement applies to insurable facilities or property (buildings, contents, equipment, and vehicles), including those funded as an alternative procedures for permanent work project.[522] FP 206-086-1 Public Assistance Policy on Insurance[523] describes these requirements in detail.

B. Appeals for Alternative Procedures Projects

FEMA does not grant appeals on alternative procedures permanent work projects, except in cases of a cost adjustment after the fixed-cost offer has been accepted (such as adjustments related to insurance, noncompliance, or audits). Any disagreements regarding damage, SOW, or costs must be resolved before the applicant accepts the fixed cost offer. Additionally, FEMA does not grant appeals on denied time extensions to accept fixed cost offers for alternative procedures permanent work projects.

C. Office of the Inspector General

The Department of Homeland Security's Office of Inspector General (OIG) conducts independent audits and investigations on FEMA programs, operations, activities, and functions; how recipients and subrecipients expend federal funds; and oversight of non-federal audits such as single audits. The OIG evaluates activities to identify, deter, and address fraud, waste, and abuse. The OIG has authority to audit any project, including alternative procedures projects.

[521] Stafford Act § 311; 42 U.S.C. § 5154; 44 Code of Federal Regulations (C.F.R.) § 206 Subpart I; 2 C.F.R 200.310.
[522] 44 C.F.R. § 206.203(d).
[523] For more information, refer to: Public Assistance Policy on Insurance (FP 206-086-1) | fema.gov.

Appendix H: Mold Remediation

I. Mold Remediation Methods

The following table describes common mold remediation methods.

Table 37. Mold Remediation Methods[524]

Method	Application
Wet Vacuum	▪ Use when materials are wet; ▪ Use where water has accumulated, such as on floors, carpets and hard surfaces; and, ▪ Do not use when sufficient liquid is not present.
Damp Wipe	▪ Wipe or scrub non-porous (hard) surfaces with water and detergent; and, ▪ Follow instructions listed on the product label.
High-Efficiency Particulate (HEPA) Vacuum	▪ Final clean-up after thoroughly dry and contaminated materials are removed; ▪ Recommended for cleanup of dust outside of the remediation area. ▪ Properly seal HEPA filter; and, ▪ Personal protection equipment is highly recommended; filter and contents must be disposed of in well-sealed bags.
Discard	▪ Use for building materials and furnishings that cannot be remediated; ▪ Seal contents in two bags using 6-mil polyethylene sheeting; ▪ Cover large items in polyethylene sheeting and seal with duct tape; and, ▪ Sealing of materials must be within containment area to limit further contamination.

II. Application of Remediation Methods

The following table outlines typical mold remediation actions.

[524] Summarized from Indoor Environments Division of the U.S. Environmental Protection Agency, “Mold Remediation in Schools and Commercial Buildings.”

Table 38. Application of Mold Remediation Methods[525]

Water Damaged Material	Action
Books and paper	▪ Non-valuable items: discard; ▪ Valuable/important: photocopy and discard originals; and, ▪ Invaluable items: freeze in frost-free freezer or meat locker or freeze dry.
Carpet and backing	▪ Wet vacuum; ▪ Reduce ambient humidity levels with dehumidifier; and, ▪ Accelerate drying process with fans.
Ceiling tiles	▪ Discard and replace. (Replacement is only eligible as permanent work.)
Cellulose insulation	▪ Discard and replace. (Replacement is only eligible as permanent work.)
Concrete or cinder block surfaces	▪ Wet vacuum; and, ▪ Accelerate drying process with dehumidifiers, fans, and/or heaters.
Fiberglass Insulation	▪ Discard and replace. (Replacement is only eligible as permanent work.)
Hard surfaces, porous floorings (linoleum, ceramic tile, vinyl)	▪ Vacuum or damp wipe with water and mild detergent; ▪ Scrubbing may be necessary; and, ▪ Allow to dry.
Upholstered furniture	▪ Wet vacuum; and, ▪ Accelerate drying process with dehumidifiers, fans, and/or heaters.
Wallboard (drywall and gypsum board)	▪ If obvious swelling and seams are not intact: discard; ▪ If no obvious swelling and seams are intact: may be dried in place; and, ▪ Ventilate wall cavity. (May include removal of wallboard up to 12-16 inches above the waterline.)
Window drapes	▪ Launder or clean according to manufacturer's instructions.
Wood surfaces	▪ Remove water with wet vacuum; ▪ Accelerate drying process with dehumidifiers, fans, and/or heaters; and, ▪ Wet paneling: discard and ventilate wall cavity.

[525] Summarized from the U.S. Environmental Protection Agency's Mold Remediation in Schools and Commercial Buildings | epa.gov.

Appendix I: Work Eligibility Considerations by Type of Facility

I. General Work Eligibility Considerations for Facilities

Table 39. Work Eligibility Considerations: All Facilities

PAPPG Reference	Topic	Applicability
Ch. 4: Facility Eligibility	Facility Eligibility	All permanent work.
Ch. 4: General Work Eligibility	General Work Eligibility	All work.
Ch. 6: Cost Eligibility	Cost Eligibility	All eligible work.
Ch. 7: Emergency Work Eligibility	Emergency Work Eligibility	All emergency work, including debris removal (category A) and emergency protective measures (category B).
Ch. 7: Debris Removal	Debris Removal Eligibility	All debris removal work.
Ch. 10: Environmental and Historic Preservation; Appendix A	Environmental and Historic Preservation (EHP) Compliance	All work (including ground disturbance for any staging areas, access roads, parking, landscaping, grading, or utilities).
Ch. 8: Codes and Standards	Codes and Standards	Upgrades to pre-disaster design required by codes or standards.
Ch. 8: Hazard Mitigation; Appendix J	Hazard Mitigation	Hazard mitigation is any cost-effective measure which will reduce the potential for damage to a facility from a disaster event.[526]
Ch. 8: Repair vs. Replacement	Replacement	The purpose of the 50% rule is to make an early determination on whether it is more prudent to repair or replace a facility. It is not intended to be a full calculation of all eligible project costs.
Ch. 8: Relocation	Permanent Relocation	FEMA may approve funding for and require restoration of an applicant's destroyed (i.e., eligible for replacement) facility at a new location.
Ch. 8: Facility Located in or Impacting a Floodplain	Floodplain Considerations	All permanent work in or impacting the floodplain.
Ch. 8: Landslides and Slope Stabilization	Landslides and Slope Stabilization	Facilities damaged due to a landslide or slope instability triggered by the incident.
Ch. 8: Building Code and Floodplain Management	Disaster Recovery Reform Act Section 1206	FEMA will provide resources needed to effectively administer and enforce building

[526] 44 Code of Federal Regulations (C.F.R.) § 206.201(e).

PAPPG Reference	Topic	Applicability
Administration and Enforcement		codes and floodplain management regulations (e.g., substantial damage assessments or determinations, permitting) and enhancing National Flood Insurance Program (NFIP) compliance.
Ch. 7: Temporary Relocation of Essential Services	Temporary Relocation	Certain essential community service facilities.

II. Work Eligibility Considerations for Roads and Bridges

The following work eligibility considerations apply to:

- Roads (including, but not limited to: surface, base, shoulders, roadside ditches, guardrails, lighting, signage, sidewalks);
- Drainage structures (including, but not limited to culvert, low-water crossing); and,
- Bridges (including, but not limited to, decking, pavement, piers, girders, abutments, slope protection, approaches, guardrails, lighting, signage, sidewalks).

EHP laws, regulations, and EOs that frequently apply: NEPA; NHPA, ESA, CWA, CAA, EOs 11988 and 11990. In addition, projects involving work in waterways usually require Section 404 permits, which are issued by the USACE as required by the CWA and also for local NFIP requirements.

Policy waiver for any ineligible work requires approval from Assistant Administrator of Recovery.

Table 40. Work Eligibility Considerations: Roads and Bridges

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 7	A	▪ Debris removal and disposal to eliminate an immediate threat.	▪ Removal of debris placed on public ROWs from commercial properties unless approved by FEMA. ▪ Removal of materials related to the construction, repair, or renovation of either residential or commercial structures.	▪ Must distinguish between incident-related debris versus debris generated by other recent events, and household waste.
Ch. 7	B	▪ Emergency access ▪ The extent of damage or blockage makes areas inaccessible.	▪ Removal of debris from a privately-owned access facility unless no other access point exists, and damage or	▪ Must acquire and retain all necessary legal processes or obtains rights-of-entry and agreements to indemnify and hold

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
		▪ Clearing debris from or conducting emergency repairs to an access facility, such as a road or bridge. ▪ Limited to work necessary for the access to remain passable. ▪ Includes construction of strictly temporary access.	debris impedes emergency access. ▪ Emergency repairs to privately-owned roads unless no other access point exists, damage impedes emergency access, and repair eliminates temporary housing needs.	harmless the federal government.
Ch. 7	B	▪ Emergency repairs to address an immediate threat.	▪ Emergency repair of federal-aid highways (under FHWA authority).	▪ None.
Ch. 6 & 8	C	▪ Restoration (permanent repair or replacement).	▪ Loss of useful service life ▪ Loss of toll revenue ▪ Construction of additional lanes even if required by a code or standard, except when code requires changing a one lane bridge to two lanes. ▪ Costs related to maintenance of roads. ▪ Repair of disaster-caused federal-aid highways (under FHWA authority). Does not apply to Tribal Nations.	▪ Must distinguish between minor incident-related damage and damage related to age of the road, traffic flow, and frequent rain events. ▪ Need date of construction for culvert and any nearby structures that may be altered or affected by the project. ▪ Hydrologic and hydraulic (H&H) studies to evaluate upstream and downstream impacts are necessary if replacing culvert with differently sized cross drain structure.

III. Work Eligibility Considerations for Water Control Facilities

The following work eligibility considerations apply to:

- Dams or reservoirs;
- Irrigation and water conveyances (including canals, pipelines, laterals, pump stations, siphons);

- Aqueducts;
- Drainage channels;
- Sediment and debris basins;
- Stormwater retention and detention basins;
- Coastal shoreline protection facilities (including seawalls and revetments);
- Flood control works (including levees, floodwalls, flood control channels, dams or basins, and other structures primarily used for flood control);
- Navigational waterways; and,
- Shipping channels.

Construction of storm water drainage facilities associated with road projects (inside the ROW) are instead considered eligible work under category C.

EHP laws, regulations, and EOs that frequently apply to work eligibility for water control facilities include NEPA, NHPA, ESA, CWA, EOs 11988 and 11990. Projects involving work in waterways usually require Section 404 permits, which are issued by the USACE as required by the CWA and to include potential local NFIP requirements.

Policy waiver for any ineligible work requires approval from Assistant Administrator of Recovery.

Table 41. Work Eligibility Considerations: Water Control Facilities

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 7	A	▪ Debris removal and disposal (from natural feature or engineered facility) to eliminate an immediate threat. ▪ Debris removal eligibility requirements are different for navigable vs. non-navigable waterways	▪ Removal of debris to eliminate a threat of flooding to agricultural land. ▪ Surveys to look for debris. ▪ Debris removal from flood control works that are under the specific authority of another federal agency. ▪ Removal of debris from federally maintained navigable waterways.	▪ Must distinguish between incident-related debris versus pre-existing debris and debris generated by other incidents.
Ch. 7	B	▪ Flood-fighting (on natural feature or engineered facility) or emergency repairs (engineered and maintained facility only)	▪ Emergency protective measures to reduce the threat of flooding to agricultural land. ▪ Emergency repair of flood control works that are under the authority	▪ USACE can conduct flood fighting activities. ▪ USACE cannot reimburse applicants for flood fighting efforts.

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
		to address an immediate threat: ▪ Includes the repair of deliberate breaches or removal of flood-fighting measures as part of the category B emergency protective measure project.	of another federal agency. ▪ Permanently increasing height or capacity of a flood control work. ▪ De-watering of flooded areas primarily for the purpose of drying land. ▪ Emergency repair of a secondary levee riverward of a primary levee. ▪ Emergency repairs of flood control works under the authority of another federal agency and of federally constructed coastal shoreline protective features under the authority of another federal agency.	
Ch. 8	D	▪ Debris and silt removal required to restore capacity (engineered and maintained facilities only).	▪ Restoration of flood control works under the authority of USACE.	▪ None.
Ch. 8	D	▪ Restoration (permanent repair or replacement) ▪ Includes PNP irrigation facilities only if they provide water for essential services of a governmental nature to the general public for water for drinking water supply, fire suppression, or electricity generation	▪ Restoration of natural channels, lakes, and shorelines (any feature that is not improved and maintained) ▪ Restoration of PNP irrigation systems that provide water solely for agricultural purposes. ▪ Restoration of federally constructed coastal shoreline protective features	▪ None.

IV. Work Eligibility Considerations for Buildings, Equipment, and Vehicles

EHP laws, regulations, and EOs that frequently apply to work eligibility considerations for buildings, equipment, and vehicles include NEPA, NHPA, CAA, ESA and EOs 11988 and 11990.

Table 42. Work Eligibility Considerations: Buildings, Equipment, and Vehicles

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 7	B	▪ Extracting water and clearing mud, silt, or other accumulated debris from eligible facilities; ▪ Requires the work to be conducted expeditiously for the purpose of addressing an immediate threat; and ▪ Work necessary to restore the facility is permanent work, not emergency work (see category E below).	▪ Conducted on private property unless FEMA approves the work because: ▪ The immediate threat is widespread, affecting numerous homes and businesses such that it is a threat to the health and safety of the general public; ▪ The applicant has legal authority to perform the work; and ▪ The applicant obtained rights-of-entry and agreements to indemnify and hold harmless the federal government.	▪ None.
Ch. 8	E	▪ Removal of mud, silt, or other accumulated debris; and, ▪ Must be conducted in conjunction with restoration of the facility.	▪ None.	▪ None.
Ch. 7	B	▪ Mold remediation to address immediate threat of additional damage; and, ▪ Includes post-remediation sampling to confirm remediation is complete.	▪ Mold remediation required as a result of poor facility maintenance or failure to take protective measures in a reasonable amount of time following the incident.	▪ Pre-remediation mold sampling is only eligible when sampling reveals presence of mold.

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 8	E	▪ Mold remediation when conducted in conjunction with restoring the facility; and, ▪ Includes post-remediation sampling to confirm remediation is complete.	▪ Mold remediation required as a result of poor facility maintenance or failure to take protective measures in a reasonable amount of time following the incident.	▪ Pre-remediation mold sampling is only eligible when sampling reveals presence of mold.
Ch. 7	B	▪ Emergency protective measures to address an immediate threat; ▪ Includes buttressing, bracing, or shoring; barricading and safety fencing; and flood protection, such as sandbagging; and ▪ Includes emergency repairs to prevent further damage.	▪ None.	▪ None.
Ch. 7	B	▪ Demolition to address an immediate threat; and ▪ May include demolition of private structures when collapse is imminent, and an immediate threat exists to the general public (subject to additional requirements).	▪ Removal of slabs or foundations that do not present a health or safety hazard (except structures in a buyout program funded by FEMA through HMGP); and, ▪ Removal or covering of concrete pads and driveways (except structures in a buyout program funded by FEMA through HMGP).	▪ If securing an unsafe structure and the surrounding area to prevent access is sufficient to alleviate the threat to public safety, demolition may not be necessary or eligible.
Ch. 7 & 8	B & I	▪ Safety inspections; ▪ Must be intended to establish whether a building is safe for entry, occupancy, and lawful use, as well as posting appropriate placards; and,	▪ Inspections associated with: ▪ A determination of whether the building needs to be elevated or relocated; ▪ Ensuring repairs are completed in accordance with	▪ None.

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
		▪ Applies to both public and private buildings.	applicable building codes and standards; ▪ Inspections for substantial damage compliance; ▪ Building inspections to ensure the removal of temporary fill and related materials used in flood fighting; and, ▪ inspections to ensure compliance with repair and substantial damage construction requirements.	
Ch. 6 & 8	E	▪ Post-earthquake inspection and evaluation of welded steel moment frames in buildings; and ▪ Must be intended to determine the level of disaster-related damage requiring repair.	▪ Preliminary assessment to determine which buildings are likely to have sustained damage to welded steel moment frame connections; ▪ Detailed analytical or experimental studies; and ▪ Inspections that do not yield discovery of significant connection damage attributable to the earthquake.	▪ The repair of the damaged frame connections to pre-earthquake design in accordance with FEMA 352, Chapter 6, is eligible, but only if FEMA approves a specific SOW for the repairs prior to the applicant performing the work; and ▪ Repair of the architectural finishes and fire retardants removed in the area of the damage are also eligible.
Ch. 6 & 8	E	▪ Restoration (permanent repair or replacement); ▪ Repair or replacement of buildings (to achieve pre-disaster design, capacity, and / or function); and, ▪ Repair or replacement of building components, vehicles or equipment with	▪ Tax assessments; ▪ Additional capacity necessary due to increased population or use, even if required by code; and, ▪ Americans Disabilities Act (ADA), if the applicant was notified of being in violation of a requirement prior to the incident and did	▪ Need date(s) of construction of all facilities in the project area; ▪ Check National Register of Historic Places or a State historic register; ▪ Identify whether the building is located in the 1% annual chance floodplain (0.2%

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
		items similar in age, condition, and capacity.	not bring the facility into compliance, then accessibility requirements related to the violation are ineligible.	annual chance floodplain for critical actions); ▪ Public housing authority facility(s) is only eligible for permanent work if Congress does not appropriate funds to HUD for emergency capital needs for the facility; ▪ Must consider the age of the building, roof, and building systems; evidence of regular maintenance; severity and impacts of incident when distinguishing between incident-related damage and pre-existing damage; and, ▪ Comply with federally required codes and standards when repairing or replacing building.

V. Work Eligibility Considerations for Contents

Contents includes furnishings, equipment, consumable supplies, files, records, research-related contents, animals, irreplaceable collections and individual objects, library books, and publications.

Table 43. Work Eligibility Considerations: Contents

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 7	B	▪ Address an immediate threat; and, ▪ Includes removal and storage of contents to minimize additional damage.	▪ None.	▪ None.

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 8	E	▪ Restoration (permanent repair or replacement); ▪ Replacement of destroyed contents with items similar in age, condition, and capacity; ▪ Condition assessment, stabilization, and treatment and treatment of irreplaceable items; ▪ Recovering and stabilizing records; and, ▪ Re-shelving, cataloging, and other work incidental to the replacement of library books and publications.	▪ Replacing used items with new items, unless a used replacement item is not reasonably available; ▪ Establishing new information databases; ▪ Manually re-entering data into new computers; ▪ Scanning re-established hardcopy files into computers to create digital files; ▪ Deciphering photocopies of damaged hard copies; ▪ Research-related contents and animal replacement, if a comparable item/animal is not available for purchase at a reasonable cost; and ▪ Replacement of rare books, collections, or objects.	▪ Contents may be replaced with different items used for the same general purpose; and, ▪ Eligible funding is capped at the estimated cost for equivalent items.

VI. Work Eligibility Considerations for Utilities

The following work eligibility considerations apply to:

- Water storage, treatment plants, and delivery systems;
- Power generation, transmission, distribution, and storage facilities (including, but not limited to, natural gas systems, wind turbines, generators, substations, and power lines);
- Sewage collection systems and treatment plants; and,
- Communication systems.

EHP laws, regulations, and EOs that frequently apply to work eligibility for utilities include NEPA, NHPA, ESA, CAA, CWA, and EOs 11988 and 11990 and to include potential local NFIP requirements.

Table 44. Work Eligibility Considerations: Utilities

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 6 & 7	B	▪ Emergency protective measures to address an immediate threat: ○ Includes buttressing, bracing, or shoring; barricading and safety fencing; and flood protection, such as sandbagging; and, ○ Includes emergency repairs to prevent further damage.	▪ Revenue lost due to shutdown of a utility; and, ▪ Increased operating costs, such as increased costs for obtaining an alternative source of power because of the shutdown of a power generation plant.	▪ Limited ROW clearance required to access a damaged facility may be eligible; ▪ For debris removal and permanent work, straight-time and overtime costs are eligible for both budgeted and unbudgeted labor; and, ▪ For emergency protective measures, only overtime costs are eligible for budgeted labor; for unbudgeted labor, both straight-time and overtime costs are eligible.
Ch. 6 & 8	F	▪ Restoration (permanent repair or replacement). ○ Includes components of the system, including buildings, structures, or systems, even if not contiguous; ○ Electrical conductor replacement subject to specific criteria; ○ Includes inspection or assessment of damaged components of a system; and, ○ May include inspection or assessment of an inaccessible structure or component of a system, but only when there is	▪ General post-disaster surveys, inspections, and assessments, such as video inspection of sewer lines.	▪ Eligible for mitigation and codes and standards upgrades.

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
		evidence of damage, such as when sunken ground appears above a water pipeline.		

VII. Work Eligibility Considerations for Parks, Recreation, and Other

EHP laws, regulations, and EOs that frequently apply to work eligibility for parks, recreation, and other include NEPA, NHPA, CZMA, CBRA, ESA, CWA, and EOs 11988 and 11990 and to include potential local NFIP requirements.

Table 45. Work Eligibility Considerations: Parks, Recreation, and Other

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
Ch. 7	B	▪ Emergency protective measures to address an immediate threat: ○ Includes buttressing, bracing, or shoring; barricading and safety fencing; and flood protection, such as sandbagging; and ○ Includes emergency repairs or stabilization to eliminate or lessen an immediate threat.	▪ Work performed under an exigent circumstance that restores the pre-disaster design and function of the facility in accordance with codes and standards is permanent work, not emergency work.	▪ None.
Ch. 8	G	▪ Restoration (permanent repair or replacement): ○ Includes replacement of trees, shrubs, and other vegetation during site restoration.	▪ Restoration of federally constructed beaches or shoreline protection facilities; ▪ Restoration of PNP parks and recreational facilities, including supporting facilities	▪ Restoration of engineered beaches is subject to specific eligibility criteria.

PAPPG Reference	Category	Eligible Work (including but not limited to)	Ineligible Work and Costs	Other Considerations
			such as roads, buildings, and utilities; ▪ Restoration of natural, unimproved features; ▪ Replacement of destroyed crops; and, ▪ Restoration of private and homeowners' association beaches or dunes,	

Appendix J: Cost-Effective Public Assistance Hazard Mitigation Measures

FEMA considers the following mitigation measures to be cost-effective PA mitigation if the measures do not exceed 100 percent of the eligible repair cost (prior to any insurance reductions). The mitigation measures must meet all eligibility requirements described under the Hazard Mitigation section in Chapter 8. There may be instances where these measures are required by codes or standards[527] (see the Codes and Standards section in Chapter 8). In these cases, the work is completed as part of the PA repair project and requires no additional cost-effectiveness evaluation. Resilience beyond that which is required by codes and standards is implemented as PA mitigation. All mitigation measures are subject to general eligibility requirements, including compliance with Environmental and Historic Preservation (EHP) laws, regulations, and EOs.

I. Drainage Structures

For Sections I.A and I.B (below), PA and EHP staff coordinate to determine whether a hydrologic and hydraulic (H&H) study is needed. Applicants must submit an H&H study to determine the appropriate culvert size with no adverse up or downstream impacts and National Flood Insurance Program regulations when:

- The facility is in a special flood hazard area;
- There is a potential adverse impact to the floodplain;[528]
- There is a potential adverse impact to a federally listed threatened or endangered species, critical habitat, or essential fish habitat;[529] or
- It is required to demonstrate compliance with the Clean Water Act.

A. Replace the structure with multiple structures or a larger structure. Applicants may use existing SLTT drainage criteria for sizing replacement culverts. Applicants must consider replacement structures with regard to the total drainage system.

B. For the purpose of erosion control, add properly designed entrance and exit structures, such as a headwall, wingwalls, flared aprons, or energy dissipation measures to increase efficiency and help to minimize scour and erosion. Depending on the severity of erosion, solutions for bank protection may include gabion baskets, rip rap, cast-in-place concrete, crushed stone or rock, grouted rip rap,[530] sheet-piling, geotextile fabric (for roads that were paved prior to the event), or similar measures to control erosion. Additionally, the use of nature-based solutions, which includes vegetation or a combination of vegetation and construction materials such as live fascines, vegetated geogrids, live crib walls, brush mattresses, root wads, or similar measures are eligible. Applicants should consider using eligible nature-

[527] 44 Code of Federal Regulations (C.F.R.) § 206.226(d).
[528] 44 C.F.R. §§ 9.11(d)(4) and 60.3(b)(7), (c)(10), and (d)(3).
[529] Endangered Species Act 16 U.S.C. §§ 1531-1544 and Magnuson-Stevens Fishery Conservation and Management Act.
[530] Projects involving grouted rip rap may be subject to an environmental assessment and may not be allowable in all instances.

based solutions such as bioswales, bioretention, rain gardens, and similar techniques that may be used in public drainage systems.

C. Culverts

1. Where the alignment of a culvert is inconsistent with existing water flow, realign the culvert vertically or horizontally or relocate the culvert to improve hydraulics and minimize erosion and scour. Applicants must consider realignment of structures with regard to the total drainage system.
2. Extend the culvert discharge to mitigate erosion and scour by extending the discharge end beyond the toe of the embankment.
3. Install a debris barrier to prevent debris blockage or fins designed to orient floating debris for passage through the culvert.
4. Install a debris barrier riser to allow debris to float up with the rising floodwaters without blocking flow into the culvert.

Example: Relief Culvert

Adding a relief culvert located at the same crossing site as a damaged culvert and in the embankment above the flow line of the primary culvert or located upstream of the main culvert. A relief culvert provides an alternate route for the flow if the main culvert is over capacity or gets plugged and prevents sedimentation through the high-flow scouring action.

II. Transportation Facilities

A. Bridges

1. Where traffic counts are low, replace with low-water crossings.
2. Install cables to restrain a bridge from being knocked off piers or abutments during floods or earthquakes.
3. Install girder and deck uplift tie-downs to prevent their displacement from the substructure.
4. Install Longitudinal Peaked Stone Toe Protection with nature planting, upstream of a failed abutment, to provide a stable floodplain bench for the protection of the abutment and the adjoining bridge approach. Consider other relevant nature-based solutions such as engineered logjams, log vanes or log bendway weir.

B. Marine pier ramps: If attached to decking, install open decking or floating decking with uplift-resistant tie-downs and fasteners.

C. Roadways and railways: Where shoulders are susceptible to overflow from adjacent water courses, stabilize shoulders and embankments with geotextile fabric (such as an erosion control blanket/rolled erosion control product (RECP) or a turf reinforcement mat) and revetments.

D. Roadways: Use geotextile drainage blankets between the pavement section and subbase to strengthen subgrade.

III. Mechanical, Electrical, Plumbing Components

A. Provide seismic bracing for electrical lines, conduit, piping, ductwork, water heaters, and other mechanical, electrical, plumbing (MEP) equipment.

B. Roof-mounted equipment: Secure to roof top via a continuous load path, using tie-downs, straps, or other anchoring systems that will resist expected wind forces.

C. Elevate or dry floodproof components or systems vulnerable to flood damage, including equipment controls, electrical panels; heating, ventilation, and air conditioning/machinery rooms; emergency generators; and fuel tanks. When wiring cannot be elevated, replace with equipment suitable for submerged applications.

D. Install switches, circuit isolation and/or quick connect capability to facilitate rapid connection of backup power for any damaged or susceptible mechanical and electrical components.

E. Install camlocks, transfer switches, and electrical panels to facilitate the connection of portable emergency generators.

IV. Pipes

A. Install pipe joint restraints, flexible piping at pipe/conduit connections, or replace pipes with more ductile material.

B. Install continuous lining or encasement to prevent infiltration or structural collapse.

C. Underground Pipes: Install shut-off valves so that damaged sections of pipe can be isolated.

V. Water/Wastewater

A. Pumps: If pumps and their attached motors are damaged by stormwater inundation, replace them with submersible or inline pumps as appropriate.

B. Sewer access covers: Elevate to the hydraulic grade line. When elevation is not feasible or practicable, install devices to prevent infiltration into access holes such as cast-iron watertight frames and covers.

C. Well systems: Seal exposed portions of well casing or raise the elevation of the well head to prevent infiltration of flood waters.

D. Raw water intakes: Install buttressing to prevent damage from erosion, scour, and flood debris.

VI. Electric Power Systems

A. Provide looped distribution service or other redundancies in the electrical service to critical facilities, such as hospitals and fire stations. This measure does not entail overall power grid capacity expansion.

B. Install surge suppressors and lightning arrestors.

C. Transformers:

   1. Elevate pad transformers above the base flood elevation.
   2. Support pole-mounted transformers with multiple poles.

D. Power poles:

1. Replace damaged poles with higher-rated poles (preferably two classes stronger) of the same or different material. When replacing poles with higher-rated poles, install guys and anchors to provide lateral support for poles supporting pole-mounted transformers, regulators, capacitor banks, reclosers, air-break switches, or other electrical distribution equipment.
2. Add cross-bracing to H-frame poles to provide additional strength.
3. Power lines: Add guy-wires or additional support.

VII. Storage Tanks

A. Anchor or otherwise protect from movement by strengthening or stiffening base connections.

B. Install self-initiating disconnects and shut-off values between tanks and distribution lines to minimize damage and leaks.

VIII. Buildings and Structures

A. For small support buildings subject to uplift or rollover from high winds, securely anchor the buildings to foundations to prevent toppling or becoming missile hazards.

B. Elevate, wet floodproof, or dry floodproof buildings. Dry floodproofing may include installing flood barriers. Wet or dry floodproofing may include nature-based solutions such as rain gardens, bioswales, constructed or restored wetlands that reduce flood risk. Nature-based solutions used alone however do not provide wet or dry floodproofing.

C. Footings: Where spread footings have been undercut by scour, underpin footings.

D. Siding: Replace with a stronger siding to prevent future disaster damage (e.g., wind, wildfire) with stronger attachments to the wall sheathing and structure.

E. Vents: Replace with water-resistant vents.

F. Non-structural building components: Brace interior walls, partitions, parapets, anchor veneer or cladding, suspended light features, drop ceilings, soffits, and other non-structural elements that could collapse and cause injury or block safe exit of a building during an earthquake or high-wind event.

G. Furnishings: Provide seismic ties, straps, or clips to secure replaced furniture, cabinets, computers, bookcases, and other furnishings.

H. For buildings and structures outside of the wildland-urban interface (where FEMA building code policy already requires these mitigation measures), create defensible space around facilities or structures with wildfire risk by removing or reducing the volume of flammable vegetation. The volume of vegetation should be minimized (e.g., hardscaping) by thinning or replacing flammable vegetation with less flammable, non-invasive species. Less flammable vegetation includes high-moisture plants, trees with low sap or resin content, plants with thick leaves, and drought tolerant vegetation. Native species are preferable as non-native options are less likely to withstand weather conditions, creating a fire risk.

I. For buildings and structures outside of the wildland-urban interface (where FEMA building code policy already requires these mitigation measures), non-combustible construction materials: Replace and upgrade construction materials with non-combustible alternatives for facilities with wildfire risk.

J. Roofs:

1. Install hurricane clips, fasteners, anchors, straps, and connectors that are compatible with the roof system and corrosion-resistant in coastal areas.

2. Strengthen the high-wind pressure areas (e.g., corner zones, roof soffits, overhangs).
3. Strengthen roof openings, such as hatches and skylights.
4. Low slope roofs: Replace and upgrade materials for entire roof covering with a fully adhered roof covering, such as a modified bitumen membrane roof. FEMA does not provide PA mitigation funding for loose laid insulation or membranes as punctures can cause large amounts of water intrusion. Additionally, FEMA does not provide PA mitigation funding for loose laid roof membranes with loose ballast stones as the stones can become projectiles in high winds and cause damage.
5. Gable roofs: Replace and upgrade materials for the gable-end framing with hipped roof framing to reduce wind forces (lower edge pressure; reduced projected wind area) and strengthen the roof framing.
6. Gutters and downspouts: Upgrade to direct water away from the structure to prevent interior or basement water damage.

K. Doors and Windows:
   1. Upgrade the weather stripping to prevent water infiltration.
   2. Replace doors, door frames, hinges, and hardware with wind-resistant units.
   3. Strengthen windows.
   4. Replace glass with impact-resistant material.
   5. Install shutters on windows:
      a. Of critical facilities, such as hospitals.
      b. On the lower floors of noncritical facilities most likely to be struck by debris.
      c. Of buildings with very high-value contents that can be damaged by water (such as libraries and document centers).
      d. Of buildings when failure of roofing materials or other portions of nearby structures could create impact hazards.

L. Replace impervious paved surfaces with permeable pavement alternatives. Alternatives include permeable concrete, porous asphalt, permeable interlocking pavers, plastic grid pavers, or other systems that enable water infiltration while maintaining structural integrity. Permeable pavement projects should include aggregate and geotextile fabric layers to meet project-specific requirements such as desired storage capacity, pavement strength, or subgrade composition. [531]

M. Construct new or install pre-fabricated tornado or hurricane safe room. Safe rooms must be part of the footprint of the facility that is being repaired due to damage caused by the declared incident. Safe Rooms should provide life safety protection and be designed to meet the design and construction criteria in *Safe Rooms for Tornadoes and Hurricanes* (FEMA P-361)[532].

IX. Signage

A. Replace sign panels and their supports with a stronger type of system of supports and panels. Consider using multiple support posts and stronger panels and fasteners.

[531] For more information, refer to: Stormwater Best Management Practice, Permeable Pavements | epa.gov.
[532] For more information, refer to: *Safe Rooms for Tornadoes and Hurricanes* (FEMA P-361).

Appendix K: Snow Declarations

For eligibility to be considered, the STT must request and be issued a major disaster declaration that must include a request for snow assistance as part of that declaration. Snow related activities are not eligible under Emergency Declarations. Snow-related activities, including snow removal, de-icing, salting, snow dumps, and sanding of roads and other eligible facilities, is only an eligible emergency protective measure when a winter storm results in record or near-record snowfall.[533] FEMA considers near record as being within 10 percent of the record snowfall. FEMA authorizes snow assistance by county based on a finding that the county received record or near-record snowfall or meets the contiguous county criteria as described below. FEMA evaluates Tribal Nation lands either as part of a requested county or separately.

I. Record or Near-Record Snowfall

FEMA utilizes data collected by the National Oceanic and Atmospheric Administration's National Centers for Environmental Information (NCEI) to identify the historical 1-, 2-, and 3-day snowfall records for each county. For current event snowfall, FEMA relies primarily on snowfall measurements taken at National Weather Service (NWS) Cooperative Network Stations but accepts measurements from other sources if those measurements are verified as reasonable and accurate by the NWS. Historical 1-, 2-, and 3-day snowfall records by county[534] and daily snowfall reports by county[535] are available on the NCEI Snow Climatology Database (SCDB). FEMA follows the following process to determine record or near-record snowfalls:

- Compare current snowfall amounts with the historical record snowfall amounts for a like number of days without regard for the month in which the record snowfall or current event occurred.
- For multiple-day snowstorms, counties or Tribal Nation lands that meet the 1-day record or near-record requirement on any 1 day, or the 2-day record or near record over 2 consecutive days, or the 3-day record or near record over 3 consecutive days, etc., meets the record or near-record criteria for that county or tribal lands.
- FEMA relies on the NWS to determine the duration of the snowstorm.
- When data from multiple NWS-verified sources exist within a county or Tribal Nation lands, FEMA compares the highest current event snowfall reported by the NWS within that county or Tribal Nation land with the highest historical record snowfall for that county or Tribal Nation land. In counties with multiple recording stations, the observed/recorded snowfall measurements demonstrating a record or near record storm must correspond to a single reporting station not an average or combination of measurement across multiple reporting stations within a county.
- For counties or Tribal Nation lands that do not have NCEI or NWS historical record snowfall data, use the historical record from the nearest NWS Cooperative Network Station in an adjacent county or Tribal Nation land, even if located in an adjacent state, for determining historical snowfall records.

[533] 44 Code of Federal Regulations (C.F.R.) § 206.227.
[534] For more information, refer to: Snowfall Extremes | National Centers for Environmental Information (NCEI) | noaa.gov.
[535] For more information, refer to: Daily U.S. Snowfall and Snow Depth | National Centers for Environmental Information (NCEI) | noaa.gov.

- If current event snowfall data are not available from the NWS for a county or Tribal Nation land, use the nearest NWS Cooperative Network Station data from an adjacent county, even if located in an adjacent state.
- FEMA may designate a county or Tribal Nation land that does not receive a record or near-record snowfall but is contiguous to a county (generally referred to as a "core county") that does receive a record or near-record snowfall, for snow assistance if the county or Tribal Nation land has current event snowfall that meets or exceeds the current event snowfall of the core county, to which it is contiguous. Base this comparison on the highest current event snowfall received by each county as reported by the NWS.
- Consider counties or Tribal Nation areas that experience snowfalls occurring over a period exceeding 3 consecutive days that do not reach record or near-record snowfalls during a 3-day period, and for which there are no historical snowfall records for a period exceeding 3 days with NCEI or NWS, on a case-by-case basis.

Terminology

A **core county** is a county that has a record or near record snowfall with PA costs that exceed the annually established countywide per capita impact indicator and is designated for snow assistance under a major disaster declaration.

A **contiguous county** is a county in the same state that shares a common border with a core county without geographic separation other than by a minor body of water, typically not exceeding one mile between the land areas of such counties.

II. Winter Storm or Snowstorm Declaration Requests

The request for a major disaster declaration must include a request for snow assistance as part of that declaration. All such requests are subject to the requirements and processes established in the Stafford Act and FEMA regulations.[536] In addition to the information required in every declaration request, requests for snow assistance must include the following information:

- Identification of core and contiguous counties for which a snowstorm declaration is requested;
- Duration of snowfall, as identified or confirmed by the NWS; and,
- For each requested county or tribal land, daily snowfall totals from NWS stations or NWS-verified sources and historical record snowfall data from the NCEI.

Generally, the current event weather and snowfall information is included in a statement or report from the NWS describing the event. FEMA only includes costs related to snow activities as part of the preliminary damage assessment data for counties or tribal lands that meet the record or near-record criteria or qualify as contiguous counties. Other categories of work, including permanent work, may be authorized for snowstorm or winter storm declarations as appropriate.

[536] 44 C.F.R. § 206 Subpart B (206.31–48).

Appendix L: Validation of Applicant-Provided Cost Estimates

This appendix provides a checklist that FEMA PA staff must use to review and validate cost estimates submitted to FEMA for large permanent work projects. FEMA staff may also use relevant portions of this checklist for emergency work.

The steps for validating applicant-provided cost estimates are as follows:

1. **Verify that the estimate:**

☐ Is prepared by a licensed professional engineer or other estimating professional, such as a licensed architect or certified professional cost estimator[537] who certifies that the estimate was prepared in accordance with industry standards;

☐ Includes certification that the estimated cost directly corresponds to the repair of the agreed upon damage;

☐ Is based on unit costs for each component of the scope of work and not a lump sum amount; and,

☐ Contains a level of detail sufficient for FEMA to validate that all components correspond with the agreed-upon scope of work.

2. **Review the scope of work and cost estimate to verify only eligible items are included.**

☐ The scope of work items in the cost estimate are required based on the agreed-upon damage description and dimensions.

☐ The scope of work included ineligible items, and FEMA has removed the ineligible components from the estimate. Documentation detailing the components removed and reason for removal is attached.

☐ The scope of work included ineligible items, and FEMA is returning the estimate to the applicant to revise.

3. **Determine whether unit costs are from an approved source of industry standard information and whether current cost data publications were used.[538]**

☐ The applicant used the following appropriate cost estimating resource(s):

  ☐ Industry standard construction cost estimating resource(s):

[537] In lieu of a license or certification, an individual with professional experience and proficiency in the field of cost estimating may prepare and sign the cost estimate.
[538] There are numerous sources that may be used in the preparation of cost estimates.

- ☐ RSMeans
- ☐ XActimate
- ☐ BNi Costbooks
- ☐ Marshall & Swift
- ☐ "Sweet's Unit Cost Guide"
- ☐ Other_____

☐ Local cost data from_____

☐ Contract unit costs from recently completed projects.

☐ Other: _____

☐ FEMA returned the estimate to the applicant to revise as the applicant did not use an appropriate cost estimate resource.

4. Determine the components of unit costs.[539]

☐ The estimate contained sufficient information related to the components of the unit costs:

- ☐ Each unit cost represented a complete and in-place cost that included all labor, equipment, materials, small tools, incidentals, and hauling costs necessary to complete that element of work.
- ☐ Unit costs were analyzed to determine if general contractor overhead and profit were included in the unit costs:
  - ☐ Both general contractor and subcontractor overhead and profit are included in the unit costs and these costs are not duplicated elsewhere in the estimate or in the Cost Estimating Format (CEF).
  - ☐ Overhead and profit are not included in the unit costs.
  - ☐ Overhead and profit are duplicated in the estimate.
  - ☐ Costs for surveying, construction inspection, and permit compliance fees are not duplicated (i.e., not included within a unit cost and separately in the estimate).

[539] Ensure that the components that make up the unit costs are fully understood. The purpose of this review is to ensure that components of the unit costs are not duplicated elsewhere in the cost estimate.

☐ The estimate did not contain sufficient information related to the components of the unit costs. FEMA requested additional information from the applicant.

5. Validate the cost estimate for completeness and reasonableness.

☐ The costs of work items are reasonable based on a representative sample.

☐ FEMA has determined costs for items of work in the estimate to be unreasonable (see attached). Therefore, the estimate was returned to applicant to revise.

☐ All items of work included in the cost estimate are eligible.

☐ FEMA has removed ineligible items of work from the cost estimate (see attached).

☐ All work activities required to complete the work are quantified with unit costs.

☐ The cost estimate included lump sum amounts for work activities that need to be adjusted to unit prices. FEMA has returned the estimate to the applicant for revision.

☐ The appropriate locality adjustment factor from the cost estimating publication is used for each line item, as applicable. Where historical costs were used, a locality adjustment was not applied, but cost escalation factors were added.

☐ The appropriate locality adjustment factor from the cost estimating publication was not used (see attached) or, as historical costs were used, a locality adjustment was inappropriately applied.

☐ The following cost items are each within 10 percent of either 1) the local average weighted unit prices or 2) industry standard construction cost data:

  ☐ At least six of the ten largest cost items (or all cost items if there are less than ten), reviewed individually; and,

  ☐ At least 25 percent of the remaining cost items.

☐ Cost items checked are not within 10 percent of the local average weighted unit prices or industry standard construction cost data; therefore, the estimate was returned to applicant to revise.

Date Review Completed _____

Date of Information Requests to Applicant _____

Name of Reviewer _____

Reviewer Signature _____

Appendix M. Consensus-Based Codes, Specifications, and Standards

The most recent edition of codes, specifications, and standards from the following organizations, as published at the time of the disaster declaration, will be applied to the design and construction of certain facilities (currently limited to buildings, electrical power, roads, bridges, drinking water, and wastewater). FEMA may issue updates to these codes in a separate document before the version 6 release of the "Public Assistance Program and Policy Guide" (PAPPG).

These codes, specifications, and standards apply only to the repair and replacement of disaster-damaged elements and facilities. This appendix does not make costs for regular operations and maintenance eligible for assistance.

Eligible building projects that involve substantial improvement or new construction in flood hazard areas must meet the minimum floodproofing or elevation standards set out in 44 C.F.R. § 9.11(d), or the standards of the International Code Council (e.g., International Building Code, International Existing Building Code, International Energy Conservation Code, or International Residential Code), whichever requirement is stricter.

When triggered by these FEMA-identified codes, specifications, and standards, applicants must include the latest applicable criteria, including but not limited to the following:

- In areas where tornado shelter design wind speeds are 250 mph or greater, the Applicant must incorporate a storm shelter or safe room (designed to International Code Council (ICC) 500 standards) for elementary and secondary schools with an occupant load of 50 or more, Emergency Operations Centers (EOCs), 911 call stations, fire stations, rescue stations, ambulance stations, and police stations.
- Concerning requirements for wind, seismic, flood, temperature, ice and snow, and wildfire the Applicant must incorporate applicable design and construction standards contained in the International Building Code (IBC), International Existing Building Code (IEBC), International Residential Code (IRC) and their referenced standards [e.g., American Society of Civil Engineers (ASCE)/Structural Engineering Institute (SEI) 7; 24 and 41], and International Wildland-Urban Interface Code (IWUIC).

Quick reference tables covering the application of codes, specifications, and standards to structural building components (Table 1) and non-structural building components (Table 2) can be found in the *Consensus-Based Codes, Specifications and Standards for Public Assistance* Frequently Asked Questions,[540] along with a table of the NFIP technical bulletins and their areas of applicability (Table 3). The FAQs also contain reference tables specific to potable water facilities, wastewater facilities, roads and bridges and electric power facilities.

[540] For more information, refer to: Section 1235(b) | Consensus-Based Codes and Standards | FEMA.gov.

Table 46. Standard Setting Organization and Consensus-Based Codes, Specifications, and Standards by Facility Type

Facility Type	Standard Setting Organization and Consensus-Based Codes, Specifications and Standards
Buildings	▪ **American Concrete Institute (ACI):** ACI 318-19, "Building Code Requirements for Reinforced Concrete; ACI 301 Specifications for Concrete Construction; ACI 318, Building Code Requirements for Structural Concrete and Commentary ▪ **American Institute of Steel Construction (AISC):** AISC 325, Steel Construction Manual; ANSI/AISC 303, Code of Standard Practice for Steel Buildings and Bridges; ANSI/AISC 360, Specification for Structural Steel Buildings; ANSI/AISC 341, Seismic Provisions for Structural Steel Buildings ▪ **American Iron and Steel Institute (AISI):** AISI S100, North American Specification for the Design of Cold-formed Steel Structural Members ▪ **American National Standards Institute and FM Approvals (ANSI/FM Approvals):** ANSI/FM Approvals 2510-2020, American National Standard for Flood Mitigation Equipment ▪ **American Society of Civil Engineers (ASCE):** ASCE 24, Flood Resistant Design and Construction; ASCE 41, Seismic Evaluation and Retrofit of Existing Buildings; ASCE/SEI 7, Minimum Design Loads and Associated Criteria for Buildings and Other Structures; ASCE 8, Standard Specification for the Design of Cold-formed Stainless-Steel Structural Members; ASCE 49, Wind Tunnel Testing for Buildings and Other Structures ▪ **American Society Mechanical Engineers (ASME):** ASME/A17.1/CSA B44-16, Safety Code for Elevators and Escalators ▪ **American Society of Testing and Materials (ASTM):** ASTM E1886, Standard Test Method for Performance of Exterior Windows, Curtain Walls, Doors and Impact Protective Systems Impacted by Missile(s) and Exposed to Cyclic Pressure Differentials; ASTM E1996, Specification for Performance of Exterior Windows, Curtain Walls, Doors and Impact Protective Systems Impacted by Windborne Debris in Hurricanes ▪ **American Wood Council (AWC):** NDS, National Design Specification (NOS) for Wood Construction-with NOS Supplement ▪ **American Welding Society (AWS):** AWS D1.4/D1.4M Structural Welding Code-Reinforcing Steel ▪ **Facilities Guideline Institute (FGI):** (FGI), Guidelines for Design and Construction of Hospitals/Outpatient ▪ **International Association of Plumbing and Mechanical Officials (IAPMO):** IAPMO UMC Uniform Plumbing Code, UPC Uniform Mechanical Code ▪ **International Code Council (ICC):** International Building Code (IBC); International Existing Building Code (IEBC); International Residential Code (IRC); International Energy Conservation Code (IECC); International Wildland-Urban Interface Code (IWUIC); International Plumbing Code (IPC); International Mechanical Code (IMC); International Fire Code (IFC); ICC 500, International Fire Code (IFC); ICC A117.1, ICC/NSSA Standard on the Design and Construction of Storm Shelters; ICC 600, Standard for Residential Construction in High-wind Regions

Facility Type	Standard Setting Organization and Consensus-Based Codes, Specifications and Standards
	▪ **National Association of Architectural Metal Manufacturers (NAAMM):** NAAMM FP 1001, Guide Specifications for Design of Metal Flag Poles ▪ **National Fire Protection Association (NFPA):** NFPA 70, National Electrical Code (NEC); NFPA 1142, Standard on Water Supplies for Suburban and Rural Firefighting; NFPA 1144, Standard for Reducing Structure Ignition Hazards from Wildland Fire ▪ **Steel Joist Institute (SJI):** SJI 100 Standard Specification Load Tables and Weight Tables for Steel Joists and Joist Girders K-Series, Series, DHL-Series, Joist Girders; SJI 200, Standard Specification for Composite Steel Joists, CJ-Series ▪ **The Aluminum Association (TAA):** ADM1, Aluminum Design Manual, Part 1 - A Specification for Aluminum Structures ▪ **The Masonry Society (TMS):** TMS 402, Building Code for Masonry Structures; TMS 602, Specification for Masonry Structures ▪ **Timber Piling Council (TPC):** TPC, Timber Pile Construction
Electric Power	▪ **American Society of Civil Engineers (ASCE):** ASCE MOP 74 Guidelines for Electrical Transmission Line Structural Loading; ASCE 48 Design of Steel Transmission Pole Structures ▪ **Institute of Electrical and Electronics Engineers:** IEEE 1527, Recommended Practice for the Design of Busywork Located in Seismic Active Areas; IEEE 693 Recommended Practice for Seismic Design of Substations ▪ **U.S. Department of Agriculture Rural Electric Service (RUS):** RUS Bulletins Transmission - 1724E-200, 1724E-204, 1724E-206, 1724E-214, 1724E-216, 1724E-224, 1724E-226, 1724E-300, 1728F-803, 1728F-804, 1728F-806, 1728F-810, 1728F-811, 1728H-701
Roads and Bridges	▪ **American Association of State Highway and Transportation Officials (AASHTO):** A Policy on Geometric Design of Highways and Streets; Standard Specifications for Highway Bridges; LRFD Bridge Construction Specifications; LRFD Bridge Design Specifications; LRFD Movable Highway Bridge Design Specifications; AASHTO/AWS D1.5M/D1.5 Bridge Welding Code,; LRFD Guide Specifications for Accelerated Bridge Construction; Guide Specifications for LFRD Seismic Bridge Design; Guide Specifications for Design of Bonded FRP Systems for Repair or Strengthening of Concrete Bridge Elements; Guide Specifications for Design and Construction of Segmental Concrete Bridges, Guide Specifications for Wind Loads on Bridges During Construction; Guidelines for Geometric Design of Low-Volume Local Roads; M288 Standard Specifications for Geosynthetic Specifications for Highway Applications; Manual on Uniform Traffic Control (MUTCD) ▪ **American Concrete Institute (ACI):** ACI-548.10Specification for Type MMS (Methyl Methacrylate Slurry) Polymer Overlays for Bridge and Parking Garage Decks; ACI-548.8 - Specification for Type EM (Epoxy Multi-Layer) Polymer Overlay for Bridge and Parking Garage Decks; ACI-548.9 - Specification for Type ES (Epoxy Slurry) Polymer Overlays for Bridge and Parking Garage Decks ▪ **FAA AC150/5300 Airport Design**

Facility Type	Standard Setting Organization and Consensus-Based Codes, Specifications and Standards
Potable Water	▪ **American Society of Testing and Materials (ASTM):** ASTM-F-480-17, Standard Specification for Thermoplastic Well Casing Pipe and Couplings Made in Standard Dimension Ratios (SDR) ▪ **National Fire Protection Association (NFPA):** 1141 Standard for Fire Protection for Land Development in Wildland, Rural, and Suburban Areas ▪ **National Standards Foundation (NSF):** NSF Standard 14, Plastic Piping System Components and Related Materials. NSF Standard 61, Drinking Water System Components – Health Effects ▪ **Great Lakes Upper Mississippi River Board of Provincial Public Health and Environmental Managers:** Recommended Standards for Water Works
Wastewater	▪ **American Society of Testing and Materials (ASTM):** ASTM D-2321-18, Standard Practice for Underground Installation of Thermoplastic Pipe for Sewers and Other Gravity Flow Installations; ASTM F-1417, Standard Practice for Installation Acceptance of Plastic Gravity Sewer Lines Using Low-Pressure Air; ASTM C-12, Standard Practice for Installing Vitrified Clay Pipe Lines; ASTM C- 828, Standard Test Method for Low Pressure Air Test of Vitrified Clay Pipe Lines; ASTM C-478, Standard Specification for Circular Precast Reinforced Manhole Sections; ASTM C-1244, Standard Test Method for Concrete Sewer Manholes Negative Air Pressure (Vacuum) Test Prior to Backfill ▪ **Great Lakes Upper Mississippi River Board of Provincial Public Health and Environmental Managers:** Recommended Standards for Wastewater Facilities

190 Cal.App.3d 521, 234 Cal.Rptr. 795

CARMEL VALLEY FIRE PROTECTION DISTRICT et al., Plaintiffs and Respondents,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.
RINCON DEL DIABLO MUNICIPAL WATER DISTRICT et al., Plaintiffs and Respondents,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.
COUNTY OF LOS ANGELES, Plaintiff and Respondent,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.

No. B006078., No. B011941., No. B011942.
Court of Appeal, Second District, Division 5, California.
Feb 19, 1987.

SUMMARY

The trial court, in separate proceedings brought by three counties against the state for reimbursement of funds expended by the counties in complying with a state order to provide protective clothing and equipment for county fire fighters, issued writs of mandate compelling the state to reimburse the counties. Previously, the counties had filed test claims with the State Board of Control for reimbursement of similar expenses. The board determined that there was a state mandate and the counties should be reimbursed. The state did not seek judicial review of the board's decision. Thereafter, a local government claims bill, Sen. Bill No. 1261 (Stats. 1981, ch. 1090, p. 4191) was introduced to provide appropriations to pay some of the counties' claims for the state-mandated costs. After various amendments, the legislation was enacted into law without the appropriations. The counties then sought reimbursement by filing petitions for writs of mandate and complaints for declaratory relief. (Superior Court of Los Angeles County, No. C437471, Norman L. Epstein, Judge; No. C514623 and No. C515319, Jack T. Ryburn, Judge.) *522

In a consolidated appeal, the Court of Appeal affirmed with certain modifications. It held that, by failing to seek judicial review of the board's decision, the state had waived its right to contest the board's finding that the counties' expenditures were state mandated. Similarly, it held that the state was collaterally estopped from attacking the board's findings. It also held that the executive orders requiring the expenditures constituted the type of "program" that is subject to the constitutional imperative of subvention under Cal. Const., art. XIII B, § 6. The court also held that the trial courts had not ordered an appropriation in violation of the separation of powers doctrine, and that the trial courts correctly determined that certain legislative disclaimers, findings, and budget control language did not exonerate the state from its constitutionally and statutorily imposed obligation to reimburse the counties' state-mandated costs. Further, the court held that the trial courts properly authorized the counties to satisfy their claims by offsetting fines and forfeitures due to the state, and that the counties were entitled to interest. (Opinion by Eagleson, J., with Ashby, Acting P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Estoppel and Waiver § 23--Waiver--Trial and Appeal--Failure to Seek Judicial Review of Administrative Decision--Waiver of Right to Contest Findings.
In a proceeding by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state waived its right to contest findings made by the State Board of Control in a previous proceeding. The board found that the costs were state-mandated and that the county was entitled to reimbursement. The state failed to seek judicial review of the board's decision, and the statute of limitations applicable to such review had passed. Moreover, the state, through its agents, had acquiesced in the board's findings by seeking an appropriation to satisfy the validated claims, which, however, was rebuffed by the Legislature.

(2)
Estoppel and Waiver § 19--Waiver--Requisites.

Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable ***523** belief that it has been waived. A right that is waived is lost forever. The doctrine of waiver applies to rights and privileges afforded by statute.

[See **Cal.Jur.3d,** Estoppel and Waiver § 21; **Am.Jur.2d,** Estoppel and Waiver § 154.]

(3a, 3b, 3c, 3d)
Judgments § 81--Res Judicata--Collateral Estoppel--County's Action for Reimbursement of State-mandated Costs--Findings of State Board of Control.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state was collaterally estopped from attacking the findings made, in a previous proceeding, by the State Board of Control that the costs were state-mandated and that the county was entitled to reimbursement. The issues were fully litigated before the board. Similarly, although the state was not a party to the board hearings, it was in privity with those state agencies which did participate. Moreover, a determination of conclusiveness would not work an injustice.

(4)
Judgments § 81--Res Judicata--Collateral Estoppel--Elements.
In order for the doctrine of collateral estoppel to apply, the issues in the two proceedings must be the same, the prior proceeding must have resulted in a final judgment on the merits, and the parties or their privies must be involved.

(5)
Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--Privity--Governmental Agents.
The agents of the same government are in privity with each other for purposes of collateral estoppel, since they represent not their own rights but the right of the government.

(6)
Judgments § 96--Res Judicata--Collateral Estoppel--Matters Concluded-- Questions of Law.
A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice.

(7)
State of California § 11--Fiscal Matters--Reimbursement to County for State-mandated Costs--New Programs.
A "new program," for purposes of determining whether the program is subject to the constitutional imperative of subvention under Cal. Const., art. XIII B, § 6, is one which carries out the governmental function of providing services ***524** to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(8)
State of California § 7--Actions--Reimbursement of County Funds for State-mandated Costs--New Programs.
In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with state executive orders to provide protective clothing and equipment to county fire fighters, the trial court properly determined that the executive orders constituted the type of "new program" that was subject to the constitutional imperative of subvention under Cal. Const., art. XIII B, § 6. Fire protection is a peculiarly governmental function. Also, the executive orders manifest a state policy to provide updated equipment to all fire fighters, impose unique requirements on local governments, and do not apply generally to all residents and entities in the state, but only to those involved in fire fighting.

(9)
Constitutional Law § 37--Doctrine of Separation of Powers--Violations of Doctrine--Judicial Order of Appropriation.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the trial court's judgment granting the writ was not in violation of the separation of powers doctrine. The court order did not directly compel the Legislature to appropriate funds or to pay funds not yet appropriated, but merely affected an existing appropriation.

(10)
Constitutional Law § 40--Distribution of Governmental Powers--Between Branches of Government--Judicial Power and Its Limits--Order Directing Treasurer to Pay on Already Appropriated Funds.
Once funds have been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures from such funds. Thus, a judgment which ordered the State Controller to draw warrants and directed the State Treasurer to pay on already-appropriated funds permissibly compelled performance of a ministerial duty.

(11)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to County for State-mandated Costs.
Appropriations affected by a court order need not specifically refer to the particular expenditure in question in order to be available. Thus, in a proceeding brought by a county for a writ of mandate to compel reimbursement ***525** by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the funds appropriated for the Department of Industrial Relations for the prevention of industrial injuries and deaths of state workers were available for reimbursement, despite the fact that the funds were not specifically appropriated for reimbursement. The funds were generally related to the nature of costs incurred by the county.

(12a, 12b)
Fires and Fire Districts § 2--Statutes and Ordinances--County Compliance With State Executive Order to Provide Protective Equipment--Federal Mandate.
A county's purchase of protective clothing and equipment for its fire fighters was not the result of a federally mandated program so as to relieve the state of its obligation (Cal. Const., art. XIII B, § 6) to reimburse the county for the cost of the purchases. The county had made the purchase in compliance with a state executive order. The federal government does not have jurisdiction over local fire departments and there are no applicable federal standards for local government structural fire fighting clothing and equipment. Hence, the county's obedience to the state executive orders was not federally mandated.

(13)
Statutes § 20--Construction--Judicial Function--Legislative Declarations.
The interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility.

(14a, 14b)
Statutes § 10--Title and Subject Matter--Single Subject Rule.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters (Cal. Admin. Code, tit. 8, §§ 3401-3409), the trial court properly invalidated, as violating the single subject rule, the budget control language of Stats. 1981, ch. 1090, § 3. The express purpose of ch. 1090 was to increase funds available for reimbursing certain claims. The budget control language, on the other hand, purported to make the reimbursement provisions of Rev. & Tax. Code, § 2207, and former Rev. & Tax. Code, § 2231, unavailable to the county. Because the budget control language did not reasonably relate to the bill's stated purpose, it was invalid.

(15)
Statutes § 10--Title and Subject Matter--Single Subject Rule.
The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in a statute's ***526** title. The rule's primary purpose is to prevent "logrolling" in the enactment of laws, which occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which might otherwise not have passed had the legislative mind been directed to them. However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose.

(16)
Statutes § 5--Operation and Effect--Retroactivity--Reimbursement to County for State-mandated Costs.
The budget control language of Stats. 1981, ch. 1090, § 3, which purported to make the reimbursement provisions of

Rev. & Tax. Code, § 2207 and former Rev. & Tax. Code, § 2231, unavailable to a county seeking reimbursement (Cal. Const., art. XIII B, § 6) for expenditures made in purchasing state-required protective clothing and equipment for county fire fighters (Cal. Admin. Code, tit. 8, §§ 3401-3409), was invalid as a retroactive disclaimer of the county's right to reimbursement for debts incurred in prior years.

(17)
State of California § 13--Fiscal Matters--Limitations on Disposal-- Reimbursement to Counties for State-mandated Costs.
The budget control language of § 28.40 of the 1981 Budget Act and § 26.00 of the 1983 and 1984 Budget Acts did not exonerate the state from its constitutional and statutory obligations to reimburse a county for the expenses incurred in complying with a state mandate to purchase protective clothing and equipment for county fire fighters. The language was invalid in that it violated the single subject rule, attempted to amend existing statutory law, and was unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget.

(18)
Constitutional Law § 4--Legislative Power to Create Workers' Compensation System--Effect on County's Right to Reimbursement.
Cal. Const., art. XIV, § 4, which vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system, does not affect a county's right to state reimbursement for costs incurred in complying with state-mandated safety orders.

(19)
Constitutional Law § 7--Mandatory, Directory, and Self-executing Provisions--Subvention Provisions--County Reimbursement for State-mandated Costs.
The subvention provisions of Cal. Const., art. XIII B, § 6, operate so as to require the state to reimburse counties for ***527** state-mandated costs incurred between January 1, 1975, and June 30, 1980. The amendment, which became effective on July 1, 1980, provided that the Legislature "may, but need not," provide reimbursement for mandates enacted before January 1, 1975. Nevertheless, the Legislature must reimburse mandates passed after that date, even though the state did not have to begin reimbursement until the effective date of the amendment.

(20)
Mandamus and Prohibition § 5--Mandamus--Conditions Affecting Issuance--Exhaustion of Administrative Remedies--County Reimbursement for State-mandated Costs.
A county's right of action in traditional mandamus to compel reimbursement for state-mandated costs did not accrue until the county had exhausted its administrative remedies. The exhaustion of remedies occurred when it became unmistakably clear that the legislative process was complete and that the state had breached its duty to reimburse the county.

(21)
Mandamus and Prohibition § 13--Mandamus--Conditions Affecting Issuance--Existence and Adequacy of Other Remedy.
A party seeking relief by mandamus is not required to exhaust a remedy that was not in existence at the time the action was filed.

(22a, 22b)
State of California § 7--Actions--Reimbursement to County for State-mandated Costs--County's Right to Offset Fines and Forfeitures Due to State.
In a proceeding by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment for county fire fighters, the trial court did not err in authorizing the county to satisfy its claims by offsetting fines and forfeitures due to the state. The order did not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters.

(23)
Equity § 5--Scope and Types of Relief--Offset.
The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike or balance, holding himself owing or entitled only to the net difference. Although this doctrine exists independent of statute, its governing principle has been partially codified in Code Civ. Proc., § 431.70 (limited to cross-demands for money).

(24)
State of California § 7--Actions--Reimbursement to County for State-mandated Costs--State's Use of Statutory Offset Authority.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state ***528** order to provide protective clothing and equipment to county fire fighters, the trial court did not err in enjoining the exercise of the state's statutory offset authority (Gov. Code, § 12419.5) until the county was fully reimbursed. In view of the state's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating the county's collection efforts from occurring.

(25)
State of California § 7--Actions--Reimbursement to County for State-mandated Costs--State's Right to Revert or Dissipate Undistributed Appropriations.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the trial court properly enjoined, and was not precluded by Gov. Code, § 16304.1, from enjoining, the state from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy the court's judgment in favor of the county.

(26)
Parties § 2--Indispensable Parties--County Auditor Controller--County Action to Collect Reimbursement From State.
In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the county auditor-controller was not an indispensable party whose absence would result in a loss of the trial court's jurisdiction. The auditor-controller was an officer of the county and was subject to the direction and control of the county board of supervisors. He was indirectly represented in the proceedings because his principal, the county, was the party litigant. Additionally, he claimed no personal interest in the action and his pro forma absence in no way impeded complete relief

(27)
Parties § 2--Indispensable Parties--Fines and Forfeitures--County Action to Collect Reimbursement From State.
In an action brought by a county for a writ of mandate to compel reimbursement by the state for costs expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the funds created by the collected fines and forfeitures which the county was allowed to offset to satisfy its claims against the state were not "indispensable parties" to the litigation. The action was not an in rem proceeding, and the ownership of a particular stake was not in dispute. Complete relief could be afforded without including the specified funds as a party.

(28)
Interest § 4--Interest on Judgments--County Action for Reimbursement of State-mandated Costs--State Reliance on Invalid Statute.
An ***529** invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest on damages under Civ. Code, § 3287, subd. (a). Thus, in an action brought by a county for writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state could not avoid its obligation to pay interest on the funds by relying on invalid budget control language which purported to restrict payment on reimbursement claims.

(29)
Appellate Review § 127--Review--Scope and Extent--Interpretation of Statutes.
An appellate court is not limited by the interpretation of statutes given by the trial court.

(30)
Appellate Review § 162--Determination of Disposition of Cause-- Modification--Action Against State--Appropriation.
In an action against the state, an appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts.

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EAGLESON, J.

These consolidated appeals arise from three separate trial court proceedings concerning the heretofore unsuccessful efforts of various local agencies to secure reimbursement of state-mandated costs.

Case No. 2d Civ. B006078 (Carmel Valley et al. case) was the first matter decided by the trial court. The memorandum of decision in that case was judicially noticed by the trial court which heard the consolidated matters in 2d Civ. B011941 (Rincon et al. case) and 2d Civ. B011942 (County of Los Angeles case). Issues common to all three cases will be discussed together ***530** under the County of Los Angeles appeal, while issues unique to the other two appeals will be considered separately.

We identify the parties to the various proceedings in footnote 1.[1] For literary convenience, however, we will refer to all appellants as the State and all respondents as the County unless otherwise indicated.

Appeal In Case No. 2 Civil B011942

(County of Los Angeles Case)

Facts and Procedural History

County employs fire fighters for whom it purchased protective clothing and equipment, as required by title 8, California Administrative Code, sections 3401-3409, enacted in 1978 (executive orders). County argues that it is entitled to State reimbursement for these expenditures because they constitute a state-mandated "new program" or "higher level of service." County relies on Revenue and Taxation Code section 2207[2] and former ***531** section 2231,[3] and California Constitution, article XIII B, section 6[4] to support its claim.

County filed a test claim with the State Board of Control (Board) for these costs incurred during fiscal years 1978-1979 and 1979-1980.[5] After hearings were held on the matter, the Board determined on November 20, 1979, that there was a state mandate and that County should be reimbursed. State did not seek judicial review of this quasi-judicial decision of the Board.

Thereafter, a local government claims bill, Senate Bill Number 1261 (Stats. 1981, ch. 1090, p. 4191) (S.B. 1261) was introduced to provide appropriations to pay some of County's claims for these state-mandated costs. This bill was amended by the Legislature to delete all appropriations for the payment of these claims. Other claims of County not provided for in S.B. 1261 were contained in another local government claims bill, Assembly Bill Number 171 (Stats. 1982, ch. 28, p. 51) (A.B. 171). The appropriations in this bill were deleted by the Governor. Both pieces of legislation, sans appropriations, were enacted into law.[6]

On September 21, 1984, following these legislative rebuffs, County sought reimbursement by filing a petition for writ of mandate (Code Civ. Proc., § 1085) and complaint for declaratory relief. After appropriate responses were filed and a hearing was held, the court executed a judgment on February 6, 1985, granting a peremptory writ of mandate. A writ of mandate was issued and other findings and orders made. It is from this judgment of ***532** February 6, 1985, that State appeals. The relevant portions of the judgment are set forth verbatim below.[7] ***533**

Contentions

State advances two basic contentions. It first asserts that the costs incurred by County are not state mandated because they are not the result of a "new program," and do not provide a "higher level of service." Either or both of these requirements are the sine qua non of reimbursement. Second, assuming a "new program" or "higher level of service" exists, portions of the trial court order aimed at assisting the reimbursement process were made in excess of the court's jurisdiction.

These contentions are without merit. We modify and affirm all three judgments.

Discussion

I

Issue of State Mandate

The threshold question is whether County's expenditures are state mandated. The right to reimbursement is triggered when the local agency incurs "costs mandated by the state"

in either complying with a "new program" or providing "an increased level of service of an existing program."[8] State advances many theories as to why the Board erred in concluding that these expenditures are state-mandated costs. One of these arguments is whether the executive orders are a "new program" as that phrase has been recently defined by our Supreme Court in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202]. ***534**

As we shall explain, State has waived its right to challenge the Board's findings and is also collaterally estopped from doing so. Additionally, although State is not similarly precluded from raising issues presented by the *State of California* case, we conclude that the executive orders are a "new program" within the meaning of article XIII B, section 6.

A. *Waiver*

(1a)We initially conclude that State has waived its right to contest the Board's findings. (2)Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has has been waived. (*Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 432 [132 P.2d 457]; *Loughan v. Harger-Haldeman* (1960) 184 Cal.App.2d 495, 502-503 [7 Cal.Rptr. 581].) A right that is waived is lost forever. (*L.A. City Sch. Dist. v. Landier Inv. Co*. (1960) 177 Cal.App.2d 744, 752 [2 Cal.Rptr. 662].) The doctrine of waiver applies to rights and privileges afforded by statute. (*People v. Murphy* (1962) 207 Cal.App.2d 885, 888 [24 Cal.Rptr. 803].)

(1b)State now contends to be an aggrieved party and seeks to dispute the Board's findings. However it failed to seek judicial review of that November 20, 1979 decision (Code Civ. Proc., § 1094.5) as authorized by former Revenue and Taxation Code section 2253.5. The three-year statute of limitations applicable to such review has long since passed. (*Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256]; Code Civ. Proc., § 338, subd. 1.)

In addition, State, through its agents, acquiesced in the Board's findings by seeking an appropriation to satisfy the validated claims. (Former Rev. & Tax. Code, § 2255, subd. (a).) On September 30, 1981, S.B. 1261 became law. On February 12, 1982, A.B. 171 was enacted. Appropriations had been stripped from each bill. State did not then seek review of the Board determinations even though time remained before the three-year statutory period expired. This inaction is clearly inconsistent with any intent to contest the validity of the Board's decision and results in a waiver.

B. *Administrative Collateral Estoppel*

(3a)We next conclude that State is collaterally estopped from attacking the Board's findings. (4)Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In order for the doctrine to apply, the issues in the two proceedings must ***535** be the same, the prior proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. (*People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77, 651 P.2d 321].)

The doctrine was extended in *Sims* to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent criminal case. Our Supreme Court held that collateral estoppel applies to such prior adjudications where three requirements are met: (1) the administrative agency acted in a judicial capacity; (2) it resolved disputed issues properly before it; and (3) all parties were provided with the opportunity to fully and fairly litigate their claims. (*Id.* at p. 479.) All of the elements of administrative collateral estoppel are present here.

(3b)The Board was created by the state Legislature to exercise quasi-judicial powers in adjudging the validity of claims against the State. (*County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 452 [206 Cal.Rptr. 626].) At the time of the hearings, the Board proceedings were the sole administrative remedy available to local agencies seeking reimbursement for state-mandated costs. (Former Rev. & Tax. Code, § 2250.) Board examiners had the power to administer oaths, examine witnesses, issue subpoenas, and receive evidence. (Gov. Code, § 13911.) The hearings were adversarial in nature and allowed for the presentation of evidence by the claimant, the Department of Finance, and any other affected agency. (Former Rev. & Tax. Code, § 2252.)

The record indicates that the state mandate issues in this case were fully litigated before the Board. A representative

of the state Division of Occupational Safety and Health and the Department of Industrial Relations testified as to why County's costs were not state mandated. Representatives of the various claimant fire districts in turn offered testimony contradicting that view. The proceedings culminated in a verbatim transcript and a written statement of the basis for the Board's decision.

State complains, however, that some of the traditional elements of the collateral estoppel doctrine are missing. In particular, State argues that it was not a party to the Board hearings and was not in privity with those state agencies which did participate.

(5)"[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]" (*Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398 [29 Cal.Rptr. 657, 380 P.2d 97].) As we stated in our introduction of the parties in this case, the party ***536** known as "State" is merely a shorthand reference to the various state agencies and officials named as defendants below. Each of these defendants is an agent of the State of California and had a mutual interest in the Board proceedings. They are thus in privity with those state agencies which did participate below (e.g., Occupational Safety and Health Division).

It is also clear that even though the question of whether a cost is state mandated is one of law (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781 [200 Cal.Rptr. 642]), subsequent litigation on that issue is foreclosed here. (6)A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230 [123 Cal.Rptr. 1, 537 P.2d 1250]; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 Cal.App.3d 274, 286-287 [93 Cal.Rptr. 907]; Rest.2d Judgments, § 28, p. 273.) [9]

(3d)Here, the basic issues of state mandate and the amount of reimbursement arose out of County's required compliance with the executive orders. In either forum—Board or court—the claims and the evidentiary and legal determination of their validity would be considered in similar fashion.

Furthermore, a determination of conclusiveness would not work an injustice. As we have noted, the Board was statutorily created to consider the validity of the various claims now being litigated. Processing of reimbursement claims in this manner was the only administrative remedy available to County. If we were to grant State's request and review the Board's determination de novo, we would, in any event, adhere to the well-settled principle of affording "great weight" to "the contemporaneous administrative construction of the enactment by those charged with its enforcement ...." (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921 [156 P.2d 1].)

There is no policy reason to limit the application of the collateral estoppel doctrine to successive court proceedings. In *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679 [159 Cal.Rptr. 56], the doctrine was applied to bar relitigation in a subsequent civil proceeding of a zoning issue previously decided by a city board of permit appeals. We similarly hold that the questions of law decided by the Board are binding in all of the subsequent civil proceedings presented here. State therefore is collaterally ***537** estopped to raise the issues of state mandate and amount of reimbursement in this appeal.

C. *Executive Orders—A "New Program" Under Article XIII B, Section 6*

(7)The recent decision by our Supreme Court in *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d at p. 49 presents a new issue not previously considered by the Board or the trial court. That question is whether the executive orders constitute the type of "program" that is subject to the constitutional imperative of subvention under article XIII B, section 6. [10] We conclude that they are.

In *State of California*, the Court concluded that the term "program" has two alternative meanings: "programs that carry out the governmental function of providing services to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Id.* at p. 56, italics added.) Although only one of these findings is necessary to trigger reimbursement, both are present here.

(8)First, fire protection is a peculiarly governmental function. (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481 [105 Cal.Rptr. 374, 503 P.2d 1382].) "Police and fire protection are two of the most essential and basic functions of local government." (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107 [133 Cal.Rptr. 649].) This classification is not weakened by State's assertion that there are private sector fire fighters who are also subject to the executive orders. Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function. [11] ***538**

The second, and alternative, prong of the *State of California* definition is also satisfied. The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting.

These facts are distinguishable from those presented in *State of California*. There, the court held that a state-mandated increase in workers' compensation benefits did not require state subvention because the costs incurred by local agencies were only an incidental impact of laws that applied generally to all state residents and entities (i.e., to all workers and all governmental and nongovernmental employers). Governmental employers in that setting were indistinguishable from private employers who were obligated through insurance or direct payment to pay the statutory increases.

State of California only defined the scope of the word "program" as used in California Constitution, article XIII B, section 6. We apply the same interpretation to former Revenue and Taxation Code section 2231 even though the statute was enacted much earlier. The pertinent language in the statute is identical to that found in the constitutional provision and no reason has been advanced to suggest that it should be construed differently. In any event, a different interpretation must fall before a constitutional provision of similar import. (*County of Los Angeles v. Payne* (1937) 8 Cal.2d 563, 574 [66 P.2d 658].)

II

Issue of Whether Court Orders Exceeded Its Jurisdiction

A. *The Court Has Not Ordered an Appropriation in Violation of the Separation of Powers Doctrine*

(9)State begins its general attack on the judgment by citing the longstanding principle that a court order which directly compels the Legislature to appropriate funds or to pay funds not yet appropriated violates the separation of powers doctrine. (Cal. Const., art. III, § 3; art. XVI, § 7; *Mandel v. Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935].) [12] State ***539** observes (and correctly so) that the relevant constitutional (art. XIII B, § 6) and statutory (Rev. & Tax. Code, § 2207 & former § 2231) provisions are not appropriations measures. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398 [231 Cal.Rptr. 686].) Since State otherwise discerns no manifest legislative intent to appropriate funds to pay County's claims (*City & County of S. F. v. Kuchel* (1948) 32 Cal.2d 364, 366 [196 P.2d 545]), it concludes that the judgment unconstitutionally compels performance of a legislative act.

State further argues that the judiciary's ability to reach an existing agency-support appropriation (State Department of Industrial Relations) (fn. 7, ¶ 1, *ante*) has been approved in only two contexts. First, the court can order payment from an existing appropriation, the expenditure of which has been legislatively prohibited by an unconstitutional or unlawful restriction. (*Committee to Defend Reproductive Rights v. Cory* (1982) 132 Cal.App.3d 852, 856 [183 Cal.Rptr. 475].) Second, once an adjudication has finally determined the rights of the parties, the court may compel satisfaction of the judgment from a current unexpended, unencumbered appropriation which administrative agencies routinely have used for the purpose in question. (*Mandel v. Myers*, *supra.*, 29 Cal.3d at p. 544.) State insists that these facts are not present here.

County rejoins that a writ of traditional mandate (Code Civ. Proc., § 1085) is the correct method of compelling State to

perform a clear and present ministerial legal obligation. (*County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at pp. 451-452.) The ministerial obligation here is contained in California Constitution, article XIII B, section 6 and in Revenue and Taxation Code section 2207 and former section 2231. These provisions require State to reimburse local agencies for state-mandated costs.

We reject State's general characterization of the judgment by noting that it only affects an existing appropriation. It declares (fn. 7, ¶ 1, *ante*) that only funds already "*appropriated* by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund" shall be spent for reimbursement of County's state-mandated costs. (Italics added.) There is absolutely no language purporting to require the Legislature to enact appropriations or perform any other act that might violate separation of powers principles. (10)By simply ordering the State Controller to draw warrants and directing the State Treasurer to pay on already appropriated funds (fn. 7, ¶ 2, *ante*), the judgment permissibly compels performance of a ministerial duty: "[O]nce funds have already been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures ***540** from such funds. [Citations.]" (*Mandel v. Myers*, *supra.*, 29 Cal.3d at p. 540.)

As we will discuss in further detail below, the subject funds (fn. 7, ¶ 1, *ante*)*ante*) were saddled with an unconstitutional restriction (fn. 7, ¶ 7, *ante*). However, *Mandel* establishes that such a restriction does not necessarily infect the entire appropriation. There, the Legislature had improperly prohibited the use of budget funds to pay a court-ordered and administratively approved attorney's fees award. The court reasoned that as long as appropriated funds were "reasonably available for the expenditures in question, the separation of powers doctrine poses no barrier to a judicial order directing the payment of such funds." (*Id.* at p. 542.) The court went on to find that money in a general "operating expenses and equipment" fund was, by both the Budget Act's terms and prior administrative practice, reasonably available to pay the attorney's fees award.

Contrary to State's argument, *Mandel* does not require that past administrative practice support a judgment for reimbursement from an otherwise available appropriation. Although there was evidence of a prior administrative practice of paying counsel fees from funds in the "operating expenses and equipment" budget, this fact was not the main predicate of the court's holding. Rather, the decisive factor was that the budget item in question functioned as a "catchall" appropriation in which funds were still reasonably available to satisfy the State's adjudicated debt. (*Id.* at pp. 543-544.)

Another illustration of this principle is found in *Serrano v. Priest* (1982) 131 Cal.App.3d 188 [182 Cal.Rptr. 387]. Plaintiffs in that case secured a judgment against the State of California for $800,000 in attorney's fees. The judgment was not paid, and subsequent proceedings were brought against State to satisfy the judgment. The trial court directed the State Controller to pay the $800,000 award, plus interest, from funds appropriated by the Legislature for "operating expenses and equipment" of the Department of Education, Superintendent of Public Instruction and State Board of Education. (*Id.* at p. 192.) This court affirmed that order even though there was no evidence that the agencies involved had ever paid court-ordered attorney's fees from that portion of the budget. Relying on *Mandel*, we concluded that funds were reasonably available from appropriations enacted in the Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent budget acts.

(11)State also incorrectly asserts that the appropriations affected by the court's order must specifically refer to the particular expenditure in question in order to be available. This notion was summarily dismissed in *Mandel v. Myers*, *supra.*, 29 Cal.3d at pp. 543-544. Likewise, in *Committee to Defend* ***541** *Reproductive Rights v. Cory*, *supra.*, 132 Cal.App.3d at pp. 857-858, the court decreed that payments for Medi-Cal abortions could properly be ordered from monies appropriated for other Medi-Cal services, even though this use had been specifically prohibited by the Legislature.

Applying these various principles here, we note that the judgment (fn. 7, ¶ 2, *ante*)*ante*) identified funds in account numbers 8350-001-001, 8350-001-452, 8350-001-453 and 8350-001-890 as being available for reimbursement. Within these 1984-1985 account appropriations for the Department of Industrial Relations were monies for Program 40, the Prevention of Industrial Injuries and Deaths of California Workers. The evidence clearly showed that the remaining balances on hand would cover the cost of reimbursement. Since it is conceded that the fire fighting protective clothing and equipment in this case was purchased to

prevent deaths and injuries to fire fighters, these funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of costs incurred by County and are therefore reasonably available for reimbursement.

B. *Legislative Disclaimers, Findings and Budget Control Language Are No Defense to Reimbursement*

As a general defense against the order to reimburse, State insists that the Legislature has itself concluded that the claimed costs are not reimbursable. This determination took the combined form of disclaimers, findings and budget control language. State interprets this self-serving legislation, as well as the legislative and gubernatorial deletions, as forever sweeping away State's obligation to reimburse the state-mandated costs at issue. Consequently, any order that ignores these restrictions on payment would amount to a court-ordered appropriation. As we shall conclude, these efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly.

The seminal legislation that gave rise to the 1978 executive orders was enacted by Statutes 1973, chapter 993, and is labeled the California Occupational Safety and Health Act (Cal/OSHA). It is modeled after federal law and is designed to assure safe working conditions for all California workers. A legislative disclaimer appearing in section 106 of that bill reads: "No appropriation is made by this act ... for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on ...." The stated reason for this decision not to appropriate was that the cost of implementing the act was "minimal on a statewide basis in relation to the effect on local tax rates." (Stats. 1973, ch. 993, § 106, p. 1954.) ***542**

Again, in 1974, the Legislature stated: "Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section, nor shall there be an appropriation made by this act, because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations." (Stats. 1974, ch. 1284, § 106, p. 2787.) This statute amended section 106 of Statutes 1973, chapter 993, and was a post facto change in the stated legislative rationale for not providing reimbursement.

Presumably because of the large number of reimbursement claims being filed, the Legislature subsequently used budget control language to confirm that compliance with the executive orders should not trigger reimbursement. Some of this legislation was effective September 30, 1981, as part of a local agency and school district reimbursement bill. The control language provided that "[t]he Board of Control shall not accept, or submit to the Legislature, any more claims pursuant to ... Sections 3401 to 3409, inclusive, of Title 8 of the California Administrative Code." (Stats. 1981, ch. 1090, § 3, p. 4193.) [13]

Further control language was inserted in the 1981, 1983 and 1984 Budget Acts. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This language prohibits encumbering appropriations to reimburse costs incurred under the executive orders, except under certain limited circumstances.

(12a)State first challenges the trial court's finding that expenditures mandated by the executive orders were not the result of a federally mandated program (fn. 7, ¶ 8, *ante*), despite the legislative finding in Statutes 1974, chapter 1284, section 106. We agree with the court's decision that there was no federal mandate.

The significance of this no-federal-mandate finding is revealed by examining past changes in the statutory definition of state-mandated costs. As thoroughly discussed in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 196-197 [203 Cal.Rptr. 258] disapproved on other grounds in *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d at p. 58, fn. 10, the concept of federally mandated costs has provided local agencies with a financial escape valve ever since passage of the "Property Tax Relief Act of 1972." (Stats. 1972, ch. 1406, § 1, p. 2931.) That act limited local governments' power to levy property taxes, while requiring that they be reimbursed by the State for providing compulsory increased levels of service or ***543** new programs. However, under Revenue and Taxation Code section 2271, "costs mandated by the federal government" were not subject to reimbursement and local governments were permitted to levy taxes in addition to the maximum property tax rate to pay such costs.

On November 6, 1979, the limitation on local government's ability to raise property taxes, and the duty of the State to reimburse for state-mandated costs, became a part of the

California Constitution through the initiative process. Article XIII B, section 6, enacted at that time, directs state subvention similar in nature to that required by the preexisting provisions of Revenue and Taxation Code section 2207 and former section 2231. As a defense against this duty to reimburse local agencies, the Legislature began to insert disclaimers in bills which mandated costs on local agencies. It also amended Revenue and Taxation Code section 2206 to expand the definition of nonreimbursable "costs mandated by the federal government" to include the following: "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state."

In applying this definition here, State offers nothing more than the bare legislative finding contained in Statutes 1974, chapter 1284, section 106. State contends that a federally mandated cost cannot, by definition, be a state-mandated cost. Therefore, if the cost is federally mandated, local agency reimbursement is not required. (13)**(See fn. 14.)** Although State's argument is correct in the abstract, neither the facts nor federal law supports the underlying assumption that there is a federal mandate. [14]

(12b)Both the Board and the court had in evidence a letter from a responsible official of the federal Occupational Safety and Health Administration (OSHA). The letter emphasizes the independence of state and federal OSHA standards: "OSHA does not have jurisdiction over the fire departments of any political subdivision of a state whether the state has elected to have its own state plan under the OSHA act or not .... [¶] More specifically, in 1978, the State of California promulgated standards applicable to fire departments in California. Therefore, California standards, rather than ***544** federal OSHA standards, are applicable to fire departments in that state ...." This theme is also reflected in a section of OSHA which expressly disclaims jurisdiction over local agencies such as County. (29 U.S.C. § 652(5).) Accordingly, as a matter of law, there are no federal standards for local government structural fire fighting clothing and equipment.

In short, while the Legislature's enactment of Cal/OSHA to comply with federal OSHA standards is commendable, it certainly was not compelled. Consequently, County's obedience to the 1978 executive orders is not federally mandated.

(14a)The trial court also properly invalidated the budget control language in Statutes 1981, chapter 1090, section 3 (fn. 7, ¶ 7, *ante*) because it violated the single subject rule. [15] This legislative restriction purported to make the reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231 unavailable to County.

(15)The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in the statute's title. The rule's primary purpose is to prevent "log-rolling" in the enactment of laws. This disfavored practice occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which otherwise might not have passed had the legislative mind been directed to them. (*Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1196 [219 Cal.Rptr. 664].) However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose. (*Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172-173 [28 Cal.Rptr. 724, 379 P.2d 28].)

(14b)The stated purpose of chapter 1090 is to increase funds available for reimbursing certain claims. It describes itself as an "act making an appropriation to pay claims of local agencies and school districts for additional reimbursement for specified state-mandated local costs, awarded by the State Board of Control, and declaring the urgency thereof, to take effect immediately." (Stats. 1981, ch. 1090, p. 4191.) There is nothing in this introduction ***545** alerting the reader to the fact that the bill prohibits the Board from entertaining claims pursuant to the Cal/OSHA executive orders. The control language does not modify or repeal these orders, nor does it abrogate the necessity for County's continuing compliance therewith. It simply places County's claims reimbursement process in limbo.

This special appropriations bill is similar in kind to appropriations in an annual budget act. Observations that have

been made in connection with the enactment of a budget bill are appropriate here. "[T]he annual budget bill is particularly susceptible to abuse of [the single subject] rule. 'History tells us that the general appropriation bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage. If a rider can be attached to it, the rider can be adopted on the merits of the general appropriation bill without having to depend on its own merits for adoption.' [Citation.]" (*Planned Parenthood Affiliates v. Swoap*, *supra.*, 173 Cal.App.3d at p. 1198.) Therefore, the annual budget bill must only concern the subject of appropriations to support the annual budget and may not constitutionally be used to substantively amend or change existing statutory law. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394 [211 Cal.Rptr. 758, 696 P.2d 150].) We see no reason to apply a less stringent standard to a special appropriations bill. Because the language in chapter 1090 prohibiting the Board from processing claims does not reasonably relate to the bill's stated purpose, it is invalid.

(16)The budget control language in chapter 1090 is also invalid as a retroactive disclaimer of County's right to reimbursement for debts incurred in prior years. This legislative technique was condemned in *County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at p. 446. There, the Legislature had enacted a Government Code section which prohibited using appropriations for any purpose which had been denied by any formal action of the Legislature. The State attempted to use this code section to uphold a special appropriations bill which had deleted County's Board-approved claims for costs which were incurred prior to the enactment of the code section. The court held that the code section did not apply retroactively to defeat County's claims: "A retroactive statute is one which relates back to a previous transaction and gives that transaction a legal effect different from that which it had under the law when it occurred ... 'Absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively.'" (*Id.* at p. 459, quoting *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 912 [159 Cal.Rptr. 791].) Similarly, the control language in chapter 1090 does not apply retroactively to County's prior, Board-approved claims. ***546**

(17)Finally, the control language in section 28.40 of the 1981 Budget Act and section 26.00 [16] of the 1983 and 1984 Budget Acts does not work to defeat County's claims. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This section is comprised of both substantive and procedural provisions. We are concerned primarily with those portions that purport to exonerate State from its constitutionally and statutorily imposed obligation to reimburse County's state-mandated costs.

The writ of mandate directed compliance with the procedural provisions of these sections and is not a point of dispute on appeal. Subsection (a) affords the Legislature one last opportunity to appropriate funds which are to be encumbered for the purpose of paying state-mandated costs, an invitation repeatedly rejected. Subsection (b) directs that the Department of Finance notify the chairpersons of the appropriate committees in each house and chairperson of the Joint Legislative Budget Committee of the need to encumber funds. Presumably, the objective of this procedure is to give the Legislature another opportunity to amend or repeal substantive legislation requiring local agencies to incur state-mandated costs. Again, the Legislature declined to act. Legislative action pursuant to subsection (b) could arguably ameliorate the plight of local agencies prospectively, but would be of no practical assistance to a local agency creditor seeking reimbursement for costs already incurred.

The first portion of each section, however, imposes a budgetary restriction on encumbering appropriated funds to reimburse for state-mandated costs arising out of compliance with the executive orders, absent a specific appropriation pursuant to subparagraph (b). For the reasons stated above, this substantive language is invalid under the single subject rule. It attempts to amend existing statutory law and is unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget. (*Association for Retarded Citizens v. Department of Developmental Services*, *supra.*, 38 Cal.3d at p. 394.) Now unfettered by invalid restrictions, the appropriations involved in this case are reasonably available for reimbursement. ***547**

C. *The Legislature's Plenary Power to Regulate Worker Safety Does Not Affect the Right to Reimbursement*

(18)State contends that article XIV, section 4 of the California Constitution vests the Legislature with unlimited plenary power to create and enforce a complete workers'

compensation system. It postulates that the Legislature may determine that the interest in worker safety and health is furthered by requiring local agencies to bear the costs of safety devices. This non sequitur is advanced without citation of authority.

Article XIV, section 4 concerns the power to enact workers' compensation statutes and regulations. It does not focus on the issue of reimbursement for state-mandated costs, which is covered by Revenue and Taxation Code section 2207 and former section 2231, and article XIII B, section 6. Since these latter provisions do not effect a pro tanto repeal of the Legislature's plenary power over workers' compensation law (see *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d 46), they do not conflict with article XIV, section 4.

Moreover, even though the reimbursement issue has come before the Legislature repeatedly since 1972, no law has been enacted to exempt compliance with workers' compensation executive orders from the mandatory reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231. Likewise, article XIII B, section 6 does not provide an exception to the obligation to reimburse local agencies for compliance with these safety orders.

D. *Pre-1980 Claims Are Reimbursable Under Article XIII B, Section 6, Effective July 1, 1980*

(19)State further argues that to the extent County's claims for fiscal years 1978-1979 and 1979-1980 are predicated on the subvention provisions of article XIII B, section 6, they fall within a "window period" of nonreimbursement. This assertion emanates from section 6, subdivision (c), which states that the Legislature "[m]ay, but need not," provide reimbursement for mandates enacted before January 1, 1975. State reasons that because the constitutional amendment did not become effective until July 1, 1980, claims for costs incurred between January 1, 1975 and June 30, 1980, need not be reimbursed.

This notion was rejected in *City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at p. 182 on behalf of local agencies seeking reimbursement of unemployment insurance costs mandated by a 1978 statute. Basing its decision on well-settled principles of constitutional interpretation ***548** and upon a prior published opinion of the Attorney General, the court interpreted section 6, subdivision (c) as follows: "[T]he Legislature *may* reimburse mandates enacted prior to January 1, 1975, and *must* reimburse mandates passed after that date, but does not have to begin such reimbursement until the effective date of article XIII B (July 1, 1980)." (*Id.* at p. 191, italics in original.) In other words, the amendment operates on "window period" mandates even though the reimbursement process may not actually commence until later.

We agree with this reasoning and find costs incurred by County under the 1978 executive orders subject to reimbursement under the Constitution.

E. *Claims Under Revenue and Taxation Code Section 2207 and Former Section 2231 Are Not Time-barred*

(20)State collaterally asserts that to the extent County bases its claims on Revenue and Taxation Code section 2207 and former section 2231, they are barred by Code of Civil Procedure sections 335 and 338, subdivision 1. This omnibus challenge to the order directing payment has no merit.

Code of Civil Procedure section 335 is a general introductory section to the statute of limitations for all matters except recovery of real property. Code of Civil Procedure section 338, subdivision 1 requires "[a]n action upon a liability created by statute" to be commenced within three years.

A claimant does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 77 [222 Cal.Rptr. 750].) Here, County pursued its remedy before the Board and prevailed. Thereafter, as required by law, appropriate legislation was introduced. Both the Board hearings and the subsequent efforts to secure legislative appropriations were part of the legislative process. (Former Rev. & Tax. Code, § 2255, subd. (a).) It was not until the legislation was enacted sans appropriations on September 30, 1981 (S.B. 1261) and February 12, 1982 (A.B. 171) that it became unmistakably clear that this process had ended and State had breached its duty to reimburse. At these respective moments of breach, County's right of action in traditional mandamus accrued. County's petition was filed on September 21, 1984, within the three-year statutory period. [17] (*Lerner v. Los Angeles City Board of Education*, *supra.*, 59 Cal.2d at p. 398.) ***549**

F. *Government Code Section 17612*'s Remedy for Unfunded Mandates Does Not Supplant the Court's Order

State continues its general attack on the order directing payment by arguing that the Legislature has "defined" the remedy available to a local agency if a mandate is unfunded. That remedy is found in Government Code section 17612, subdivision (b) and reads: "If the Legislature deletes from a local government claims bill funding for a mandate, the local agency ... *may* file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Italics added.) (See also former Rev. & Tax. Code, § 2255, subd. (c), eff. Oct. 1, 1982.)

State hints that this procedure is the only remedy available to a local agency if funding is not provided. At oral argument, State admitted that this declaration of enforceability and injunction against enforcement would be prospective only. This remedy would provide no relief to local agencies which have complied with the executive orders.

We conclude that Government Code section 17612, subdivision (b) is inapplicable here because it did not become operative until January 1, 1985. It was not in place when the Board rendered its decision on November 20, 1979; when funding was deleted from S.B. 1261 (Sept. 30, 1981) and A.B. 171 (Feb. 12, 1982); or when this litigation commenced on September 21, 1984. (21)A party is not required to exhaust a remedy that was not in existence at the time the action was filed. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 912, fn. 9 [141 Cal.Rptr. 133, 569 P.2d 727].) To abide by this post facto legislation now would condone legislative interference in a specific controversy already assigned to the judicial branch for resolution. (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at p. 201.)

Also, this remedy is purely a discretionary course of action. By using the permissive word "may," the Legislature did not intend to override article XIII B, section 6 and Revenue and Taxation Code section 2207 and former section 2231. These constitutional and statutory imprimaturs each impose upon the State an obligation to reimburse for state-mandated costs. Once that determination is finally made, the State is under a clear and present ministerial duty to reimburse. In the absence of compliance, traditional mandamus lies. (Code Civ. Proc., § 1085.) [18] ***550**

G. *The Court's Order Properly Allows County the Right of Offset*

(22a)As the first in a series of objections to portions of the judgment which assist in the reimbursement process, State argues that the court has improperly authorized County to satisfy its claims by offsetting fines and forfeitures due to State. (Fn. 7, ¶ 5, *ante.ante*.) The fines and forfeitures are those found in Penal Code sections 1463.02, 1463.03, 1463.5a and 1464; Government Code sections 13967, 26822.3 and 72056; Fish and Game Code section 13100; Health and Safety Code section 11502; and Vehicle Code sections 1660.7, 42004 and 41103.5. [19]

Broadly speaking, these statutes require County to periodically transfer all or part of the fines and forfeitures collected by it for specified law violations to the State Treasury. They are to be held there "to the credit" of various state agencies, or for payment into specific funds. State contends that since these statutes require mandatory, regular transfers and do not expressly permit diversion for other purposes, the court had no power to allow County to offset. State cites no authority for this contention.

(23)The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike a balance, holding himself owing or entitled only to the net difference. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266].) Although this doctrine exists independent of statute, its governing principle has been partially codified (Code Civ. Proc., § 431.70) (limited to cross-demands for money).

The doctrine has been applied in favor of a local agency against the State. In *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576[159 Cal.Rptr.1], for example, the court of appeal upheld a trial court's decision to grant a writ of mandate that ordered funds awarded the County under a favorable judgment to be offset against its current liabilities to the State under the Medi-Cal program. The court stated that such an order does not interfere with the "Legislature's control over the 'submission, approval and enforcement of

budgets....'" (*Id.* at p. 592, quoting Cal. Const., art. IV, § 12, subd. (e).)

(22b)The order herein likewise does not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters. The identified ***551** fines and forfeitures are collected by the County for statutory law violations. Some of these funds remain with the County, while others are transferred to the State. State's portions are uncertain as to amount and date of transfer. State does not come into actual possession of these funds until they are transferred. State's holding of these funds "to the credit" of a particular agency, or for payment to a specific fund, does not commence until their receipt. Until that time, they are unencumbered, unrestricted and subject to offset.

H. *State's Use of its Statutory Offset Authority Was Properly Enjoined*

(24)State further contends that the trial court exceeded its jurisdiction by enjoining the exercise of State's statutory offset authority until County is fully reimbursed. (Fn. 7, ¶ 11, *ante*.)[20] This order complemented that portion of the order discussed, *infra.*, which allowed County to temporarily offset fines and forfeitures as an aid in the reimbursement process.

State correctly observes that it has not unlawfully used its offset authority during the course of this dispute. However, State has not needed to do so because it has adopted other means of avoiding payment on County's claims. In view of State's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating County's collection efforts from occurring. (See *County of Los Angeles v. State of California* (1984) 153 Cal.App.3d 568 [200 Cal.Rptr. 394].)

I. *The Injunction Against Reversion or Dissipation of Undisbursed Appropriations Is Proper*

(25)State continues that the order (fn. 7, ¶ 4, *ante*)*ante*) enjoining it from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy this court's judgment, violates Government Code section 16304.1.[21] This section reverts undisbursed ***552** balances in any appropriation to the fund from which the appropriation was made. No authority is cited for State's proposition. To the contrary, *County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at pp. 456-457 expressly confirms this type of ancillary remedy as a legitimate exercise of the court's authority to assist in collecting on an adjudicated debt, the payment of which has been delayed all too long.

That portion of the order restraining reversion is particularly innocuous because it only affects undisbursed balances in an appropriation. At the time of reversion, it is crystal clear that these remaining funds are unneeded for the primary purpose for which appropriated; otherwise, they would not exist. Moreover, that portion of the order restraining dissipation of the reimbursement award sum in a manner that would make it unavailable to satisfy a court's judgment is similarly a proper exercise of the court's authority. By not reimbursing County for the state-mandated costs, State would be contravening its constitutional and statutory obligations to subvent. To the extent it is not reimbursed, County would be compelled, contrary to law, to bear the cost of complying with a state-imposed obligation.

J. *The Auditor Controller and the Specified Funds Are Not Indispensable Parties*

(26, 27)State next contends that the Auditor Controller of Los Angeles County and the "specified" fines and forfeitures County was allowed to offset are indispensable parties. Failure to join them in the action or to serve them with process purportedly renders the trial court's order void as in excess of its jurisdiction.[22] State cites only the general statutory definition of an indispensable party (Code Civ. Proc., § 389) to support this assertion.

The Auditor Controller is an officer of the County and is subject to the ***553** direction and control of the County board of supervisors. (Gov. Code, § 24000, subds. (d), (e), 26880; L.A. County Code, § 2.10.010.) He is indirectly represented in these proceedings because his principal, the County, is the party litigant. Additionally, he claims no personal interest in the fines and forfeitures and his pro forma absence in no way impedes complete relief.

The funds created by the collected fines and forfeitures also are not indispensable parties. This is not an in rem proceeding, and the ownership of a particular stake is not in dispute. Rather, this is an action to compel a ministerial obligation imposed by law. Complete relief may be afforded without including the specified funds as a party.

K. *County is Entitled to Interest*

(28)State insists that an award of interest to County unfairly penalizes State for not paying claims which it was prohibited by law from paying under Statutes 1981, chapter 1090, section 3. This argument is unavailing.

Civil Code section 3287, subdivision (a) allows interest to any person "entitled to recover damages certain, or capable of being made certain by calculation...." Interest begins on the day that the right to recover vests in the claimant. By its own terms, this section applies to any judgment debtor, "including the state...or any political subdivision of the state."

The judgment orders interest at the legal rate from September 30, 1981, for reimbursement funds originally contained in S.B. 1261, and from February 12, 1982, for the funds originally contained in A.B. 171. These are the respective dates that the bills were enacted without appropriations. As we concluded earlier, County's cause of action did not arise and its right to recover did not vest until this legislative process was complete. County offers no authority to suggest that any other vesting date is appropriate.

Furthermore, State cannot avoid its obligation to pay interest by relying on the invalid budget control language in Statutes 1981, chapter 1090, section 3. "An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a)." (*Olson v. Cory* (1983) 35 Cal.3d 390, 404 [197 Cal.Rptr. 843, 673 P.2d 720].)

Appeal in Case No. 2 Civil B011941

(Rincon et al. Case)

The procedural history and legal issues raised in the *Rincon et al*. appeal are essentially similar to those discussed in the County of Los Angeles matter. ***554**

County, although not a party to this underlying trial court proceeding, filed a test claim with the Board. All parties agree that County represented the interests of the named respondents here.

The Board action resulted in a finding of state-mandated costs. It further found that Rincon et al. were entitled to reimbursement in the amount of $39,432. After the Legislature and the Governor, respectively, deleted the funding from the two appropriations bills, S.B. 1261 and A.B. 171, Rincon et al. filed a petition for writ of mandate and declaratory relief. This action was consolidated for hearing in the trial court with the action in B011942 (County of Los Angeles matter). The within judgment was also signed, filed and entered on February 6, 1985. The reimbursement order was directed against the 1984-1985 budget appropriations. State appeals from that judgment.

The court here included a judicial determination that the Board, or its successors, hear and approve the claims of certain other respondents for costs incurred in connection with the state-mandated program. (Fn. 7, ¶ 9, *ante*.) This special directive was necessary because the claims of these respondents (petitioners below) have not yet been determined.[23] Since we have ruled that State is barred by the doctrines of waiver and administrative collateral estoppel from raising the state mandate issue, the validity of these claims becomes a question of law susceptible to but one conclusion, and mandamus properly lies. (*County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at p. 453.) This portion of the order also underscores, for the Board's edification, the determination that the statutory restriction on the Board authority to proceed is invalid.[24]

Once again, our determinations and conclusions in the County of Los Angeles matter are equally applicable here.

Appeal in Case No. 2 Civil B006078

(Carmel Valley et al.)

Again, the procedural history and legal issues raised in this appeal are essentially similar to those discussed in the County of Los Angeles matter.

County filed a test claim with the Board. All parties agree that the County represented the interests of the named respondents here. ***555**

On December 17, 1980, the Board found that a state mandate existed and that specific amounts of reimbursement were due several respondents totalling $159,663.80. Following the refusal of the Legislature to appropriate funds for reimbursement, Carmel Valley et al. filed a petition for writ of mandate and declaratory relief on January 3, 1983. Judgment

was entered on May 23, 1984. The reimbursement order was directed against 1983-1984 budget appropriations.

The judgment differs from the other two because it does not decree a specific reimbursement amount. The trial court determined that even though the Board had approved the claims, the State was not precluded from contesting that determination. The court's reasons were that the State, in its answer, had denied that the money claimed was actually spent, and that Board approval had not been implemented by subsequent legislation. The court concluded that the reimbursement process, of which the Board action was an intrinsic part, was "aborted."

We disagree with this portion of the court's analysis. The moment S.B. 1261 and A.B. 171 were enacted into law without appropriations, Carmel Valley et al. had exhausted their administrative remedies and were entitled to seek a writ of mandate. At the time of trial, State was barred by the doctrines of waiver and administrative collateral estoppel from contesting the state mandate issue or the amount of reimbursement. The trial court therefore should have rendered a judgment for the amount of reimbursement. Having failed to do so, this fact-finding responsibility falls upon this court. Although we ordinarily are not equipped to handle this function, the writ of mandate in this case identifies the amount of the approved claims as $159,663.80. We accordingly will amend the judgment to reflect that amount.

The trial court also predicated its judgment for Carmel Valley et al. solely on the basis of Revenue and Taxation Code section 2207 and former section 2231. In doing so, the court did not have the benefit of the decision in *City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at p. 182.[25] That case held that mandates passed after January 1, 1975, must be reimbursed pursuant to article XIII B, section 6 of the California Constitution, but that reimbursement need not commence until July 1, 1980. In light of this rule, we conclude that the trial court's decision ordering reimbursement is also supported by article XIII B, section 6. ***556**

State raises another point specific to this particular appeal. In its answer to the writ petition, State admitted that the local agency expenditures were state mandated. Consequently, the issue was not contested at the trial court level. However, State vigorously contends here that it is not bound by its trial court admissions because the state mandate issue is purely a question of law.

(29)State is correct in contending that an appellate court is not limited by the interpretation of statutes given by the trial court. (*City of Merced v. State of California*, *supra.*, 153 Cal.App.3d at p. 781.) However, State's victory on this point is Pyrrhic. Regardless of how the issue is characterized, State is precluded from contesting the Board findings on appeal because of the independent application of the doctrines of waiver and administrative collateral estoppel. These doctrines would also have applied at the trial court level if State's answer had raised the issue of state mandate in the first instance.

We also reject State's argument, advanced for the first time on appeal, that the executive orders of 1978 initially implement legislation enacted prior to January 1, 1975, and that state reimbursement is therefore discretionary. (Cal. Const., art. XIII B, § 6, subd. (c).) Again, State is barred by the doctrines of waiver and administrative collateral estoppel from arguing that costs incurred under the executive orders are not subject to reimbursement.

State continues that the *Carmel Valley* judgment against the Department of Industrial Relations is erroneous. Since the department was never made a party in the suit, nor served with process, the resulting judgment reflects a denial of due process and is in excess of the court's jurisdiction. (See Code Civ. Proc., § 389; fn. 22, *ante*.)

This assertion is but a variant of the same argument advanced in the County of Los Angeles case, *supra.*, which we rejected as meritless. The department is part of the State of California. (Lab. Code, § 50.) State extensively argued the department's position and even offered into evidence a declaration from the chief of fiscal accounting of the department. As stated earlier, agents of the same government are in privity with each other. (*People v. Sims*, *supra.*, 32 Cal.3d at p. 487.)

Ross v. Superior Court, *supra.*, 19 Cal.3d at p. 899 demonstrates how, through the notion of privity, a government agent can be held in contempt for knowingly violating a court order issued against another agent of the same government. There, a court in an earlier proceeding had decided that defendant Department of Health and Welfare must pay unlawfully withheld welfare benefits to qualified recipients. The County Board of Supervisors, ***557** who

were not parties to this action, knew about the court's order but refused to comply. The Supreme Court affirmed a trial court decision holding the Board in contempt for violating the order directing payment. The court reasoned that, as an agent of the Department of Health and Welfare, the Board did not collectively or individually need to be named as a party in order to be bound by a court order of which they had actual knowledge.

The determinations and conclusions in the County of Los Angeles case are likewise applicable here.

Modification of Judgments in All Three Appeals

The trial court judgments ordering reimbursement from specific account appropriations were entered many months ago. We will affirm these judgments and thereby validate the trial courts' determination that funds already appropriated for the State Department of Industrial Relations were reasonably available for payment at the time of the courts' orders.

Due to the passage of time, we requested State at oral argument to confirm whether the appropriations designated in the respective judgments are still available for encumbrance. State's counsel responded by rearguing that the weight of the evidence did not support the trial courts' findings that specific funds were reasonably available for reimbursement. Counsel further hinted that the funds may not actually be available.

We hope that counsel for the State is mistaken. But in order to emphasize our strong and unequivocal determination that the local agency petitioners be promptly reimbursed, we will take judicial notice of the enactment of the 1985-1986 Budget Act (Stats. 1985, ch. 111) and the 1986-1987 Budget Act (Stats. 1986, ch. 186). (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at p. 197.) Both acts appropriate money for the State Department of Industrial Relations and fund the identical account numbers referred to in the trial courts' judgments. They are:

Account Numbers	1985-1986 Budget Act	1986-1987 Budget Act
8350-001-001	$94,673,000	$106,153,000
8350-001-452	2,295,000	2,514,000
8350-001-453	2,859,000	2,935,000
8350-001-890	16,753,000	17,864,000

(30)An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at pp. 198, 201.) We do so here with respect to all three judgments. ***558**

Disposition

2d Civ. B011942 (*County of Los Angeles Case*)

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: “If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts.”

(2) The words “Fish and Game Code Section 13100” are deleted from paragraph 5.

(3) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

***2d Civ. B011941* (*Rincon et al. Case*)**

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: “If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts.”

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same

account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

***2d Civ. B006078* (*Carmel Valley et al. Case*)**

The judgment is modified as follows: ***559**

(1) The following sentences are added to paragraph 2: "The reimbursement amounts total $159,663.80. If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

Ashby, Acting P. J., and Hastings, J., concurred.

A petition for a rehearing was denied March 17, 1987, and appellant's petition for review by the Supreme Court was denied May 14, 1987. Eagleson, J., did not participate therein. ***560**

Footnotes

1 *2d Civ. B006078*: The petitioners below and respondents on appeal are Carmel Valley Fire Protection District, City of Anaheim, Aptos Fire Protection District, Citrus Heights Fire Protection District, Fair Haven Fire Protection District, City of Glendale, City of San Luis Obispo, County of Santa Barbara and Ventura County Fire Protection District.

The respondents below and appellants here are State of California, Kenneth Cory and Jesse Marvin Unruh.

2d Civ. B011941: The petitioners below and respondents on appeal are Rincon Del Diablo Municipal Water District, Twenty-Nine Palms Water District, Alpine Fire Protection District, Bonita-Sunnyside Fire Protection District, Encinitas Fire Protection District, Fallbrook Fire Protection District, City of San Luis Obispo, Montgomery Fire Protection District, San Marcos Fire Protection District, Spring Valley Fire Protection District, Vista Fire Protection District and City of Coronado.

Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, State Board of Control, Kenneth Cory, State Controller, Jesse Marvin Unruh, State Treasurer, and Mark H. Bloodgood, Auditor-Controller, County of Los Angeles.

2d Civ. B011942: The County of Los Angeles is the petitioner below and respondent on appeal. Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, Kenneth Cory, and Jesse Marvin Unruh.

All respondents on appeal are conceded to be "local agencies," as defined in Revenue and Taxation Code section 2211.

2 The pertinent parts of Revenue and Taxation Code section 2207 provide: " 'Costs mandated by the state' means any incureased costs which a local agency is required to incur as a result of the following" [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or a n incureased level of service of an existing program: [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program; [¶] (c) Any executive order isued after January 1, 1973, which (i) implements or interprets a state statute

and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973 ...“

3 The pertinent parts of former Revenue and Taxation Code section 2231, subdivision (a) provide: ”The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207.“ This section was repealed (Stats. 1986, ch. 879, § 23), and replaced by Government Code section 17561. We will refer to the earlier code section.

4 The pertinent parts of section 6, article XIII B of the California Constitution, enacted by initiative measure, provide: ”Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] ... [¶¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.“ This constitutional amendment became effective July 1, 1980.

5 County filed its test claim pursuant to former Revenue and Taxation Code section 2218, which was repealed by Statutes 1986, chapter 879, section 19.

Additionally, the Board is no longer in existence. The Commission on State Mandates has succeeded to these functions. (Gov. Code, §§ 17525, 17630.)

6 The final legislation did include appropriations for other local agencies on other types of approved claims.

7 ”1. The Court adjudges and declares that funds appropriated by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund may properly be and should be spent for the reimbursement of state-mandated costs incurred by Petitioner as established in this action.

“2. A peremptory writ of mandamus shall issue under the seal of this Court, commanding Respondent State of California, through its Department of Finance, to give notification in writing as specified in Section 26.00 of the Budget Act of 1984 (Chapter 258, Statutes of 1984) of the necessity to encumber funds in conformity [with]this order and, unless the Legislature approves a bill that would enact a general law, within 30 days of said notification that would obviate the necessity of such payment, Respondent Kenn[e]th Cory, the State Controller of the State of California, or his successors in office, if any, shall draw warrants on funds appropriated for the State Department of Industrial Relations for the 1984-85 Budget Year in account numbers 8350-001-001, 8350-001-452, 8350-001-453, and 8350-001-890 as implemented in Chapter 258 Statutes of 1984, sufficient to satisfy the claims of Petitioner, plus interest, as set forth in the motion and accompanying writ of mandamus. Said writ shall also issue against Jessie [*sic*] Marvin Unruh, the State Treasurer of the State of California, and his successors in office, if any, commanding him to make payment on the warrants drawn by Respondent Kenneth Cory.

“3. Pending the final disposition of this proceeding, or the payment of the applicable reimbursement claims and interest as set forth herein, Respondents, and each of of [*sic*] them, their successors in office, agents, servants and employees and all persons acting in concert [or] participation with them, are hereby enjoined and restrained from directly or indirectly expending from the 1984-85 General Fund Budget of the State Department of Industrial Relations as is more particularly described in paragraph number 2 hereinabove, any sums greater than that which would leave in said budget at the conclusion of the 1984-85 fiscal year an amount less than the reimbursement amounts on the aggregate amount of $307,685 in this case, together

with interest at the legal rate through payment of said reimbursement amounts. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"4. Pending the final disposition of this proceeding or the payment of the reimbursement award sum at issue herein, Respondents, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly reverting the reimbursement award sum from the General Fund line-item accounts of the Department of Industrial Relations to the General Funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"5. In addition to the foregoing relief, Petitioner is entitled to offset amounts sufficient to satisfy the claims of Petitioner, plus interest, against funds held by Petitioner as fines and forfeitures which are collected by the local Courts, transferred to the Petitioner and remitted to Respondents on a monthly basis. Those fines and forfeitures are levied, and their distribution provided, as set forth in Penal Code Sections 1463.02, 1463.03, 14[6] 3.5[a], and 1464; Government Code Sections 13967, 26822.3 and 72056, Fish and Game Code Section 13100; Health and Safety Code Section 11502 and Vehicle Code Sections 1660.7, 42004, and 41103.5.

"6. The Court adjudges and declares that the State has a continuing obligation to reimburse Petitioner for costs incurred in fiscal years subsequent to its claim for expenditures in the 1978-79 and 1979-80 fiscal years as set forth in the petition and the accompanying motion for the issuance of a writ of mandate.

"7. The Court adjudges and declares that deletion of funding and prohibition against accepting claims for expenditures incurred as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 as contained in Section 3 of Chapter 109[0], Statutes of 1981 were invalid and unconstitutional.

"8. The Court adjudges and declares that the expenditures incurred by Petitioner as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 were not the result of any federally mandated program.

"9. A peremptory writ of mandamus shall issue under the seal of this Court commanding Respondent State Board of Control, or its successor-in-interest, to hear and approve the claims of Petitioner for costs incurred in complying with the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 subsequent to fiscal year 1979-80.

. . . . ."

"11. The Court adju[d]ges and declares that the State Respondents are prohibited from offsetting, or attempting to implement an offset against moneys due and owing Petitioner until Petitioner is completely reimbursed for all of its costs in complying with the state mandate of Title 8, California Administrative Code Sections 3401 through 3409."

8 This language is taken from Revenue and Taxation Code section 2207 and former section 2231. Article XIII B, section 6 refers to "higher" level of service rather than "increased" level of service. We perceive the intent of the two provisions to be identical. The parties also use these words interchangeably.

9 As it happened, the entire Board determination involved a question of law since the dollar amount of the claimed reimbursement was not disputed.

10 State is not precluded from raising this new issue on appeal. Questions of law decided by an administrative agency invoke the collateral estoppel doctrine only when a determination of conclusiveness will not work an injustice. Likewise, the doctrine of waiver is inapplicable if a litigant has no actual or constructive knowledge of his rights. Since the *State of California* rule had not been announced at the time of the Board or trial court proceedings herein, the doctrines of waiver and collateral estoppel are inapplicable to State on this particular issue. Both parties have been afforded additional time to brief the matter.

11 County suggests that to the extent private fire brigades exist, they are customarily part-time individuals who perform the function on a part-time basis. As such, they are excluded by the balance of the definitional term in title 8, California Administrative Code section 3402, which provides, in pertinent part: "... The term [fire fighter] does not apply to emergency pick-up labor or other persons who may perform first-aid fire extinguishment as collateral to their regular duties."

12 Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Article XVI, section 7 of the California Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."

13 When Governor Brown deleted the appropriations from A.B. 171, he stated that he was relying on the pronouncements in Statutes 1974, chapter 1284 and Statutes 1981, chapter 1090.

14 We address this subject only because the trial court found that the costs were not federally mandated. Actually, State cannot raise this issue on appeal because of the waiver and administrative collateral estoppel doctrines. We note, however, where there is a quasi-judicial finding that a cost is state mandated, there is an implied finding that the cost is not federally mandated; the two concepts are mutually exclusive.

Moreover, our task is aided by the fact that interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility. (*City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at pp. 196-197.)

15 Article IV, section 9 of the California Constitution reads: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

16 Each of these sections contains the following language: "No funds appropriated by this act shall be encumbered for the purpose of funding any increased state costs or local governmental costs, or both such costs, arising from the issuance of an executive order as defined in section 2209 of the Revenue and Taxation Code or subject to the provisions of section 2231 of the Revenue and Taxation Code, unless (a) such funds to be encumbered are appropriated for such purpose, or (b) notification in writing of the necessity of the encumbrance of funds available to the state agency, department, board, bureau, office, or commission is given by the Department of Finance, at least 30 days before such encumbrance is made, to the chairperson of the committee in each house which considers appropriations and the Chairperson of the

Joint Legislative Budget Committee, or such lesser time as the chairperson of the committee, or his or her designee, determines."

17 Technically, Statute has waived the statute of limitations defense because it was not raised in its answer. (*Ventura County Employees' Retirement Association v. Pope* (1978) 87 Cal.App.3d 938, 956 [151 Cal.Rptr. 695].)

18 We leave undecided the question of whether this type of legislation could ever be held to override California Constitution, article XIII B, section 6. The Constitution of the State is supreme. Any statute in conflict therewith is invalid. (*County of Los Angeles v. Payne*, *supra.*, 8 Cal.2d at p. 574.)

Similarly, former Revenue and Taxation Code section 2255, subdivision (c) cannot abrogate the constitutional directive to reimburse.

19 At oral argument, County conceded that the order authorizing offset of Fish and Game Code section 13100 fines and forfeitures is inappropriate. These collected funds must be spent exclusively for protection, conservation, propagation or preservation of fish, game, mollusks, or crustaceans, and for administration and enforcement of laws relating thereto, or for any such purpose. (Cal. Const., art. XVI, § 9; 20 Ops. Cal. Atty. Gen. 110 (1952).)

20 Government Code section 12419.5 provides: "The Controller may, in his discretion, offset any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The Controller may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant.... The amount due any person or entity from the state or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided." (See also *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 975-976 [185 Cal.Rptr. 49].)

21 Government Code section 16304.1 provides: "Disbursements in liquidation of encumbrances may be made before or during the two years following the last day an appropriation is available for encumbrance.... Whenever, during [such two-year period], the Director of Finance determines that the project for which the appropriation was made is completed and that a portion of the appropriation is not necessary for disbursements, such portion shall, upon order of the Director of Finance, revert to and become a part of the fund from which the appropriation was made. Upon the expiration of two years...following the last day of the period of its availability, the undisbursed balance in any appropriation shall revert to and become a part of the fund from which the appropriation was made...."

22 Code of Civil Procedure section 389, subdivision (a) provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

23 Responding to the budget control language directing it to refuse to process these claims, the Board declined to hear these matters.

24 Because certain claims have not yet been processed, we assume that the issue of the amount of reimbursement may still be at large. Our record is not clear on this point.

25 The decision in *City of Sacramento*, *supra.*, was filed just one day before the trial court signed the written order in this case. The Revenue and Taxation Code sections on which the court relied were operational before the costs claimed in this case were incurred.

KeyCite Yellow Flag - Negative Treatment
Distinguished by San Diego Unified School Dist. v. Commission on State Mandates, Cal., August 2, 2004

43 Cal.3d 46, 729 P.2d 202, 233 Cal.Rptr. 38
Supreme Court of California

COUNTY OF LOS ANGELES
et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et
al., Defendants and Respondents.
CITY OF SONOMA et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA
et al., Defendants and Respondents

L.A. No. 32106.
Jan 2, 1987.

SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service mandated by the state for workers' compensation benefits. The trial court found that Cal. Const., art. XIII B, § 6, requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the necessity of further proceedings before the board. The court held that when the voters adopted art. XIII B, § 6, their intent was not to require the state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by art. XIII B, § 6. Finally, the court held that no pro tanto repeal of Cal. Const., art. XIV, § 4 (workers' compensation), was intended or made necessary by ***47** the adoption of art. XIII B, § 6. (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Costs to Be Reimbursed.
When the voters adopted Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

(2)
Statutes § 18--Repeal--Effect--"Increased Level of Service."
The statutory definition of the phrase "increased level of service," within the meaning of Rev. & Tax. Code, § 2207, subd. (a) (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature,

by deleting an express provision of a statute, intended a substantial change in the law.

[See **Am.Jur.2d,** Statutes, § 384.]

(3)
Constitutional Law § 13--Construction of Constitutions--Language of Enactment.
In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

(4)
Constitutional Law § 13--Construction of Constitutions--Language of Enactment--"Program."
The word "program," as used in Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on ***48** local governments and do not apply generally to all residents and entities in the state.

(5)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Increases in Workers' Compensation Benefits.
The provisions of Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state- mandated programs or higher levels of service within the meaning of art. XIII B, § 6. Accordingly, the State Board of Control properly denied reimbursement to local governmental entities for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees be covered by unemployment insurance.)

[See **Cal.Jur.3d,** State of California, § 78.]

(6)
Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts.
Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

(7)
Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts--Pro Tanto Repeal of Constitutional Provision.
The goals of Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of art. XIII B, § 6, did not effect a pro tanto repeal of Cal. Const., art. XIV, § 4, which gives the Legislature plenary power over workers' compensation. ***49**

COUNSEL
De Witt W. Clinton, County Counsel, Paula A. Snyder, Senior Deputy County Counsel, Edward G. Pozorski, Deputy County Counsel, John W. Witt, City Attorney, Kenneth K. Y. So, Deputy City Attorney, William D. Ross, Diana P. Scott, Ross & Scott and Rogers & Wells for Plaintiffs and Appellants.
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Rothenberg & Tunney and Clare Bronowski as Amici Curiae on behalf of Defendants and Respondents.

GRODIN, J.

We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. (1) We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or ***50** increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning. [1]

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which ***51** employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $231 per week to $262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from $55,000 to $75,000. No appropriation for increased state-mandated costs was made in this legislation. [2]

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in

providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207. [3] They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to pay the increased benefits until the state provided reimbursement.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly ***52** excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they did not, in the view of the trial court, create an "increased level of service " in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $73.50 to $168, and the maximum from $262.50 to $336. For permanent partial disability the weekly wage was raised from a minimum of $45 to $105, and from a maximum of $105 to $210, in each case for injuries occurring on or after January 1, 1984. (Lab. Code, § 4453.) A $10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, § 4553), and the maximum death benefit was raised from $75,000 to $85,000 for deaths in 1983, and to $95,000 for deaths on or after January 1, 1984. (Lab. Code, § 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[n]otwithstanding section 6 of Article XIIIB of the California Constitution and section 2231 ... of the Revenue and Taxation Code." (Stats. 1982, ch. 922, § 17, p. 3372.) [4]

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or ***53** section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings (Lab. Code, § 3202.5); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (Lab. Code, §§ 3601-3602); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (Lab. Code, § 4551.)

The court also held: "[T]he changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" [5] described in subdivision (a) of Revenue and Taxation Code section 2207. The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The

Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of section 2231 in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the ***54** definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289].) [6] On that basis the court concluded that increased costs were no longer tantamount to an increased level of service.

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma " case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions. [7]

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 was adopted. That provision used the same "increased level of service " phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law ... which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code § 2207.) As noted, however, the definition of that term which had been ***55** included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced section 2164.3 in 1973, was repealed and a new section 2231 enacted. (Stats. 1975. ch. 486, §§ 6 & 7, p. 999.) [8] Prior to repeal, Revenue and Taxation Code section 2164.3, and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that " "Increased level of service' means any requirement mandated by state law or executive regulation ... which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

(2) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange* (1978) 86 Cal.App.3d 394, 402 [150 Cal.Rptr. 286]; see also *Eu* v. *Chacon, supra*, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been ***56** aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

(3) In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must

look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [210 Cal.Rptr. 226, 693 P.2d 811].) In section 6, the electorate commands that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

(4) Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term—programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not ***57** for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]; *Big Sur Properties v. Mott* (1976) 63 Cal.App.3d 99, 105 [132 Cal.Rptr. 835].) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (Rev. & Tax. Code, §§ 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote.[9] Certainly no such intent is reflected in the language or history of article XIII B or section 6.

(5) We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation ***58** benefits that employees of private individuals or organizations receive.[10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are

indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See Lab. Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

(6) Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency* v. *California State Air Resources Bd.* (1974) 1 Cal.3d 801, 813-814 [114 Cal.Rptr. 577, 523 P.2d 617]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (*Legislature* v. *Deukmejian* (1983) 34 Cal.3d 658, 676 [194 Cal.Rptr. 781, 669 P.2d 17].)

Our concern over potential conflict arises because article XIV, section 4,[11] gives the Legislature "plenary power, unlimited by any provision of ***59** this Constitution" over workers' compensation. Although seemingly unrelated to workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature.

The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural ***60** limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIII B *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329 [178 Cal.Rptr. 801, 636 P.2d 1139]. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article

XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that ***61** amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co.* v. *Pillsbury* (1915) 170 Cal. 686, 695, [151 P. 398].) A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization of the objectives of the new article. (*Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 691-692 [97 Cal.Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 115-117 [148 Cal.Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power—the disciplining of attorneys—that otherwise rests exclusively with this court?" (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

(7) A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency* v. *Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220].) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage—costs which all employers must bear—neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in ***62** benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal—whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims

lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Bird, C. J., Broussard, J., Reynoso, J., Lucas, J., and Panelli, J., concurred.

MOSK, J.

I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither article XIII B, section 6, of the Constitution nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living ***63** adjustment. I agree with the Court of Appeal that this was permissible.

Appellants' petition for a rehearing was denied February 26, 1987. ***64**

Footnotes

1 The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[T]he initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates. ...

The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [¶] (1) will not allow the state government to force programs on local governments without the state paying for them."

2 The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.

Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $510 on which to base benefits, an unspecified appropriation was included.

3 The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

4 The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

5 The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

6 The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (Cf. *California Employment Stabilization Co.* v. *Payne* (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.

The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

7 We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See Code Civ. Proc. § 1094.5, subd. (f).)

8 Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218-2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[t]he state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (*County of Orange v. Flournoy* (1974) 42 Cal.App.3d 908, 913 [117 Cal.Rptr. 224].)

9 Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through

revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 [149 Cal.Rptr. 239, 583 P.2d 1281].)

10 The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

11 Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

729 P.2d 202, 233 Cal.Rptr. 38

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15 Cal.4th 68, 931 P.2d 312, 61 Cal.Rptr.2d 134, Med & Med GD (CCH) P 45,112, 97 Cal. Daily Op. Serv. 1555, 97 Daily Journal D.A.R. 2296
Supreme Court of California

COUNTY OF SAN DIEGO, Cross-complainant and Respondent,
v.
THE STATE OF CALIFORNIA et al., Cross-defendants and Appellants.

No. S046843.
Mar 3, 1997.

SUMMARY

After a county's unsuccessful administrative attempts to obtain reimbursement from the state for expenses incurred through its County Medical Services (CMS) program, and after a class action was filed on behalf of CMS program beneficiaries seeking to enjoin termination of the program, the county filed a cross-complaint and petition for a writ of mandate (Code Civ. Proc., § 1085) against the state, the Commission on State Mandates, and various state officers, to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service). The county alleged that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The trial court found that the state had an obligation to fund the county's CMS program. (Superior Court of San Diego County, No. 634931, Michael I. Greer, * Harrison R. Hollywood, and Judith D. McConnell, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D018634, affirmed the judgment of the trial court insofar as it provided that Cal. Const., art. XIII B, § 6, required the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required the county to spend at least $41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. The Court of Appeal remanded to the commission to determine the reimbursement amount and appropriate statutory remedies.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it held that the exclusion of medically indigent adults from Medi-Cal imposed a mandate on the county within the meaning of Cal. Const., art. XIII B, § 6. The Supreme Court reversed the judgment insofar as it held that the state required the county to spend at least $41 million on the CMS ***69** program in fiscal years 1989-1990 and 1990-1991, and remanded the matter to the commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c), Welf. & Inst. Code, §§ 10000, 17000) forced the county to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which the county was entitled. The court held that the trial court had jurisdiction to adjudicate the county's mandate claim, notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The court also held that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. The court further held that there was a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide the medical care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000, or be struck down as void by the courts. The court also held that the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the commission to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its CMS program. (Opinion by Chin, J., with

George, C. J., Mosk, and Baxter, JJ., Anderson, J.,* and Aldrich, J.,† concurring. Dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program.
***70** Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ill equipped to assume increased financial responsibilities because of the taxing and spending limitations that Cal. Const., arts. XIII A and XIII B, impose. With certain exceptions, Cal. Const., art. XIII B, § 6, essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

(2a, 2b)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Jurisdiction--With Pending Test Claim.
The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under Cal. Const., art. XIII B, § 6 (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering the futility exception to the exhaustion requirement, given that the commission rejected the other county's claim.

(3)
Administrative Law § 99--Judicial Review and Relief--Administrative Mandamus--Jurisdiction--As Derived From Constitution.
The power of superior courts to perform mandamus review of administrative decisions derives in part from Cal. Const., art. VI, § 10. ***71** That section gives the Supreme Court, Courts of Appeal, and superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." The jurisdiction thus vested may not lightly be deemed to have been destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

(4)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided

prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe rules (Welf. & Inst. Code, § 14000.2), and Medi-Cal was administered by state departments and agencies.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(5a, 5b)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards-- ***72** Eligibility.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000 (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although Welf. & Inst. Code, § 17000, does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under Welf. & Inst. Code, § 17000. The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. (Disapproving *Bay General Community Hospital v. County of San Diego* (1984) 156 Cal.App.3d 944 [203 Cal.Rptr. 184] insofar as it holds that a county's responsibility under Welf. & Inst. Code, § 17000, extends only to indigents as defined by the county's board of supervisors, and suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of Welf. & Inst. Code, § 17000, but do not qualify for Medi-Cal.)

(6)
Public Aid and Welfare § 4--County Assistance--Counties' Discretion.
Counties may exercise their discretion under Welf. & Inst. Code, § 17001 (county board of supervisors or authorized agency shall adopt standards of aid and care for indigent and dependent poor), only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose (Gov. Code, § 11374). Despite the counties' statutory discretion, courts have consistently invalidated county welfare regulations that fail to meet statutory requirements. ***73**

(7)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Service.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. Welf. & Inst. Code, § 17000, mandates that medical care be provided to indigents, and Welf. & Inst. Code, § 10000, requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing Welf. & Inst. Code, § 17000, have

held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, Health & Saf. Code, § 1442.5, former subd. (c), also spoke to the level of services that counties had to provide under Welf. & Inst. Code, § 17000, requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. (Disapproving *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706] to the extent it held that Health & Saf. Code, § 1442.5, former subd. (c), was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that services in the county were reduced.)

(8)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Minimum Required Expenditure.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), in which the trial court found that the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults mandated a reimbursable new program entitling the county to reimbursement, the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the Commission on State Mandates to determine the amount of any reimbursement due, erred in finding the county ***74** had a minimum required expenditure on its County Medical Services (CMS) program. The Court of Appeal relied on Welf. & Inst. Code, former § 16990, subd. (a), which set forth the financial maintenance-of-effort requirement for counties that received California Healthcare for the Indigent Program (CHIP) funding. However, counties that chose to seek CHIP funds did so voluntarily. Thus, Welf. & Inst. Code, former § 16990, subd. (a), did not mandate a minimum funding requirement. Nor did Welf. & Inst. Code, former § 16991, subd. (a)(5), establish a minimum financial obligation. That statute required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its allocation from various sources was less than the funding it received under Welf. & Inst. Code, § 16703, for 1988-1989. Nothing about this requirement imposed on the county a minimum funding requirement.

(9)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Proper Mandamus Proceeding:Mandamus and Prohibition § 23--Claim Against Commission on State Mandates.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under Code Civ. Proc., § 1085, was not an improper vehicle for challenging the commission's position. Mandamus under Code Civ. Proc., § 1094.5, commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under Code Civ. Proc., § 1085, as one brought under Code Civ. Proc., § 1094.5, and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, § 6, was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate. ***75**

COUNSEL
Daniel E. Lungren, Attorney General, Charlton G. Holland III, Assistant Attorney General, John H. Sanders and Richard T. Waldow, Deputy Attorneys General, for Cross-defendants and Appellants.
Lloyd M. Harmon, Jr., County Counsel, John J. Sansone, Acting County Counsel, Diane Bardsley, Chief Deputy County Counsel, Valerie Tehan and Ian Fan, Deputy County Counsel, for Cross-complainant and Respondent.

CHIN, J.

Section 6 of article XIII B of the California Constitution (section 6) requires the State of California (state), subject

to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henever the Legislature or any state agency mandates a new program or higher level of service ...." In this action, the County of San Diego (San Diego or the County) seeks reimbursement under section 6 from the state for the costs of providing health care services to certain adults who formerly received medical care under the California Medical Assistance Program (Medi-Cal) (see Welf. & Inst. Code, § 14063) [1] because they were medically indigent, i.e., they had insufficient financial resources to pay for their own medical care. In 1979, when the electorate adopted section 6, the state provided Medi-Cal coverage to these medically indigent adults without requiring financial contributions from counties. Effective January 1, 1983, the Legislature excluded this population from Medi-Cal. (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357.) Since that date, San Diego has provided medical care to these individuals with varying levels of state financial assistance.

To resolve San Diego's claim, we must determine whether the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" on San Diego within the meaning of section 6. The Commission on State Mandates (Commission), which the Legislature created to determine claims under section 6, has ruled that section 6 does not apply to the Legislature's action and has rejected reimbursement claims like San Diego's. (See *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 330, fn. 2 [285 Cal.Rptr. 66, 814 P.2d 1308] (*Kinlaw*).) The trial court and Court of Appeal in this case disagreed with the Commission, finding that San Diego was entitled to reimbursement. The state seeks ***76** reversal of this finding. It also argues that San Diego's failure to follow statutory procedures deprived the courts of jurisdiction to hear its claim. We reject the state's jurisdictional argument and affirm the finding that the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" within the meaning of section 6. Accordingly, we remand the matter to the Commission to determine the amount of reimbursement, if any, due San Diego under the governing statutes.

I. Funding of Indigent Medical Care

Before the start of Medi-Cal, "the indigent in California were provided health care services through a variety of different programs and institutions." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3 (Preliminary Report).) County hospitals "provided a wide range of inpatient and outpatient hospital services to all persons who met county indigency requirements whether or not they were public assistance recipients. The major responsibility for supporting county hospitals rested upon the counties, financed primarily through property taxes, with minor contributions from" other sources. (*Id.* at p. 4.)

Medi-Cal, which began operating March 1, 1966, established "a program of basic and extended health care services for recipients of public assistance and for medically indigent persons." (*Morris v. Williams* (1967) 67 Cal.2d 733, 738 [63 Cal.Rptr. 689, 433 P.2d 697] (*Morris*); *id.* at p. 740; see also Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 103.) It "represent[ed] California's implementation of the federal Medicaid program (42 U.S.C. §§ 1396-1396v), through which the federal government provide[d] financial assistance to states so that they [might] furnish medical care to qualified indigent persons. [Citation.]" (*Robert F. Kennedy Medical Center v. Belshé* (1996) 13 Cal.4th 748, 751 [55 Cal.Rptr.2d 107, 919 P.2d 721] (*Belshé*).) "[B]y meeting the requirements of federal law," Medi-Cal "qualif [ied] California for the receipt of federal funds made available under title XIX of the Social Security Act." (*Morris*, *supra*, 67 Cal.2d at p. 738.) "Title [XIX] permitted the combination of the major governmental health care systems which provided care for the indigent into a single system financed by the state and federal governments. By 1975, this system, at least as originally proposed, would provide a wide range of health care services for all those who [were] indigent regardless of whether they [were] public assistance recipients ...." (Preliminary Rep., *supra*, at p. 4; see also Act of July 30, 1965, Pub.L. No. 89-97, § 121(a), 79 Stat. 286, reprinted in 1965 U.S. Code ***77** Cong. & Admin. News, p. 378 [states must make effort to liberalize eligibility requirements "with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources"].) [2]

However, eligibility for Medi-Cal was initially limited only to persons linked to a federal categorical aid program by age (at least 65), blindness, disability, or membership in a family with dependent children within the meaning of the Aid to Families with Dependent Children program (AFDC). (See Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of

1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.) pp. 548, 550 (1971 Legislative Analyst's Report).) Individuals possessing one of these characteristics (categorically linked persons) received full benefits if they actually received public assistance payments. (*Id.* at p. 550.) Lesser benefits were available to categorically linked persons who were only medically indigent, i.e., their income and resources, although rendering them ineligible for cash aid, were "not sufficient to meet the cost of health care." (*Morris*, *supra*, 67 Cal.2d at p. 750; see also 1971 Legis. Analyst's Rep., *supra*, at pp. 548, 550; Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, pp. 105-106.)

Individuals not linked to a federal categorical aid program (non-categorically linked persons) were ineligible for Medi-Cal, regardless of their means. Thus, "a group of citizens, not covered by Medi-Cal and yet unable to afford medical care, remained the responsibility of" the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal.App.3d 1059, 1061 [100 Cal.Rptr. 629] (*Hall*).) In establishing Medi-Cal, the Legislature expressly recognized this fact by enacting former section 14108.5, which provided: "The Legislature hereby declares its concern with the problems which will be facing the counties with respect to the medical care of indigent persons who are not covered [by Medi-Cal] ... and ... whose medical care must be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116.) The Legislature directed the Health Review and Program Council "to study this problem and report its findings to the Legislature no later than March 1, 1967." (*Ibid.*)

Moreover, although it required counties to contribute to the costs of Medi-Cal, the Legislature established a method for determining the amount of their contributions that would "leave them with []sufficient funds to provide hospital care for those persons not eligible for Medi-Cal." (*Hall*, *supra*, 23 Cal.App.3d at p. 1061, fn. omitted.) Former section 14150.1, ***78** which was known as the "county option" or the "option plan," required a county "to pay the state a sum equal to 100 percent of the county's health care costs (which included both linked and nonlinked individuals) provided in the 1964-1965 fiscal year, with an adjustment for population increase; in return the state would pay the county's entire cost of medical care." [3] (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 581 [159 Cal.Rptr. 1] (*Lackner*).) Under the county option, "the state agreed to assume all county health care costs ... in excess of" the county's payment. (*Id.* at p. 586.) It "made no distinction between 'linked' and 'nonlinked' persons," and "simply guaranteed a medical cost ceiling to counties electing to come within the option plan." (*Ibid.*) "Any difference in actual operating costs and the limit set by the option provision [was] assumed entirely by the state." (Preliminary Rep., *supra*, at p. 10, fn. 2.) Thus, the county option "guarantee[d] state participation in the cost of care for medically indigent persons who [were] not otherwise covered by the basic Medi-Cal program or other repayment programs." [4] (1971 Legis. Analyst's Rep., *supra*, at p. 549.)

Primarily through the county option, Medi-Cal caused a "significant shift in financing of health care from the counties to the state and federal government.... During the first 28 months of the program the state ... paid approximately $76 million for care of non-Medi-Cal indigents in county hospitals." (Preliminary Rep., *supra*, at p. 31.) These state funds paid "costs that would otherwise have been borne by counties through increases in property taxes." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1974-1975 Budget Bill, Sen. Bill No. 1525 (1973-1974 Reg. Sess.) p. 626 (1974 Legislative Analyst's Report).) "[F]aced with escalating Medi-Cal costs, the Legislature in 1967 imposed strict guidelines on reimbursing counties electing to come under the 'option' plan. ([Former] § 14150.2.) Pursuant to subdivision (c) of [former] section 14150.2, the state imposed a limit on its obligation to pay for medical services to nonlinked persons ***79** served by a county within the 'option' plan." (*Lackner*, *supra*, 97 Cal.App.3d at p. 589; see also Stats. 1967, ch. 104, § 3, p. 1019; Stats. 1969, ch. 21, § 57, pp. 106-107; 1974 Legis. Analyst's Rep., *supra*, at p. 626.)

In 1971, the Legislature substantially revised Medi-Cal. It extended coverage to certain noncategorically linked minors and adults "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83; see Stats. 1971, ch. 577, §§ 12, 23, pp. 1110-1111, 1115.) These medically indigent individuals met "the income and resource requirements for aid under [AFDC] but [did] not otherwise qualify[] as a public assistance recipient." (56 Ops.Cal.Atty.Gen. 568, 569 (1973).) The Legislature anticipated that this eligibility expansion would bring "approximately 800,000 additional medically needy Californians" into Medi-Cal. (Stats. 1971, ch. 577, § 56, p. 1136.) The 1971 legislation referred to these individuals as " '[n]oncategorically related needy person [s].' " (Stats. 1971, ch. 577, § 23, p. 1115.) Subsequent legislation designated them as "medically indigent person[s]" (MIP's) and provided

them coverage under former section 14005.4. (Stats. 1976, ch. 126, § 7, p. 200; *id.* at § 20, p. 204.)

The 1971 legislation also established a new method for determining each county's financial contribution to Medi-Cal. The Legislature eliminated the county option by repealing former section 14150.1 and enacting former section 14150. That section specified (by amount) each county's share of Medi-Cal costs for the 1972-1973 fiscal year and set forth a formula for increasing the share in subsequent years based on the taxable assessed value of certain property. (Stats. 1971, ch. 577, §§ 41, 42, pp. 1131-1133.)

For the 1978-1979 fiscal year, the state assumed each county's share of Medi-Cal costs under former section 14150. (Stats. 1978, ch. 292, § 33, p. 610.) In July 1979, the Legislature repealed former section 14150 altogether, thereby eliminating the counties' responsibility to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 74, p. 1043.) Thus, in November 1979, when the electorate adopted section 6, "the state was funding Medi-Cal coverage for [MIP's] without requiring any county financial contribution." (*Kinlaw, supra*, 54 Cal.3d at p. 329.) The state continued to provide full funding for MIP medical care through 1982.

In 1982, the Legislature passed two Medi-Cal reform bills that, as of January 1, 1983, excluded from Medi-Cal most adults who had been eligible ***80** under the MIP category (adult MIP's or Medically Indigent Adults).[5] (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357; *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 411 [261 Cal.Rptr. 706] (*Cooke*).) As part of excluding this population from Medi-Cal, the Legislature created the Medically Indigent Services Account (MISA) as a mechanism for "transfer[ing] [state] funds to the counties for the provision of health care services." (Stats. 1982, ch. 1594, § 86, p. 6357.) Through MISA, the state annually allocated funds to counties based on "the average amount expended" during the previous three fiscal years on Medi-Cal services for county residents who had been eligible as MIP's. (Stats. 1982, ch. 1594, § 69, p. 6345.) The Legislature directed that MISA funds "be consolidated with existing county health services funds in order to provide health services to low-income persons and other persons not eligible for the Medi-Cal program." (Stats. 1982, ch. 1594, § 86, p. 6357.) It further provided: "Any person whose income and resources meet the income and resource criteria for certification for [Medi-Cal] services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.)

After passage of the 1982 legislation, San Diego established a county medical services (CMS) program to provide medical care to adult MIP's. According to San Diego, between 1983 and June 1989, the state fully funded San Diego's CMS program through MISA. However, for fiscal years 1989-1990 and 1990-1991, the state only partially funded San Diego's CMS program. For example, San Diego asserts that, in fiscal year 1990-1991, it exhausted state-provided MISA funds by December 24, 1990. Faced with this shortfall, San Diego's board of supervisors voted in February 1991 to terminate the CMS program unless the state agreed by March 8 to provide full funding for the 1990-1991 fiscal year. After the state refused to provide additional funding, San Diego notified affected individuals and medical service providers that it would terminate the CMS program at midnight on March 19, 1991. The response to the County's notification ultimately resulted in the unfunded mandate claim now before us.

II. Unfunded Mandates

Through adoption of Proposition 13 in 1978, the voters added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 [***81** 280 Cal.Rptr. 92, 808 P.2d 235] (*County of Fresno*).) The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574 [7 Cal.Rptr.2d 245, 828 P.2d 147].) (1) These two constitutional articles "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522].) Their goals are "to protect residents from excessive taxation and government spending. [Citation.]" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*).)

California Constitution, article XIII B includes section 6, which is the constitutional provision at issue here. It

provides in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] ... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Section 6 recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. (*County of Fresno*, *supra*, 53 Cal.3d at p. 487.) Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose. (*County of Fresno*, *supra*, 53 Cal.3d at p. 487; *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) With certain exceptions, section 6 "[e]ssentially" requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577 [15 Cal.Rptr.2d 547].)

In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. (Gov. Code, § 17500 et seq.). The local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. (Gov. Code, §§ 17521, 17551, 17555.) If the Commission finds a claim to be reimbursable, it must determine the amount of reimbursement. (Gov. Code, § 17557.) The local agency must then follow certain statutory procedures to ***82** obtain reimbursement. (Gov. Code, § 17558 et seq.) If the Legislature refuses to appropriate money for a reimbursable mandate, the local agency may file "an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c).) If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under section 1094.5 of the Code of Civil Procedure. (Gov. Code, § 17559.) Government Code section 17552 declares that these provisions "provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6 ...."

III. Administrative and Judicial Proceedings

A. *The Los Angeles Action*

On November 23, 1987, the County of Los Angeles (Los Angeles) filed a claim (the Los Angeles action) with the Commission asserting that the exclusion of adult MIP's from Medi-Cal constituted a reimbursable mandate under section 6. (*Kinlaw*, *supra*, 54 Cal.3d at p. 330, fn. 2.) Alameda County subsequently filed a claim on November 30, 1987, but the Commission rejected it because of the pending Los Angeles action. (*Id.* at p. 331, fn. 4.) Los Angeles refused to permit Alameda County to join as a claimant, but permitted San Bernardino County to join. (*Ibid.*)

In April 1989, the Commission rejected the Los Angeles claim, finding no reimbursable mandate.[6] (*Kinlaw*, *supra*, 54 Cal.3d at p. 330, fn. 2.) It found that the 1982 legislation did not impose on counties a new program or a higher level of service for an existing program because counties had a "pre-existing duty" to provide medical care to the medically indigent under section 17000. That section provides in relevant part: "Every county ... shall relieve and support all incompetent, poor, indigent persons ... lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Section 17000 did not impose a reimbursable mandate under section 6, the Commission further reasoned, because it "was enacted prior to January 1, 1975 ...." Finally, the Commission found no mandate because the 1982 legislation "neither establish[ed] the level of care to be provided nor ... define[d] the class of persons determined to be eligible for medical care since these criteria were established by boards of supervisors" pursuant to section 17001.

On March 20, 1990, the Los Angeles Superior Court filed a judgment reversing the Commission's decision and directing issuance of a peremptory ***83** writ of mandate. On April 16, 1990, the Commission and the state filed an appeal in the Second District Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.)[7] In early 1992, the parties to the Los Angeles action agreed to settle their dispute and to seek dismissal. In April 1992, after learning of this

agreement, San Diego sought to intervene. Explaining that it had been waiting for resolution of the action, San Diego requested that the Court of Appeal deny the dismissal request and add (or substitute in) the County as a party. The Court of Appeal did not respond. On December 15, 1992, the parties to the Los Angeles action entered into a settlement agreement that provided for vacation of the superior court judgment and dismissal of the appeal and superior court action. Consistent with the settlement agreement, on December 29, 1992, the Court of Appeal filed an order vacating the superior court judgment, dismissing the appeal, and instructing the superior court to dismiss the action without prejudice on remand. [8]

B. *The San Diego Action*

1. *Administrative Attempts to Obtain Reimbursement*

On March 13, 1991, San Diego submitted an invoice to the State Controller seeking reimbursement of its uncompensated expenditures on the CMS program for fiscal year 1989-1990. The Controller is a member of the Commission. (Gov. Code, § 17525.) On April 12, the Controller returned the invoice "without action," stating that "[n]o appropriation has been given to this office to allow for reimbursement" of medical costs for adult MIP's and noting that litigation was pending regarding the state's reimbursement obligation. On December 18, 1991, San Diego submitted a similar invoice for the 1990-1991 fiscal year. The state has not acted regarding this second invoice. ***84**

2. *Court Proceedings*

Responding to San Diego's notice of intent to terminate the CMS program, on March 11, 1991, the Legal Aid Society of San Diego filed a class action on behalf of CMS program beneficiaries seeking to enjoin termination of the program. The trial court later issued a preliminary injunction prohibiting San Diego "from taking any action to reduce or terminate" the CMS program.

On March 15, 1991, San Diego filed a cross-complaint and petition for writ of mandate under Code of Civil Procedure section 1085 against the state, the Commission, and various state officers. [9] The cross-complaint alleged that, by excluding adult MIP's from Medi-Cal and transferring responsibility for their medical care to counties, the state had mandated a new program and higher level of service within the meaning of section 6. The cross-complaint further alleged that the state therefore had a duty under section 6 to reimburse San Diego for the entire cost of its CMS program, and that the state had failed to perform its duty.

Proceeding from these initial allegations, the cross-complaint alleged causes of action for indemnification, declaratory and injunctive relief, reimbursement and damages, and writ of mandate. In its first declaratory relief claim, San Diego alleged (on information and belief) that the state contended the CMS program was a nonreimbursable, county obligation. In its claim for reimbursement, San Diego alleged (again on information and belief) that the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement from the State for the costs of such programs." "Under these circumstances," San Diego asserted, "denial of the County's claim by the Commission ... is virtually certain and further administrative pursuit of this claim would be a futile act."

For relief, San Diego requested a judgment declaring the following: (1) that the state must fully reimburse San Diego if it "is compelled to provide any CMS Program services to plaintiffs ... after March 19, 1991"; (2) that section 6 requires the state "to fully fund the CMS Program" (or, alternatively, that the CMS program is discretionary); (3) that the state must pay San Diego for all of its unreimbursed costs for the CMS program during the ***85** 1989-1990 and 1990-1991 fiscal years; and (4) that the state shall assume responsibility for operating any court-ordered continuation of the CMS program. San Diego also requested that the court issue a writ of mandamus requiring the state to fulfill its reimbursement obligation. Finally, San Diego requested issuance of preliminary and permanent injunctions to ensure that the state fulfilled its obligations to the County.

In April 1991, San Diego determined that it could continue operating the CMS program using previously unavailable general fund revenues. Accordingly, San Diego and plaintiffs settled their dispute, and plaintiffs dismissed their complaint.

The matter proceeded solely on San Diego's cross-complaint. The court issued a preliminary injunction and alternative writ in May 1991. At a hearing on June 25, 1991, the court found that the state had an obligation to fund San Diego's CMS program, granted San Diego's request for a writ of mandate, and scheduled an evidentiary hearing to determine damages and remedies. On July 1, 1991, it issued an order reflecting this ruling and granting a peremptory writ of mandate. The writ did not issue, however, because of the pending hearing

to determine damages. In December 1992, after an extensive evidentiary hearing and posthearing proceedings on the claim for a peremptory writ of mandate, the court issued a judgment confirming its jurisdiction to determine San Diego's claim, finding that section 6 required the state to fund the entire cost of San Diego's CMS program, determining the amount that the state owed San Diego for fiscal years 1989-1990 and 1990-1991, identifying funds available to the state to satisfy the judgment, and ordering issuance of a peremptory writ of mandate. [10] The court also issued a peremptory writ of mandate directing the state and various state officers to comply with the judgment.

The Court of Appeal affirmed the judgment insofar as it provided that section 6 requires the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required San Diego to spend at least $41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. It remanded the matter to the Commission to determine the reimbursement amount and appropriate statutory remedies. We then granted the state's petition for review.

IV. Superior Court Jurisdiction

(2a) Before reaching the merits of the appeal, we must address the state's assertion that the superior court lacked jurisdiction to hear San ***86** Diego's mandate claim. According to the state, in *Kinlaw*, *supra*, 54 Cal.3d 326, we "unequivocally held that the orderly determination of [unfunded] mandate questions demands that only one claim on any particular alleged mandate be entertained by the courts at any given time." Thus, if a test claim is pending, "other potential claims must be held in abeyance ...." Applying this principle, the state asserts that, since "the test claim litigation was pending" in the Los Angeles action when San Diego filed its cross-complaint seeking mandamus relief, "the superior court lacked jurisdiction from the outset, and the resulting judgment is a nullity. That defect cannot be cured by the settlement of the test claim, which occurred after judgment was entered herein."

In *Kinlaw*, we held that individual taxpayers and recipients of government benefits lack standing to enforce section 6 because the applicable administrative procedures, which "are the exclusive means" for determining and enforcing the state's section 6 obligations, "are available only to local agencies and school districts directly affected by a state mandate ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 328.) In reaching this conclusion, we explained that the reimbursement right under section 6 "is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services." (*Id.* at p. 334.) We concluded that "[n]either public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues." (*Id.* at p. 335.)

In finding that individuals do not have standing to enforce the section 6 rights of local agencies, we made several observations in *Kinlaw* pertinent to operation of the statutory process as it applies to entities that do have standing. Citing Government Code section 17500, we explained that "the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6 ... because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." (*Kinlaw*, *supra*, 54 Cal.3d at p. 331.) Thus, the governing statutes "establish[] procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." (*Id.* at p. 333.) Specifically, "[t]he legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies ...." (*Id.* at p. 331.) Describing the Commission's application of the test-claim procedure to claims regarding exclusion of adult MIP's from Medi-Cal, we observed: "The test claim by the County of Los Angeles was filed prior to that ***87** proposed by Alameda County. The Alameda County claim was rejected for that reason. (See [Gov. Code,] § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the [adult MIP exclusion] issues .... Los Angeles County declined a request from Alameda County that it be included in the test claim ...." (*Id.* at p. 331, fn. 4.)

Consistent with our observations in *Kinlaw*, we here agree with the state that the trial court should not have proceeded to resolve San Diego's claim for reimbursement under section 6 while the Los Angeles action was pending. A contrary conclusion would undermine one of "the express purpose[s]"

of the statutory procedure: to "avoid[] multiple proceedings ... addressing the same claim that a reimbursable state mandate has been created." (*Kinlaw*, *supra*, 54 Cal.3d at p. 333.)

(3) However, we reject the state's assertion that the error was jurisdictional. The power of superior courts to perform mandamus review of administrative decisions derives in part from article VI, section 10 of the California Constitution. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 138 [93 Cal.Rptr. 234, 481 P.2d 242]; *Lipari v. Department of Motor Vehicles* (1993) 16 Cal.App.4th 667, 672 [20 Cal.Rptr.2d 246].) That section gives "[t]he Supreme Court, courts of appeal, [and] superior courts ... original jurisdiction in proceedings for extraordinary relief in the nature of mandamus ...." (Cal. Const., art. VI, § 10.) "The jurisdiction thus vested may not lightly be deemed to have been destroyed." (*Garrison v. Rourke* (1948) 32 Cal.2d 430, 435 [196 P.2d 884], overruled on another ground in *Keane v. Smith* (1971) 4 Cal.3d 932, 939 [95 Cal.Rptr. 197, 485 P.2d 261].) "While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*Garrison*, *supra*, at p. 436.) (2b) Here, we find no statutory provision that either "expressly provide[s]" (*id.* at p. 435) or otherwise "clearly intend[s]" (*id.* at p. 436) that the Legislature intended to divest all courts other than the court hearing the test claim of their mandamus jurisdiction.

Rather, following *Dowdall v. Superior Court* (1920) 183 Cal. 348 [191 P. 685] (*Dowdall*), we interpret the governing statutes as simply vesting primary jurisdiction in the court hearing the test claim. In *Dowdall*, we determined the jurisdictional effect of Code of Civil Procedure former section 1699 on actions to settle the account of trustees of a testamentary trust. Code of Civil Procedure former section 1699 provided in part: "Where any trust ***88** has been created by or under any will to continue after distribution, the Superior Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." (Stats. 1889, ch. 228, § 1, p. 337.) We explained that, under this section, "the superior court, sitting in probate upon the distribution of an estate wherein the will creates a trust, retain[ed] jurisdiction of the estate for the purpose of the settlement of the accounts under the trust." (*Dowdall*, *supra*, 183 Cal. at p. 353.) However, we further observed that "the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction thereof." (*Ibid.*)

Similarly, we conclude that, under the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction. Thus, if an action asserting the same unfunded mandate claim is filed in any other superior court, that court, upon being informed of the pending test claim, should postpone the proceeding before it and allow the court having primary jurisdiction to determine the test claim.

However, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction. As we explained in *Dowdall*, a court that refuses to defer to another court's primary jurisdiction "is not without jurisdiction." (*Dowdall*, *supra*, 183 Cal. at p. 353.) Accordingly, notwithstanding pendency of the Los Angeles action, the trial court here did not lack jurisdiction to determine San Diego's mandamus petition. (See *Collins v. Ramish* (1920) 182 Cal. 360, 366-369 [188 P. 550] [although trial court erred in refusing to abate action because of former action pending, new trial was not warranted on issues that the trial court correctly decided]; *People* ex rel. *Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 772 [25 Cal.Rptr.2d 192] (*Garamendi*) ["rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to comply renders subsequent proceedings void"]; *Stearns v. Los Angeles City School Dist.* (1966) 244 Cal.App.2d 696, 718 [53 Cal.Rptr. 482, 21 A.L.R.3d 164] [where trial court errs in failing to stay proceedings in ***89** deference

to jurisdiction of another court, reversal would be frivolous absent errors regarding the merits].) [11]

The trial court's failure to defer to the primary jurisdiction of the court hearing the Los Angeles action did not prejudice the state. Contrary to the state's assertion, the trial court did not "usurp" the Commission's "authority to determine, in the first place, whether or not legislation creates a mandate." The Commission had already exercised that authority in the Los Angeles action. Moreover, given the settlement of the Los Angeles action, which included vacating the judgment in that action, the trial court's exercise of jurisdiction here did not result in one of the principal harms that the statutory procedure seeks to prevent: multiple decisions regarding an unfunded mandate question. Finally, the lack of an administrative record specifically relating to San Diego's claim did not prejudice the state because the threshold determination of whether a statute imposes a state mandate is an issue of law. (*County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340, 347 [280 Cal.Rptr. 310].) To the extent that an administrative record was necessary, the record developed in the Los Angeles action could have been submitted to the trial court. [12] (See *Los Angeles Unified School Dist. v. State of California* (1988) 199 Cal.App.3d 686, 689 [245 Cal.Rptr. 140].)

We also find that, on the facts of this case, San Diego's failure to submit a test claim to the Commission before seeking judicial relief did not affect the superior court's jurisdiction. Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 640 [21 Cal.Rptr.2d 453]; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73-77 [222 Cal.Rptr. 750] (*County of Contra Costa*).) However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they "can establish an exception to" the exhaustion requirement. (*County of Contra Costa*, *supra*, 177 Cal.App.3d at p. 77.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case. [Citations.]" (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 870 [226 Cal.Rptr. 119, 718 P.2d 106]; see also *County of Contra Costa*, *supra*, 177 Cal.App.3d at pp. 77-78.) ***90**

We agree with the trial court and the Court of Appeal that the futility exception applied in this case. As we have previously noted, San Diego invoked this exception by alleging in its cross-complaint that the Commission's denial of its claim was "virtually certain" because the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement ...." Given that the Commission rejected the Los Angeles claim (which alleged the same unfunded mandate claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile. Therefore, we reject the state's jurisdictional argument and proceed to the merits of the appeal.

V. Existence of a Mandate Under Section 6

(4) In determining whether there is a mandate under section 6, we turn to our decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318] (*Lucia Mar*). There, we discussed section 6's application to Education Code section 59300, which "requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped." (*Lucia Mar*, *supra*, at p. 832.) Before 1979, the Legislature had statutorily required school districts "to contribute to the education of pupils from the districts at the state schools [citations] ...." (*Id.* at pp. 832-833.) The Legislature repealed the statutory requirements in 1979 and, on July 12, 1979, the state assumed full-funding responsibility. (*Id.* at p. 833.) On July 1, 1980, when section 6 became effective, the state still had full-funding responsibility. On June 28, 1981, Education Code section 59300 took effect. (*Lucia Mar*, *supra*, at p. 833.)

Various school districts filed a claim seeking reimbursement under section 6 for the payments that Education Code section 59300 requires. The Commission denied the claim, finding that the statute did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, the latter "reasoning that a shift in the funding of an existing program is not a new program or a higher level of service" under section 6. (*Lucia Mar*, *supra*, 44 Cal.3d at p. 834.)

We reversed, finding that a contrary result would "violate the intent underlying section 6 ...." (*Lucia Mar*, *supra*, 44 Cal.3d at p. 835.) That section "was intended to preclude the state

from shifting to local agencies the financial responsibility for providing public services in view of the [] ***91** restrictions on the taxing and spending power of the local entities" that articles XIII A and XIII B of the California Constitution imposed. (*Lucia Mar*, *supra*, at pp. 835-836.) "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 ... because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B*, the result seems equally violative of the fundamental purpose underlying section 6 ...." (*Id.* at p. 836, italics added, fn. omitted.) We thus concluded in *Lucia Mar* "that because [Education Code] section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts —an obligation the school districts did not have at the time article XIII B was adopted—it calls for [the school districts] to support a 'new program' within the meaning of section 6." (*Ibid.*, fn. omitted.)

The similarities between *Lucia Mar* and the case before us "are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-197[8] the state and county shared the cost of caring for [adult MIP's] under the Medi-Cal program.... [F]ollowing enactment of [article XIII A], the state took full responsibility for both programs." (*Kinlaw*, *supra*, 54 Cal.3d at p. 353 (dis. opn. of Broussard, J.).) As to both programs, the Legislature cited adoption of article XIII A of the California Constitution, and specifically its effect on tax revenues, as the basis for the state's assumption of full funding responsibility. (Stats. 1979, ch. 237, § 10, p. 493; Stats. 1979, ch. 282, § 106, p. 1059.) "Then in 1981 (for handicapped children) and 1982 (for [adult MIP's]), the state sought to shift some of the burden back to the counties." (*Kinlaw*, *supra*, 54 Cal.3d at p. 353 (dis. opn. of Broussard, J.).)

Adopting the Commission's analysis in the Los Angeles action, the state nevertheless argues that *Lucia Mar* "is inapposite." The school program at issue in *Lucia Mar* "had been wholly operated, administered and financed by the state" and "was unquestionably a 'state program.' " " 'In contrast,' " the state argues, " 'the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for' " it under section 17000 and its predecessors.[13] The courts have interpreted section 17000 as "impos[ing] upon counties a duty to ***92** provide hospital and medical services to indigent residents. [Citations.]" (*Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 557 [254 Cal.Rptr. 905].) Thus, the state argues, the source of San Diego's obligation to provide medical care to adult MIP's is section 17000, not the 1982 legislation. Moreover, because the Legislature enacted section 17000 in 1965, and section 6 does not apply to "mandates enacted prior to January 1, 1975," there is no reimbursable mandate. Finally, the state argues that, because section 17001 give counties "complete discretion" in setting eligibility and service standards under section 17000, there is no mandate. A contrary conclusion, the state asserts, "would erroneously expand the definition of what constitutes a 'new program' under" section 6. As we explain, we reject these arguments.

A. *The Source and Existence of San Diego's Obligation*

1. *The Residual Nature of the Counties' Duty Under Section 17000*

The state's argument that San Diego's obligation to provide medical care to adult MIP's predates the 1982 legislation contains numerous errors. First, the state misunderstands San Diego's obligation under section 17000. That section creates "the *residual* fund" to sustain indigents "who cannot qualify ... under any specialized aid programs." (*Mooney*, *supra*, 4 Cal.3d at p. 681, italics added; see also *Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 562; *Boehm v. Superior Court* (1986) 178 Cal.App.3d 494, 499 [223 Cal.Rptr. 716] [general assistance "is a program of last resort"].) By its express terms, the statute requires a county to relieve and support indigent persons *only* "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (§ 17000.)[14] "Consequently, to the extent that the state or federal governments provide[d] care for [adult MIP's], the [C]ounty's obligation to do so [was] reduced ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 354, fn. 14 (dis. opn. of Broussard, J.).)[15]

As we have explained, the state began providing adult MIP's with medical care under Medi-Cal in 1971. Although it initially required counties to ***93** contribute generally to the costs of Medi-Cal, it did not set forth a specific amount for coverage of MIP's. The state was primarily responsible for the costs of the program, and the counties were simply required to contribute funds to defray the state's costs. Beginning with the 1978-1979 fiscal year, the state paid all costs of the Medi-Cal program, including the cost of medical care for adult MIP's. Thus, when section 6 was adopted in November 1979, to the extent that Medi-Cal provided medical care to adult MIP's, San Diego bore no financial responsibility for these health care costs. [16]

The California Attorney General has expressed a similar understanding of Medi-Cal's effect on the counties' medical care responsibility under section 17000. After the 1971 extension of Medi-Cal coverage to MIP's, Fresno County sought an opinion regarding the scope of its duty to provide medical care under section 17000. It asserted that the 1971 repeal of former section 14108.5, which declared the Legislature's concern with the counties' problems in caring for indigents not eligible for Medi-Cal, evidenced a legislative intent to preempt the field of providing health services. (56 Ops.Cal.Atty.Gen., *supra*, at p. 571.) The Attorney General disagreed, concluding that the 1971 change "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (*Id.* at p. 569.) The Attorney General explained: "The statement of concern acknowledged the obligation of counties to continue to provide medical assistance under section 17000; the removal of the statement of concern was not accompanied by elimination of such duty on the part of the counties, *except as the addition of* [*MIP's*] *to the Medi-Cal program would remove the burden on the counties to provide medical care for such persons*." (*Id.* at p. 571, italics added.) ***94**

Indeed, the Legislature's statement of intent in an uncodified section of the 1982 legislation excluding adult MIP's from Medi-Cal suggests that it also shared our understanding of section 17000. Section 8.3 of the 1982 Medi-Cal revisions expressly declared the Legislature's intent "[i]n eliminating [M]edically [I]ndigent [A]dults from the Medi-Cal program ...." (Stats. 1982, ch. 328, § 8.3, p. 1575; Stats. 1982, ch. 1594, § 86, p. 6357.) It stated in part: "It is further the intent of the Legislature to provide counties with as much flexibility as possible in organizing county health services to serve *the population being transferred*." (Stats. 1982, ch. 328, § 8.3, p. 1576; Stats. 1982, ch. 1594, § 86, p. 6357, italics added.) If, as the state contends, counties had always been responsible under section 17000 for the medical care of adult MIP's, the description of adult MIP's as "the population being transferred" would have been inaccurate. By so describing adult MIP's, the Legislature indicated its understanding that counties did not have this responsibility while adult MIP's were eligible for Medi-Cal. These sources fully support our rejection of the state's argument that the 1982 legislation did not impose a mandate because, under section 17000, counties had always borne the responsibility for providing medical care to adult MIP's.

2. *The State's Assumption of Full Funding Responsibility for Providing Medical Care to Adult MIP's Under Medi-Cal*

To support its argument that it never relieved counties of their obligation under section 17000 to provide medical care to adult MIP's, the state characterizes as "temporary" the Legislature's assumption of full-funding responsibility for adult MIP's. According to the state, "any ongoing responsibility of the county was, at best, only temporarily, partially, alleviated (and never supplanted)." The state asserts that the Court of Appeal thus "erred by focusing on one phase in th[e] shifting pattern of arrangements" for funding indigent health care, "a focus which led to a myopic conclusion that the state alone is forever responsible for funding the health care for" adult MIP's.

A comparison of the 1978 and 1979 statutes that eliminated the counties' share of Medi-Cal costs refutes the state's claim. The Legislature expressly limited the effect of the 1978 legislation to one fiscal year, providing that the state "shall pay" each county's Medi-Cal cost share "for the period from July 1, 1978, to June 30, 1979." (Stats. 1978, ch. 292, § 33, p. 610.) The Legislative Counsel's Digest explained that this section would require the state to pay "[a]ll county costs for Medi-Cal" for "the 1978-79 fiscal year only." (Legis. Counsel's Dig., Sen. Bill No. 154, 4 Stats. 1978 (Reg. Sess.), Summary Dig., p. 71.) The digest further explained that the purpose of the bill containing this section was "the *partial* relief of local government from the *temporary* difficulties brought about by the approval of Proposition 13." ***95** (*Id.* at p. 70, italics added.) Clearly, the Legislature knew how to include words of limitation when it intended the effects of its provisions to be temporary.

By contrast, the 1979 legislation contains no such limiting language. It simply provided: "Section 14150 of the Welfare and Institutions Code is repealed." (Stats. 1979, ch. 282, § 74,

p. 1043.) In setting forth the need to enact the legislation as an urgency statute, the Legislature explained: "The adoption of Article XIII A ... may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately." (Stats. 1979, ch. 282, § 106, p. 1059.) In describing the effect of this legislation, the Legislative Counsel first explained that, "[u]nder existing law, the counties pay a specified annual share of the cost of" Medi-Cal. (Legis. Counsel's Dig., Assem. Bill No. 8, 4 Stats. 1979 (Reg. Sess.), Summary Dig., p. 79.) Referring to the 1978 legislation, it further explained that "[f]or the 1978-79 fiscal year only, the state pays ... [¶] ... [a]ll county costs for Medi-Cal ...." (*Ibid.*) The 1979 legislation, the digest continued, "provid[ed] for state assumption of all county costs of Medi-Cal." (*Ibid.*) We find nothing in the 1979 legislation or the Legislative Counsel's summary indicating a legislative intent to eliminate the counties' cost share of Medi-Cal only temporarily.

The state budget process for the 1980-1981 fiscal year confirms that the Legislature's assumption of all Medi-Cal costs was not viewed as "temporary." In the summary of his proposed budget, then Governor Brown described Assembly Bill No. 8, 1981-1982 Regular Session, generally as "a long-term local financing measure" (Governor's Budget for 1980-1981 as submitted to Legislature (1979-1980 Reg. Sess.) Summary of Local Government Fiscal Relief, p. A-30) through which "[t]he total cost of [the Medi-Cal] program was *permanently* assumed by the State ...." (*Id.* at p. A-32, italics added.) Similarly, in describing to the Joint Legislative Budget Committee the Medi-Cal funding item in the proposed budget, the Legislative Analyst explained: "Item 287 includes the state cost of 'buying out' the county share of Medi-Cal expenditures. Following passage of Proposition 13, [Senate Bill No.] 154 appropriated $418 million to relieve counties of all fiscal responsibility for Medi-Cal program costs. Subsequently, [Assembly Bill No.] 8 was enacted, *which made permanent state assumption of county Medi-Cal costs*." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1980-1981 Budget Bill, Assem. Bill No. 2020 (1979-1980 Reg. Sess.) at p. 721, italics added.) Thus, the state errs in asserting that the 1979 legislation eliminated the counties' financial support of Medi-Cal "only temporarily."

***96**

3. *State Administration of Medical Care for Adult MIP's Under Medi-Cal*

The state argues that, unlike the school program before us in *Lucia Mar*, *supra*, 44 Cal.3d 830, which "had been wholly operated, administered and financed by the state," the program for providing medical care to adult MIP's " 'has never been operated or administered by' " the state. According to the state, Medi-Cal was simply a state "reimbursement program" for care that section 17000 required counties to provide. The state is incorrect.

One of the legislative goals of Medi-Cal was "to allow eligible persons to secure basic health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 104.) "In effect, this meant that poorer people could have access to a private practitioner of their choice, and not be relegated to a county hospital program." (*California Medical Assn. v. Brian* (1973) 30 Cal.App.3d 637, 642 [106 Cal.Rptr. 555].) Medi-Cal "provided for reimbursement to both public and private health care providers for medical services rendered." (*Lackner*, *supra*, 97 Cal.App.3d at p. 581.) It further directed that, "[i]nsofar as practical," public assistance recipients be afforded "free choice of arrangements under which they shall receive basic health care." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 115.) Finally, since its inception, Medi-Cal has permitted county boards of supervisors to "prescribe rules which authorize the county hospital to integrate its services with those of other hospitals into a system of community service which offers free choice of hospitals to those requiring hospital care. The intent of this section is to eliminate discrimination or segregation based on economic disability so that the county hospital and other hospitals in the community share in providing services to paying patients and to those who qualify for care in public medical care programs." (§ 14000.2.) Thus, "Medi-Cal eligibles were to be able to secure health care in the same manner employed by the general public (i.e., in the private sector or at a county facility)." (1974 Legis. Analyst's Rep., *supra*, at p. 625; see also Preliminary Rep., *supra*, at p. 17.) By allowing eligible persons "a choice of medical facilities for treatment," Medi-Cal placed county health care providers "in competition with private hospitals." (*Hall*, *supra*, 23 Cal.App.3d at p. 1061.)

Moreover, administration of Medi-Cal over the years has been the responsibility of various state departments and agencies. (§§ 10720-10721, 14061-14062, 14105, 14203;

Belshé, *supra*, 13 Cal.4th at p. 751; *Morris*, *supra*, 67 Cal.2d at p. 741; Summary of Major Events, *supra*, at pp. 2-3, 15.) Thus, "[i]n adopting the Medi-Cal program the state Legislature, for the most part, shifted indigent medical care from being a county responsibility to a State ***97** responsibility under the Medi-Cal program. [Citation.]" (*Bay General Community Hospital v. County of San Diego* (1984) 156 Cal.App.3d 944, 959 [203 Cal.Rptr. 184] (*Bay General*); see also Preliminary Rep., *supra*, at p. 18 [with certain exceptions, Medi-Cal "shifted to the state" the responsibility for administration of the medical care provided to eligible persons].) We therefore reject the state's assertion that, while Medi-Cal covered adult MIP's, county facilities were the sole providers of their medical care, and counties both operated and administered the program that provided that care.

The circumstances we have discussed readily distinguish this case from *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 [38 Cal.Rptr.2d 304], on which the state relies. There, the court rejected the claim that Penal Code section 987.9, which required counties to provide criminal defendants with certain defense funds, imposed an unfunded state mandate. Los Angeles filed the claim after the state, which had enacted appropriations between 1977 and 1990 "to reimburse counties for their costs under" the statute, made no appropriation for the 1990-1991 fiscal year. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 812.) In rejecting the claim, the court first held that there was no state mandate because Penal Code section 987.9 merely implemented the requirements of federal law. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at pp. 814-816.) Thus, the court stated, "[a]ssuming, arguendo, the provisions of [Penal Code] section 987.9 [constituted] a new program" under section 6, there was no state mandate. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 818.) Here, of course, it is unquestionably the state that has required San Diego to provide medical care to indigent persons.

In dictum, the court also rejected the argument that, under *Lucia Mar*, *supra*, 44 Cal.3d 830, the state's "decision not to reimburse the counties for their programs under [Penal Code] section 987.9" imposed a new program by shifting financial responsibility for the program to counties. (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th at p. 817.) The court explained: "In contrast [to *Lucia Mar*], the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under [Penal Code] section 987.9. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility." (*Ibid.*) Here, as we have explained, between 1971 and 1983, the state administered and bore financial responsibility for the medical care that adult MIP's received under Medi-Cal. The Medi-Cal program was not simply a ***98** method of reimbursement for county costs. Thus, the state's reliance on this dictum is misplaced. [17]

In summary, our discussion demonstrates the Legislature excluded adult MIP's from Medi-Cal *knowing* and *intending* that the 1982 legislation would trigger the counties' responsibility to provide medical care as providers of last resort under section 17000. Thus, through the 1982 legislation, the Legislature attempted to do precisely that which the voters enacted section 6 to prevent: "transfer[] to [counties] the fiscal responsibility for providing services which the state believed should be extended to the public." [18] (*County of Los Angeles*, *supra*, 43 Cal.3d at p. 56; see also *City of Sacramento v. State of California*, *supra*, 50 Cal.3d at p. 68 [A "central purpose" of section 6 was "to prevent the state's transfer of the *cost of government* from *itself* to the local level."].) Accordingly, we view the 1982 legislation as having mandated a " 'new program' " on counties by "compelling them to accept financial responsibility in whole or in part for a program," i.e., medical care for adult MIP's, "which was funded entirely by the state before the advent of article XIII B." [19] (*Lucia Mar*, *supra*, 44 Cal.3d at p. 836.)

A contrary conclusion would defeat the purpose of section 6. Under the state's interpretation of that section, because section 17000 was enacted before 1975, the Legislature could eliminate the *entire* Medi-Cal program and shift to the counties under section 17000 complete financial responsibility for medical care that the state has been providing since 1966. However, the taxing and spending limitations imposed by articles XIII A and XIII B would greatly limit the ability of counties to meet their expanded section 17000 obligation. "County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 351 (dis. opn. of Broussard, J.).) As we have previously explained,

the voters, recognizing that articles XIII A and XIII B left counties "ill equipped" to assume such increased financial responsibilities, adopted section 6 precisely to avoid this result. (***99** *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) Thus, it was the voters who decreed that we must, as the state puts it, "focus[] on one phase in th[e] shifting pattern of [financial] arrangements" between the state and the counties. Under section 6, the state simply cannot "compel[] [counties] to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B ...."[20] (*Lucia Mar*, *supra*, 44 Cal.3d at p. 836.)

B. *County Discretion to Set Eligibility and Service Standards*

(5a) The state next argues that, because San Diego had statutory discretion to set eligibility and service standards, there was no reimbursable mandate. Citing section 16704, the state asserts that the 1982 legislation required San Diego to spend MISA funds "only on those whom the *county* deems eligible *under § 17000*," "gave the county exclusive authority to determine the level and type of benefits it would provide," and required counties "to include [adult MIP's] in their § 17000 eligibility **only to the extent state funds were available and then only for 3 years.**"[21] (Original emphasis.) According to the state, under section 17001, "[t]he counties have ***100** complete discretion over the determination of eligibility, scope of benefits and how the services will be provided."[22]

The state exaggerates the extent of a county's discretion under section 17001. It is true "case law ... has recognized that section 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents. [Citations.]" (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 211 [211 Cal.Rptr. 398, 695 P.2d 695] (*Robbins*).) However, there are "clear-cut limits" to this discretion. (*Ibid.*) (6) The counties may exercise their discretion "only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. [Citation.] When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. (Gov. Code, § 11374.)" (*Mooney*, *supra*, 4 Cal.3d at p. 679.) Thus, the counties' eligibility and service standards must "carry out" the objectives of section 17000. (*Mooney*, *supra*, 4 Cal.3d at p. 679; see also *Poverty Resistance Center v. Hart* (1989) 213 Cal.App.3d 295, 304-305 [261 Cal.Rptr. 545]; § 11000 ["provisions of law relating to a public assistance program shall be fairly and equitably construed to effect the stated objects and purposes of the program"].) County standards that fail to carry out section 17000's objectives "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris*, *supra*, 67 Cal.2d at p. 737.) Courts, which have " 'final responsibility for the interpretation of the law,' " must strike them down. (*Id.* at p. 748.) Indeed, despite the counties' statutory discretion, "courts have consistently invalidated ... county welfare regulations that fail to meet statutory requirements. [Citations.]" (*Robbins*, *supra*, 38 Cal.3d at p. 212.)

1. *Eligibility*

(5b) Regarding eligibility, we conclude that counties must provide medical care to all adult MIP's. As we emphasized in *Mooney*, section 17000 requires counties to relieve and support " '*all indigent persons* lawfully resident therein, "when such persons are not supported and relieved by their relatives" or by some other means.' " (*Mooney*, *supra*, 4 Cal.3d at p. 678; see also *Bernhardt v. Board of Supervisors* (1976) 58 Cal.App.3d 806, 811 [130 Cal.Rptr. 189].) Moreover, section 10000 declares that the statutory "purpose" of division 9 of the Welfare and Institutions Code, which includes ***101** section 17000, "is to provide for protection, care, and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to *all* of its needy and distressed." (Italics added.) Thus, counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of section 17000 who do not receive it from other sources.[23] (See *Bell v. Board of Supervisors* (1994) 23 Cal.App.4th 1695, 1706 [28 Cal.Rptr.2d 919] [eligibility standards may not "defeat the purpose of the statutory scheme by depriving qualified recipients of mandated support"]; *Washington v. Board of Supervisors* (1993) 18 Cal.App.4th 981, 985 [22 Cal.Rptr.2d 852] [courts have repeatedly "voided county ordinances which have attempted to redefine eligibility standards set by state statute"].)

Although section 17000 does not define the term "indigent persons," the 1982 legislation made clear that all adult MIP's fall within this category for purposes of defining a county's obligation to provide medical care.[24] As part of its exclusion of adult MIP's, that legislation required counties to participate in the MISA program. (Stats. 1982, ch. 1594, §§ 68, 70, 86, pp. 6343-6347, 6357.) Regarding that program, the 1982 legislation amended section 16704, subdivision (c)(1), to require that a county board of supervisors, in applying for MISA funds, "assure that it will expend such funds only for [specified] health services ... provided to persons certified as eligible for such services pursuant to Section 17000 ...." (Stats. 1982, ch. 1594, § 70, p. 6346.) At the same time, the 1982 legislation amended section 16704, subdivision (c)(3), to provide that "[a]ny person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.) As the state correctly explains, under this provision, "counties had to include [Medically Indigent Adults] in their [section] 17000 eligibility" standards. By requiring counties to make all adult MIP's eligible for services paid for with MISA funds, while at the same time requiring counties to promise to spend such funds *only* on those certified as eligible under section 17000, the Legislature established that all adult MIP's are "indigent persons" for purposes of the counties' duty to provide medical care under section 17000. Otherwise, the counties could not comply with their promise. ***102**

Our conclusion is not affected by language in section 16704, subdivision (c)(3), making it "operative only until June 30, 1985, unless a later enacted statute extends or deletes that date."[25] As we have explained, the subdivision established that adult MIP's are "indigent persons" within the meaning of section 17000 for medical care purposes. As we have also explained, section 17000 requires counties to relieve and support *all* "indigent persons." Thus, even if the state is correct in asserting that section 16704, subdivision (c)(3), is now inoperative and no longer prohibits counties from excluding adult MIP's from eligibility for medical services, section 17000 has that effect.[26]

Additionally, the coverage history of Medi-Cal demonstrates that the Legislature has always viewed all adult MIP's as "indigent persons" within the meaning of section 17000 for medical care purposes. As we have previously explained, when the Legislature created the original Medi-Cal program, which covered only categorically linked persons, it "declar[ed] its concern with the problems which [would] be facing the counties with respect to the medical care of indigent persons who [were] not covered" by Medi-Cal, "whose medical care [had to] be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116 [enacting former § 14108.5].) Moreover, to ensure that the counties' Medi-Cal cost share would not leave counties "with insufficient funds to provide hospital care for those persons not eligible for Medi-Cal," the Legislature also created the county option. (*Hall*, *supra*, 23 Cal.App.3d at p. 1061.) Through the county option, "the state agreed to assume all county health care costs ... in excess of county costs incurred during the 1964-1965 fiscal year, adjusted for population increases." (*Lackner*, *supra*, 97 Cal.App.3d at p. 586.) Thus, the Legislature expressly recognized that the categorically linked persons initially eligible for Medi-Cal did not constitute all "indigent persons" entitled to medical care under section 17000, and required the state to share in the financial responsibility for providing that care.

In adding adult MIP's to Medi-Cal in 1971, the Legislature extended Medi-Cal coverage to noncategorically linked persons "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83.) This ***103** description was consistent with prior judicial decisions that, for purposes of a county's duty to provide "indigent persons" with hospitalization, had defined the term to include a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." (*Goodall v. Brite* (1936) 11 Cal.App.2d 540, 550 [54 P.2d 510].)

Moreover, the fate of amendments to section 17000 proposed at the same time suggests that, in the Legislature's view, the category of "indigent persons" entitled to medical care under section 17000 extended even *beyond* those eligible for Medi-Cal as MIP's. The June 17, 1971, version of Assembly Bill No. 949 amended section 17000 by adding the following: "however, the health needs of such persons shall be met under [Medi-Cal]." (Assem. Bill No. 949 (1971 Reg. Sess.) § 53.3, as amended June 17, 1971.) The Assembly deleted this amendment on July 20, 1971. (Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971, p. 37.) Regarding this change, the Assembly Committee on Health explained: "The proposed amendment to Section 17000, ... which would

have removed the counties' responsibilities as health care provider of last resort, is deleted. This change was originally proposed to clarify the guarantee to hold counties harmless from additional Medi-Cal costs. It is deleted since it cannot remove the fact that counties are, by definition, a 'last resort' for any person, with or without the means to pay, who does not qualify for federal or state aid." (Assem. Com. on Health, Analysis of Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971 (July 21, 1971), p. 4.)

The Legislature's failure to amend section 17000 in 1971 figured prominently in the Attorney General's interpretation of that section only two years later. In a 1973 published opinion, the Attorney General stated that the 1971 inclusion of MIP's in Medi-Cal "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (56 Ops.Cal.Atty.Gen., *supra*, at p. 569.) He based this conclusion on the 1971 legislation, relevant legislative history, and "the history of state medical care programs." (*Id.* at p. 570.) The opinion concluded: "The definition of medically indigent in [the chapter establishing Medi-Cal] is applicable only to that chapter and *does not include all those enumerated in section 17000*. If the former medical care program, by providing care only for a specific group, public assistance recipients, did not affect the responsibility of the counties to provide such service under section 17000, we believe the most recent expansion of the medical assistance program does not affect, *absent an express legislative intent to the contrary*, the duty of the counties under section 17000 to continue to provide services to those eligible under section 17000 but not under [Medi-Cal]." (*Ibid.*, italics added.) The Attorney General's opinion, although not binding, is entitled to considerable weight. ***104** (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829 [25 Cal.Rptr.2d 148, 863 P.2d 218].) Absent controlling authority, it is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of section 17000 and would have taken corrective action if it disagreed with that construction. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [270 Cal.Rptr. 796, 793 P.2d 2].)

In this case, of course, we need not (and do not) decide whether San Diego's obligation under section 17000 to provide medical care extended beyond adult MIP's. Our discussion establishes, however, that the obligation extended *at least* that far. The Legislature has made it clear that all adult MIP's are "indigent persons" under section 17000 for purposes of San Diego's obligation to provide medical care. Therefore, the state errs in arguing that San Diego had discretion to refuse to provide medical care to this population. [27]

2. *Service Standards*

(7) A number of statutes are relevant to the state's argument that San Diego had discretion in setting service standards. Section 17000 requires in general terms that counties "relieve and support" indigent persons. Section 10000, which sets forth the purpose of the division containing section 17000, declares the "legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life," so "as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." (§ 10000.) "Section 17000, as authoritatively interpreted, mandates that medical care be provided to indigents and section 10000 requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care ...." (*Tailfeather v. Board of Supervisors* (1996) 48 Cal.App.4th 1223, 1245 [56 Cal.Rptr.2d 255] (*Tailfeather*).)

Courts construing section 17000 have held that it "imposes a mandatory duty upon all counties to provide 'medically necessary care,' not just ***105** emergency care. [Citation.]" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1108 [18 Cal.Rptr.2d 487]; see also *Gardner v. County of Los Angeles* (1995) 34 Cal.App.4th 200, 216 [40 Cal.Rptr.2d 271]; § 16704.1 [prohibiting a county from requiring payment of a fee or charge "before [it] renders medically necessary services to ... persons entitled to services under Section 17000"].) It further "ha[s] been interpreted ... to impose a minimum standard of care below which the provision of medical services may not fall." (*Tailfeather*, *supra*, 48 Cal.App.4th at p. 1239.) In *Tailfeather*, the court stated that "section 17000 requires provision of medical services to the poor at a level which does not lead to unnecessary suffering or endanger life and health ...." (*Id.* at p. 1240.) In reaching this conclusion, it cited *Cooke*, *supra*, 213 Cal.App.3d at page 404, which held that section 17000 requires counties to provide "dental care sufficient to remedy substantial pain and infection." (See also § 14059.5 [defining "[a] service [as] 'medically necessary' ... when it is reasonable and necessary to protect life, to prevent

significant illness or significant disability, or to alleviate severe pain"].)

During the years for which San Diego sought reimbursement, Health and Safety Code section 1442.5, former subdivision (c) (former subdivision (c)), also spoke to the level of services that counties had to provide under Welfare and Institutions Code section 17000.[28] As enacted in September 1974, former subdivision (c) provided that, whether a county's duty to provide care to all indigent people "is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment received by people who cannot afford to pay for their health care shall be the same as that available to nonindigent people receiving health care services in private facilities in that county." (Stats. 1974, ch. 810, § 3, p. 1765.) The express "purpose and intent" of the act that contained former subdivision (c) was "to insure that the duty of counties to provide health care to indigents [was] properly and continuously fulfilled." (Stats. 1974, ch. 810, § 1, p. 1764.) Thus, until its repeal in September 1992,[29] former subdivision (c) "[r]equire[d] that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county." (Legis. Counsel's Dig., Sen. Bill No. 2369, 2 Stats. 1974 (Reg. Sess.) Summary Dig., p. 130; see also *Gardner v. County of Los Angeles*, *supra*, 34 Cal.App.4th at p. 216; ***106** *Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 564 [former subdivision (c) required that care provided "be *comparable* to that enjoyed by the nonindigent"].)[30] "For the 1990-91 fiscal year," the Legislature qualified this obligation by providing: "nothing in [former] subdivision (c) ... shall require any county to exceed the standard of care provided by the state Medi-Cal program. Notwithstanding any other provision of law, counties shall not be required to increase eligibility or expand the scope of services in the 1990-91 fiscal year for their programs." (Stats. 1990, ch. 457, § 23, p. 2013.)

Although we have identified statutes relevant to service standards, we need not here define the precise contours of San Diego's statutory health care obligation. The state argues generally that San Diego had discretion regarding the services it provided. However, the state fails to identify either the specific services that San Diego provided under its CMS program or which of those services, if any, were not required under the governing statutes. Nor does the state argue that San Diego could have eliminated all services and complied with statutory requirements. Accordingly, we reject the state's argument that, because San Diego had some discretion in providing services, the 1982 legislation did not impose a reimbursable mandate.[31]

VI. Minimum Required Expenditure

(8) The Court of Appeal held that, under the governing statutes, the Commission must initially determine the precise amount of any reimbursement due San Diego. It therefore reversed the damages portion of the trial court's judgment and remanded the matter to the Commission for this determination. Nevertheless, the Court of Appeal affirmed the trial court's finding that the Legislature required San Diego to spend at least $41 million on its CMS program for fiscal years 1989-1990 and 1990-1991. In affirming this finding, the Court of Appeal relied primarily on Welfare and Institutions Code section 16990, subdivision (a), as it read at all relevant times. The state contends this provision did not mandate that San Diego spend any minimum amount on the CMS program. It further asserts that the Court of Appeal's "ruling in effect sets a damages baseline, in contradiction to [its] ostensible reversal of the damage award." ***107**

Former section 16990, subdivision (a), set forth the financial maintenance-of-effort requirement for counties that received funding under the California Healthcare for the Indigent Program (CHIP). The Legislature enacted CHIP in 1989 to implement Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (codified at Rev. & Tax. Code, § 30121 et seq.). Proposition 99, which the voters approved on November 8, 1988, increased the tax on tobacco products and allocated the resulting revenue in part to medical and hospital care for certain persons who could not afford those services. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 248, 254 [279 Cal.Rptr. 325, 806 P.2d 1360].) During the 1989-1990 and 1990-1991 fiscal years, former section 16990, subdivision (a), required counties receiving CHIP funds, "at a minimum," to "maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year," adjusted annually as provided. (Stats. 1989, ch. 1331, § 9, p. 5427.) Applying this provision, the Court of Appeal affirmed the trial court's finding that the state had required San Diego to spend in fiscal years 1989-1990 and 1990-1991 at least $41 million on the CMS program.

We agree with the state that this finding is erroneous. Unlike participation in MISA, which was mandatory, participation in CHIP was voluntary. In establishing CHIP, the Legislature appropriated funds "for allocation to counties *participating* in" the program. (Stats. 1989, ch. 1331, § 10, p. 5436, italics added.) Section 16980, subdivision (a), directed the State Department of Health Services to make CHIP payments "upon application of the county assuring that it will comply with" applicable provisions. Among the governing provisions were former sections 16990, subdivision (a), and 16995, subdivision (a), which provided: "To be eligible for receipt of funds under this chapter, a county may not impose more stringent eligibility standards for the receipt of benefits under Section 17000 or reduce the scope of benefits compared to those which were in effect on November 8, 1988." (Stats. 1989, ch. 1331, § 9, p. 5431.)

However, San Diego has cited no provision, and we have found none, that *required* eligible counties to participate in the program or apply for CHIP funds. Through Revenue and Taxation Code section 30125, which was part of Proposition 99, the electorate directed that funds raised through Proposition 99 "shall be used to supplement existing levels of service and not to fund existing levels of service." (See also Stats. 1989, ch. 1331, §§ 1, 19, pp. 5382, 5438.) Counties not wanting to supplement their existing levels of service, and who therefore did not want CHIP funds, were not bound by the program's requirements. Those counties, including San Diego, that chose to ***108** seek CHIP funds did so voluntarily. [32] Thus, the Court of Appeal erred in concluding that former section 16990, subdivision (a), mandated a minimum funding requirement for San Diego's CMS program.

Nor did former section 16991, subdivision (a)(5), which the trial court and Court of Appeal also cited, establish a minimum financial obligation for San Diego's CMS program. Former section 16991 generally "establish[ed] a procedure for the allocation of funds to each county receiving funds from the [MISA] ... for the provision of services to persons meeting certain Medi-Cal eligibility requirements, based on the percentage of newly legalized individuals under the federal Immigration Reform and Control Act (IRCA)." (Legis. Counsel's Dig., Assem. Bill No. 75, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 548.) Former section 16991, subdivision (a)(5) required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its combined allocation from various sources was less than the funding it received under section 16703 for fiscal year 1988-1989. [33] Nothing about this state reimbursement requirement imposed on San Diego a minimum funding requirement for its CMS program.

Thus, we must reverse the judgment insofar as it finds that former sections 16990, subdivision (a), and 16991, subdivision (a)(5), established a $41 million spending floor for San Diego's CMS program. Instead, the various statutes that we have previously discussed (e.g., §§ 10000, 17000, and Health & Saf. Code, § 1442.5, former subd. (c)), the cases construing those statutes, and any other relevant authorities must guide the Commission's determination of the level of services that San Diego had to provide and any reimbursement to which it is entitled. ***109**

VII. Remaining Issues

(9) The state raises a number of additional issues. It first complains that a mandamus proceeding under Code of Civil Procedure section 1085 was an improper vehicle for challenging the Commission's position. It asserts that, under Government Code section 17559, review by administrative mandamus under Code of Civil Procedure section 1094.5 is the exclusive method for challenging a Commission decision denying a mandate claim. The Court of Appeal rejected this argument, reasoning that the trial court had jurisdiction under Code of Civil Procedure section 1085 because, under section 6, the state has a ministerial duty of reimbursement when it imposes a mandate.

Like the Court of Appeal, but for different reasons, we reject the state's argument. "[M]andamus pursuant to [Code of Civil Procedure] section 1094.5, commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of 'a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' [Citations.] The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except where modified by statute. [Citations.]" (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 673-674 [170 Cal.Rptr. 484, 620 P.2d 1032].) Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under Code of Civil Procedure section 1085 as one brought under Code of Civil Procedure section 1094.5 and should deny a demurrer asserting that the wrong mandamus statute has been invoked. (*Woods*, *supra*, 28 Cal.3d at

pp. 673-674; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 813-814 [140 Cal.Rptr. 442, 567 P.2d 1162].) Thus, even if San Diego identified the wrong mandamus statute, the error did not affect the trial court's ability to grant mandamus relief.

"In any event, distinctions between traditional and administrative mandate have little impact on this appeal ...." (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1584 [18 Cal.Rptr.2d 680].) The determination whether the statutes here at issue established a mandate under section 6 is a question of law. (*County of Fresno v. Lehman*, *supra*, 229 Cal.App.3d at p. 347.) In reaching our conclusion, we have relied on no facts that are in dispute. Where, as here, a "purely legal question" is at issue, courts "exercise independent judgment ... , no matter whether the issue arises by traditional or administrative mandate. [Citations.]" (*McIntosh*, *supra*, 14 Cal.App.4th at p. 1584.) As the state concedes, even under Code of Civil Procedure section 1094.5, a judgment must "be reversed if based on erroneous conclusions of law." Thus, any differences between the two mandamus statutes have had no impact on our analysis. ***110**

The state next contends that the trial court prejudicially erred in denying the "peremptory disqualification" motion that the Director of the Department of Finance filed under Code of Civil Procedure section 170.6. We will not review this ruling, however, because it is reviewable only by writ of mandate under Code of Civil Procedure section 170.3, subdivision (d). (*People v. Webb* (1993) 6 Cal.4th 494, 522-523 [24 Cal.Rptr.2d 779, 862 P.2d 779]; *People v. Hull* (1991) 1 Cal.4th 266 [2 Cal.Rptr.2d 526, 820 P.2d 1036].)

Nor can we address the state's argument that the trial court erred in granting a preliminary injunction. The May 1991 order granting the preliminary injunction was "immediately and separately appealable" under Code of Civil Procedure section 904.1, subdivision (a)(6). (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645 [4 Cal.Rptr.2d 689].) Thus, the state's attempt to challenge the order in an appeal filed after entry of final judgment in December 1992 was untimely.[34] (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 251 [256 Cal.Rptr. 194].) Moreover, the state's attempt to appeal the order granting the preliminary injunction is moot because of (1) the trial court's July 1 order granting a peremptory writ of mandate, which expressly "supersede[d] and replace[d]" the preliminary injunction order and (2) entry of final judgment. (*Sheward v. Citizens' Water Co.* (1891) 90 Cal. 635, 638-639 [27 P. 439]; *People v. Morse* (1993) 21 Cal.App.4th 259, 264-265 [25 Cal.Rptr.2d 816]; *Art Movers, Inc.*, *supra*, 3 Cal.App.4th at p. 647.)

Finally, the state requests that we reverse the trial court's reservation of jurisdiction regarding an award of attorney fees. This request is premature. In the judgment, the trial court "retain[ed] jurisdiction to determine any right to and amount of attorneys' fees ...." This provision does not declare that San Diego in fact has a right to an award of attorney fees. Nor has San Diego asserted such a right. As San Diego states, at this point, "[t]here is nothing for this Court to review." We will not give an advisory ruling on this issue.

VIII. Disposition

The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least $41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is ***111** remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c); Welf. & Inst. Code, §§ 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

C. J., Mosk, J., Baxter, J., Anderson, J.,* and Aldrich, J.,†]]]] concurred.

KENNARD, J.

I dissent.

As part of an initiative measure placing spending limits on state and local government, the voters in 1979 added article XIII B to the California Constitution. Section 6 of this article provides that when the state "mandates a new

program or higher level of service on any local government," the state must reimburse the local government for the cost of such program or service. Under subdivision (c) of this constitutional provision, however, the state "may, but need not," provide such reimbursement *if the state mandate was enacted before January 1, 1975*. (Cal. Const., art. XIII B, § 6, subd. (c).) Subdivision (c) is the critical provision here.

Because the counties have for many decades been under a state mandate to provide for the poor, a mandate that existed before the voters added article XIII B to the state Constitution, the express language of subdivision (c) of section 6 of article XIII B exempts the state from any *legal obligation* to reimburse the counties for the cost of medical care to the needy. The fact that for a certain period after 1975 the state directly paid under the state Medi-Cal program for these costs did not lead to the creation of a new mandate once the state stopped doing so. To hold to the contrary, as the majority does, is to render subdivision (c) a nullity.

The issue here is not whether the poor are entitled to medical care. They are. The issue is whether the state or the counties must pay for this care. The majority places this obligation on the state. The counties' win, however, may be a pyrrhic victory. For, in anticipation of today's decision, the Legislature has enacted legislation that will drastically reduce the counties' share of other state revenue, as discussed in part III below.

I

Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor. (*Mooney* v. *Pickett* (1971) 4 Cal.3d 669, 677-678 ***112** [94 Cal.Rptr. 279, 483 P.2d 1231].) Since 1965, this obligation has been codified in Welfare and Institutions Code section 17000. (Stats. 1965, ch. 1784, § 5, p. 4090.) That statute states in full: "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (Welf. & Inst. Code, § 17000.) Included in this is a duty to provide medical care to indigents. (*Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 557 [254 Cal.Rptr. 905].)

A brief overview of the efforts by federal, state, and local governments to furnish medical services to the poor may be helpful.

Before March 1, 1966, the date on which California began its Medi-Cal program, medical services for the poor "were provided in different ways and were funded by the state, county, and federal governments in varying amounts." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3.) The Medi-Cal program, which California adopted to implement the federal Medicaid program (42 U.S.C. § 1396 et seq.; see *Morris v. Williams* (1967) 67 Cal.2d 733, 738 [63 Cal.Rptr. 689, 433 P.2d 697]), at first limited eligibility to those persons "linked" to a federal categorical aid program by being over age 65, blind, disabled, or a member of a family with dependent children. (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.), pp. 548, 550.) Persons not linked to federal programs were ineligible for Medi-Cal; they could obtain medical care from the counties. (*County of Santa Clara* v. *Hall* (1972) 23 Cal.App.3d 1059, 1061 [100 Cal.Rptr. 629].)

In 1971, the Legislature revised Medi-Cal by extending coverage to certain so-called "noncategorically linked" persons, or "medically indigent persons." (Stats. 1971, ch. 577, §§ 12, 13, 22.5, 23, pp. 1110-1111, 1115.) The revisions included a formula for determining each county's share of Medi-Cal costs for the 1972-1973 fiscal year, with increases in later years based on the assessed value of property. (*Id.* at §§ 41, 42, pp. 1131-1133.)

In 1978, California voters added to the state Constitution article XIII A (Proposition 13), which severely limited property taxes. In that same year, to help the counties deal with the drastic drop in local tax revenue, the Legislature assumed the counties' share of Medi-Cal costs. (Stats. 1978, ch. 292, § 33, p. 610.) In 1979, the Legislature relieved the counties of their obligation to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 106, p. 1059.) ***113** Also in 1979, the voters added to the state Constitution article XIII B, which placed spending limits on state and local governments and added the mandate/reimbursement provisions at issue here.

In 1982, the Legislature removed from Medi-Cal eligibility the category of "medically indigent persons" that had been added in 1971. The Legislature also transferred funds for indigent health care services from the state to the counties

through the Medically Indigent Services Account. (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357.) Medically Indigent Services Account funds were then combined with county health service funds to provide health care to persons not eligible for Medi-Cal (Stats. 1982, ch. 1594, § 86, p. 6357), and counties were to provide health services to persons in this category "to the extent that state funds are provided" (*id.*, § 70, p. 6346).

From 1983 through June 1989, the state fully funded San Diego County's program for furnishing medical care to the poor. Thereafter, in fiscal years 1989-1990 and 1990-1991, the state partially funded San Diego County's program. In early 1991, however, the state refused to provide San Diego County full funding for the 1990-1991 fiscal year, prompting a threat by the county to terminate its indigent medical care program. This in turn led the Legal Aid Society of San Diego to file an action against the County of San Diego, asserting that Welfare and Institutions Code section 17000 imposed a legal obligation on the county to provide medical care to the poor. The county cross-complained against the state. The county argued that the state's 1982 removal of the category of "medically indigent persons" from Medi-Cal eligibility mandated a "new program or higher level of service" within the meaning of section 6 of article XIII B of the California Constitution, because it transferred the cost of caring for these persons to the county. Accordingly, the county contended, section 6 required the state to reimburse the county for its cost of providing such care, and prohibited the state from terminating reimbursement as it did in 1991. The county eventually reached a settlement with the Legal Aid Society of San Diego, leading to a dismissal of the latter's complaint.

While the County of San Diego's case against the state was pending, litigation was proceeding in a similar action against the state by the County of Los Angeles and the County of San Bernardino. In that action, the Superior Court for the County of Los Angeles entered a judgment in favor of Los Angeles and San Bernardino Counties. The state sought review in the Second District Court of Appeal in Los Angeles. In December 1992, the parties to the Los Angeles case entered into a settlement agreement providing for dismissal of the appeal and vacating of the superior court judgment. ***114** The Court of Appeal thereafter ordered that the superior court judgment be vacated and that the appeal be dismissed.

The County of San Diego's action against the state, however, was not settled. It proceeded on the county's claim against the state for reimbursement of the county's expenditures for medical care to the indigent. [1] The majority holds that the county is entitled to such reimbursement. I disagree.

II

Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, *except that the Legislature may, but need not, provide such subvention of funds for the following mandates:* [¶] ... [¶] *(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.*" (Italics added.) [2]

Of importance here is Welfare and Institutions Code section 17000 (hereafter sometimes section 17000). It imposes a legal obligation on the counties to provide, among other things, medical services to the poor. (*Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 557; *County of San Diego v. Viloria* (1969) 276 Cal.App.2d 350, 352 [80 Cal.Rptr. 869].) Section 17000 was enacted long before and has existed continuously since January 1, 1975, the date set forth in subdivision (c) of section 6 of article XIII B of the California Constitution. Thus, section 17000 falls within subdivision (c)'s language of "[l]egislative mandates enacted prior to January 1, 1975," rendering it exempt from the reimbursement provision of section 6.

Contrary to the majority's conclusion, the Legislature's 1982 legislation removing the category of "medically indigent persons" from Medi-Cal did not meet California Constitution, article XIII B, section 6 's requirement of imposing on local government "a new program or higher level of service," and therefore did not entitle the counties to reimbursement from the state under section 6 of article XIII B. The counties' legal obligation to provide medical care arises from section 17000, not from the subsequently enacted ***115** 1982 legislation. The majority itself concedes that the 1982 legislation merely "trigger[ed] the counties' responsibility to provide medical care as providers of last resort under section 17000." (Maj. opn., *ante,* at p. 98.) Although certain actions by the state and the federal government during the 1970's and 1980's may have alleviated the counties' financial burden of providing medical care for the indigent, those actions did not supplant or remove the counties' existing legal obligation under section

17000 to furnish such care. (*Cooke* v. *Superior Court* (1989) 213 Cal.App.3d 401, 411 [261 Cal.Rptr. 706]; *Madera Community Hospital* v. *County of Madera* (1984) 155 Cal.App.3d 136, 151 [201 Cal.Rptr. 768].)

The state's reimbursement obligation under section 6 of article XIII B of the California Constitution arises only if, after January 1, 1975, the date mentioned in subdivision (c) of section 6, the state imposes on the counties "a new program or higher level of service." That did not occur here. As I pointed out above, the counties' legal obligation to provide for the poor arises from section 17000, enacted long before the January 1, 1975, cutoff date set forth in subdivision (c) of section 6. That statutory obligation remained in effect when during a certain period after 1975 the state assumed the financial burden of providing medical care to the poor, in an effort to help the counties deal with a drastic drop in local revenue as a result of the voters' passage of Proposition 13, which severely limited property taxes. Because the counties' statutory obligation to provide health care to the poor was created before 1975 and has existed unchanged since that time, the state's 1982 termination of Medi-Cal eligibility for "medically indigent persons" did not create a "new program or higher level of service" within the meaning of section 6 of article XIII B, and therefore did not obligate the state to reimburse the counties for their expenditures in health care for the poor.

III

In imposing on the state a legal obligation to reimburse the counties for their cost of furnishing medical services to the poor, the majority's holding appears to bail out financially strapped counties. Not so.

Today's decision will immediately result in a reduction of state funds available to the counties. Here is why. In 1991, the Legislature added section 11001.5 to the Revenue and Taxation Code, providing that 24.33 percent of the moneys collected by the Department of Motor Vehicles as motor vehicle license fees must be deposited in the State Treasury to the credit of the Local Revenue Fund. In anticipation of today's decision, the Legislature stated in subdivision (d) of this statute: "This section shall cease to be operative on ***116** the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal [that]: [¶] ... [¶] (2) The state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, § 11001.5, subd. (d); see also *id*., § 10753.8, subd. (b).)

The loss of such revenue, which the Attorney General estimates at "hundreds of millions of dollars," may put the counties in a serious financial bind. Indeed, realization of the scope of this revenue loss appears to explain why the County of Los Angeles, after a superior court victory in its action seeking state reimbursement for the cost of furnishing medical care to "medically indigent persons," entered into a settlement with the state under which the superior court judgment was effectively obliterated by a stipulated reversal. (See *Neary v. Regents of University of California* (1992) 3 Cal.4th 273 [10 Cal.Rptr.2d 859, 834 P.2d 119].) In a letter addressed to the Second District Court of Appeal, sent while the County of Los Angeles was engaged in settlement negotiations with the state, the county's attorney referred to the legislation mentioned above in these terms: "This legislation was quite clearly written with this case in mind. Consequently, to pursue this matter, *the County of Los Angeles risks losing a funding source it must have to maintain its health services programs at current levels.* The additional funding that might flow to the County from a final judgment in its favor in this matter, is several years away *and is most likely of a lesser amount than this County's share of the vehicle license fees*." (Italics added.) Thus, the County of Los Angeles had apparently determined that a legal victory entitling it to reimbursement from the state for the cost of providing medical care to the category of "medically indigent persons" would not in fact serve its economic interests.

I have an additional concern. According to the majority, whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state. This means that so long as section 17000 continues to exist, an increase in state funding to a particular county for the care of the poor, once undertaken, may be irreversible, thus locking the state into perpetual financial assistance to that county for health care to the needy. This would, understandably, be a major disincentive for the Legislature to ever increase the state's funding of a county's medical care for the poor.

The rigidity imposed by today's holding will have unfortunate consequences should the state's limited financial resources

prove insufficient to ***117** reimburse the counties under section 6 of article XIII B of the California Constitution for the "new program or higher level of service" of providing medical care to the poor under section 17000. In that event, the state may be required to modify this "new program or higher level of service" in order to reconcile the state's reimbursement obligation with its finite resources and its other financial commitments. Such modifications are likely to take the form of limitations on eligibility for medical care or on the amount or kinds of medical care that the counties must provide to the poor under section 17000. A more flexible system—one that actively encouraged shared state and county responsibility for indigent medical care, using a variety of innovative funding mechanisms—would be less likely to result in a curtailment of medical services to the poor.

And if the Legislature is unable or unwilling to appropriate funds to comply with the majority's reimbursement order, the law allows the county to file "in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c); see maj. opn., *ante,* at p. 82.) Such a declaration would do nothing to alleviate the plight of the poor.

Conclusion

The dispute in this case ultimately arises from a collision between the taxing limitations on the counties imposed by article XIII A of the state Constitution and the preexisting, open-ended mandate imposed on them under Welfare and Institutions Code section 17000 to provide medical care for the poor. As I have explained, the Legislature's assumption thereafter of some of the resulting financial burden to the counties did not repeal section 17000' s mandate, nor did the Legislature's later termination of its financial support create a new mandate. In holding to the contrary, the majority imposes on the Legislature an obligation that the Legislature does not have under the law.

I recognize that my resolution of this issue—that under existing law the state has *no legal obligation* to reimburse the counties for health expenditures for the poor—would leave the counties in the same difficult position in which they find themselves now: providing funding for indigent medical care while maintaining other essential public services in a time of fiscal austerity. But complex policy questions such as the structuring and funding of indigent medical care are best left to the counties, the Legislature, and ultimately the electorate, rather than to the courts. It is the counties that must figure out how to allocate the limited budgets imposed on them by the electorate's adoption of articles XIII A and XIII B of the California Constitution among indigent medical care programs and a host of other pressing ***118** and essential needs. It is the Legislature that must decide whether to furnish financial assistance to the counties so they can meet their section 17000 obligations to provide for the poor, and whether to continue to impose the obligations of section 17000 on the counties. It is the electorate that must decide whether, given the ever-increasing costs of meeting the needs of indigents under section 17000, counties should be afforded some relief from the taxing and spending limits of articles XIII A and XIII B, both enacted by voters' initiative. These are hard choices, but for the reasons just given they are better made by the representative branches of government and the electorate than by the courts. ***119**

Footnotes

* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

2 Congress later repealed the requirement that states work towards expanding eligibility. (See Cal. Health and Welfare Agency, The Medi-Cal Program: A Brief Summary of Major Events (Mar. 1990) p. 1 (Summary of Major Events).)

3 Former section 14150.1 provided in relevant part: "[A] county may elect to pay as its share [of Medi-Cal costs] one hundred percent ... of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county .... If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county ...." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 121.)

4 Former section 14150 provided the standard method for determining the counties' share of Medi-Cal costs. Under it, "a county was required to pay the state a specific sum, in return for which the state would pay for the medical care of all [categorically linked] individuals .... Financial responsibility for nonlinked individuals ... remained with the counties." (*Lackner*, *supra*, 97 Cal.App.3d at p. 581.)

5 In this opinion, the terms "adult MIP's" and "Medically Indigent Adults" refer only to those persons who were excluded from the Medi-Cal program by the 1982 legislation.

6 San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles action.

7 In setting forth the facts relating to the Los Angeles action, we rely in part on the appellate record from that action, of which we take judicial notice. (Evid. Code, §§ 452, subd. (d), 459.)

8 The settlement resulted from 1991 legislation that changed the system of health care funding as of June 30, 1991. (See § 17600 et seq.; Stats. 1991, chs. 87, 89, pp. 231-235, 243-341.) That legislation provided counties with new revenue sources, including a portion of state vehicle license fees, to fund health care programs. However, the legislation declared that the statutes providing counties with vehicle license fees would "cease to be operative on the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal" that "[t]he state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, §§ 10753.8, subd. (b)(2), 11001.5, subd. (d)(2); see also Stats. 1991, ch. 89, § 210, p. 340.) Los Angeles and San Bernardino Counties settled their action to avoid triggering these provisions. Unlike the dissent, we do not believe that consideration of these recently enacted provisions is appropriate in analyzing the 1982 legislation. Nor do we assume, as the dissent does, that our decision necessarily triggers these provisions. That issue is not before us.

9 The cross-complaint named the following state officers: (1) Kenneth W. Kizer, Director of the Department of Health Services; (2) Kim Belshé, Acting Secretary of the Health and Welfare Agency; (3) Gray Davis, the State Controller; (4) Kathleen Brown, the State Treasurer; and (5) Thomas Hayes, the Director of the Department of Finance. Where the context suggests, subsequent references in this opinion to "the state" include these officers.

10 The judgment dismissed all of San Diego's other claims.

11 In *Garamendi*, *supra*, 20 Cal.App.4th at pages 771-775, the court discussed procedural requirements for raising a claim that another court has already exercised its concurrent jurisdiction. Given our conclusion that the trial court's error here was not jurisdictional, we express no opinion about this discussion in *Garamendi* or the sufficiency of the state's efforts to raise the issue in this case.

12 Notably, in discussing the options still available to San Diego, the state asserts that San Diego "might have been able to go to superior court and file a [mandamus] petition based on the record of the prior test claim."

13 "County General Assistance in California dates from 1855, and for many years afforded the only form of relief to indigents." (*Mooney* v . *Pickett* (1971) 4 Cal.3d 669, 677 [94 Cal.Rptr. 279, 483 P.2d 1231] (*Mooney*).) Section 17000 is substantively identical to former section 2500, which was enacted in 1937. (Stats. 1937, chs. 369, 464, pp. 1097, 1406.)

14 See also *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 639 [122 P.2d 526] (construing former section 2500); *Jennings v. Jones* (1985) 165 Cal.App.3d 1083, 1091 [212 Cal.Rptr. 134] (counties must support all indigent persons "having no other means of support"); *Union of American Physicians & Dentists v. County of Santa Clara* (1983) 149 Cal.App.3d 45, 51, fn. 10 [196 Cal.Rptr. 602]; *Rogers v. Detrich* (1976) 58 Cal.App.3d 90, 95 [128 Cal.Rptr. 261] (counties have duty of support "where such support is not otherwise furnished").

15 In asserting that Medi-Cal coverage did not supplant San Diego's obligation under section 17000, the dissent incorrectly relies on *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768] (*Madera*) and *Cooke*, *supra*, 213 Cal.App.3d 401. (Dis. opn., *post*, at p. 115.) In *Madera*, the court voided a county ordinance that extended county benefits under section 17000 only to persons " 'meeting all eligibility standards for the Medi-Cal program.' " (*Madera*, *supra*, 155 Cal.App.3d at p. 150.) The court explained: "Because all funding for the Medi-Cal program comes from either the federal or the state government ..., [c]ounty has denied any financial obligation whatsoever from county funds for the medical care of its indigent and poor residents." (*Ibid.*) Thus, properly understood, *Madera* held only that Medi-Cal does not relieve counties of their obligation to provide medical care to persons who are "indigent" within the meaning of section 17000 but who are ineligible for Medi-Cal. The limit of *Madera*'s holding is apparent from the court's reliance on a 1979 opinion of the Attorney General discussing the scope of a county's authority under section 17000. (*Madera*, *supra*, 155 Cal.App.3d at pp. 151-152.) The Attorney General explained that "[t]he county obligation [under section 17000] to provide general relief extends to those indigents who do not qualify under specialized aid programs, ... including Medi-Cal." (62 Ops.Cal.Atty.Gen. 70, 71, fn. 1 (1979).) Moreover, the *Madera* court expressly recognized that state and federal programs "alleviate, to a greater or lesser extent, [a] [c]ounty's burden." (*Madera*, *supra*, 155 Cal.App.3d at p. 151.) In *Cooke*, the court simply made a passing reference to *Madera* in dictum describing the coverage history of Medi-Cal. (*Cooke*, *supra*, 213 Cal.App.3d at p. 411.) It neither analyzed the issue before us nor explained the meaning of the dictum that the dissent cites.

16 As we have previously explained, even before 1971 the state, through the county option, assumed much of the financial responsibility for providing medical care to adult MIP's.

17 Because *County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th 805, is distinguishable, we need not (and do not) express an opinion regarding the court's analysis in that decision or its conclusions.

18 The state properly does not contend that the provision of medical care to adult MIP's is not a "program" within the meaning of section 6. (See *County of Los Angeles*, *supra*, 43 Cal.3d at p. 56 [section 6 applies to "programs that carry out the governmental function of providing services to the public"].)

19 Alternatively, the 1982 legislation can be viewed as having mandated an increase in the services that counties were providing through existing section 17000 programs, by adding adult MIP's to the indigent population that counties already had to serve under that section. (See *County of Los Angeles*, *supra*, 43 Cal.3d at p. 56 ["subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs' "].)

20 In reaching a contrary conclusion, the dissent ignores the electorate's purpose in adopting section 6. The dissent also mischaracterizes our decision. We do not hold that "whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state." (Dis. opn., *post*, at p. 116.) Rather, we hold that section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6. Whether the state may discontinue assistance that it initiated after section 6's adoption is a question that is not before us.

21 As amended in 1982, section 16704, subdivision (c)(1), provided in relevant part: "The [county board of supervisors] shall assure that it will expend [MISA] funds only for the health services specified in Sections 14132 and 14021 provided to persons certified as eligible for such services pursuant to Section 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount required to obtain the maximum allocation under Section 16702." (Stats. 1982, ch. 1594, § 70, p. 6346.) Section 16704, subdivision (c)(3), provided in relevant part: "Any person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which would deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service .... The provisions of this paragraph shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandates [*sic*] that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date." (Stats. 1982, ch. 1594, § 70, pp. 6346-6347.)

22 Section 17001 provides: "The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county."

23 We disapprove *Bay General*, *supra*, 156 Cal.App.3d at pages 959-960, insofar as it (1) states that a county's responsibility under section 17000 extends only to indigents as defined by the county's board of supervisors, and (2) suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of section 17000 but do not qualify for Medi-Cal.

24 Our conclusion is limited to this aspect of a county's duty under section 17000. We express no opinion regarding the scope of a county's duty to provide other forms of relief and support under section 17000.

25 The 1982 legislation made the subdivision operative until June 30, 1983. (Stats. 1982, ch. 1594, § 70, p. 6347.) In 1983, the Legislature repealed and reenacted section 16704, and extended the operative date of subdivision (c)(3) to June 30, 1985. (Stats. 1983, ch. 323, §§ 131.1, 131.2, pp. 1079-1080.)

26 Given our analysis, we express no opinion about the statement in *Cooke*, *supra*, 213 Cal.App.3d at page 412, footnote 9, that the "life" of section 16704, subdivision (c)(3), "was implicitly extended" by the fact that the "paragraph remains in the statute despite three subsequent amendments to the statute ...."

27 Although asserting that nothing required San Diego to provide "all" adult MIP's with medical care, the state never precisely identifies which adult MIP's were legally entitled to medical care and which ones were not. Nor does the state ever directly assert that some adult MIP's were not "indigent persons" under section 17000. On the contrary, despite its argument, the state seems to suggest that San Diego's medical care obligation under section 17000 extended even beyond adult MIP's. It asserts: "At no time prior to or following 1983 did Medi-Cal ever provide medical services to, or pay for medical services provided to, all persons who could not afford such services and therefore might be deemed 'medically indigent.' ... For some period prior to 1983, Medi-Cal paid for services for *some* indigent adults under its 'medically indigent adults' category.... [A]t *no time* did the state ever assume financial responsibility for all adults who are too indigent to afford health care." (Original italics.)

28 The state argues that former subdivision (c) is irrelevant to our determination because, like section 17000, it "predate[d] 1975." Our previous analysis rejecting this argument in connection with section 17000 applies here as well.

29 Statutes 1992, chapter 719, section 2, page 2882, repealed former subdivision (c) and enacted a new subdivision (c) in its place. This urgency measure was approved by the Governor on September 14, 1992, and filed with the Secretary of State on September 15, 1992.

30 We disapprove *Cooke*, *supra*, 213 Cal.App.3d at page 410, to the extent it held that Health and Safety Code section 1442.5, former subdivision (c), was merely "a limitation on a county's ability to close facilities or reduce services provided in those facilities," and was irrelevant absent a claim that a "county facility was closed [or] that any services in [the] county ... were reduced." Although former subdivision (c) was contained in a section that dealt in part with closures and service reductions, nothing limited its reach to that context.

31 During further proceedings before the Commission to determine the amount of reimbursement due San Diego, the state may argue that particular services available under San Diego's CMS program exceeded statutory requirements.

32 Consistent with the electorate's direction, in its application for CHIP funds, San Diego assured the state that it would "[e]xpend [CHIP] funds only to supplement existing levels of services provided and not to fund existing levels of service ...." Because San Diego's initial decision to seek CHIP funds was voluntary, the evidence it cites of state threats to withhold CHIP funds if it eliminated the CMS program is irrelevant.

33 Former section 16991, subdivision (a)(5), provided in full: "If the sum of funding that a county received from its allocation pursuant to Section 16703, the amount of reimbursement it received from federal State Legalization Impact Assistance Grant [(SLIAG)] funding for indigent care, and its share of funding provided in this section is less than the amount of funding the county received pursuant to Section 16703 in fiscal year 1988-89 the state shall reimburse the county for the amount of the difference. For the 1990-91 fiscal year, if the

sum of funding received from its allocation, pursuant to Section 16703 and the amount of reimbursement it received from [SLIAG] Funding for indigent care that year is less than the amount of funding the county received pursuant to Section 16703 in the 1988-89 fiscal year, the state shall reimburse the amount of the difference. If the department determines that the county has not made reasonable efforts to document and claim federal SLIAG funding for indigent care, the department shall deny the reimbursement." (Stats. 1989, ch. 1331, § 9, p. 5428.)

34 Despite its argument here, when it initially appealed, the state apparently recognized that it could no longer challenge the May 1991 order. In its March 1993 notice of appeal, it appealed only from the judgment entered December 18, 1992, and did not mention the May 1991 order.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 I agree with the majority that the superior court had jurisdiction to decide this case. (Maj. opn., *ante,* at pp. 86-90.)

2 Section 6 of article XIII B pertains to two types of mandates: new programs and higher levels of service. The words "such subvention" in the first paragraph of this constitutional provision makes the subdivision (c) exemption applicable to both types of mandates.

53 Cal.3d 482, 808 P.2d 235, 280 Cal.Rptr. 92
Supreme Court of California

COUNTY OF FRESNO, Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S015637.
Apr 22, 1991.

SUMMARY

A county filed a test claim with the Commission on State Mandates seeking, under Cal. Const., art. XIII B, § 6 (state must provide subvention of funds to reimburse local governments for costs of state- mandated programs or increased levels of service), reimbursement from the state for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.). The commission found the county had the authority to charge fees to pay for the program, and the program was thus not a reimbursable state-mandated program under Gov. Code, § 17556, subd. (d), which provides that costs are not state-mandated if the agency has authority to levy a charge or fee sufficient to pay for the program. The county filed a petition for writ of mandate and a complaint for declaratory relief against the state. The trial court denied relief. (Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.) The Court of Appeal, Fifth Dist., No. F011925, affirmed.

The Supreme Court affirmed the decision of the Court of Appeal. The court held, as to the single issue on review, that Gov. Code, § 17556, subd. (d), was facially constitutional under Cal. Const., art. XIII B, § 6. It held art. XIII B was not intended to reach beyond taxation, and § 6 was included in art. XIII B in recognition that Cal. Const., art. XIII A, severely restricted the taxing powers of local governments. It held that art. XIII B, § 6 was designed to protect the tax revenues of local governments from state mandates that would require an expenditure of such revenues and, when read in textual and historical context, requires subvention only when the costs in question can be recovered solely from tax revenues. Accordingly, the court held that Gov. Code, § 17556, subd. (d), effectively construed the term "cost" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that such a construction is altogether sound. (Opinion by Mosk, J., with Lucas, C. J., Broussard, ***483** Panelli, Kennard, JJ., and Best (Hollis G.), J.,* concurring. Separate concurring opinion by Arabian, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 11--Reimbursement to Local Governments for State-mandated Costs--Costs for Which Fees May Be Levied--Validity of Exclusion.
In a proceeding by a county seeking reversal of a decision by the Commission on State Mandates that the state was not required by Cal. Const., art. XIII B, § 6, to reimburse the county for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.), the trial court properly found that Gov. Code, § 17556, subd. (d) (costs are not state-mandated if agency has authority to levy charge or fee sufficient to pay for program), was facially constitutional. Cal. Const., art. XIII B, was intended to apply to taxation and was not intended to reach beyond taxation, as is apparent from its language and confirmed by its history. It was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues; read in its textual and historical contexts, requires subvention only when the costs in question can be recovered solely from tax revenues. Gov. Code, § 17556, subd. (d), effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that construction is altogether sound. Accordingly, Gov. Code, § 17556, subd. (d), is facially constitutional under Cal. Const., art. XIII B, § 6.

[See **Cal.Jur.3d (Rev),** Municipalities, § 361; 9 **Witkin,** Summary of Cal. Law (9th ed. 1988) Taxation, § 124.]

COUNSEL

Max E. Robinson, County Counsel, and Pamela A. Stone, Deputy County Counsel, for Plaintiff and Appellant.
B. C. Barnum, County Counsel (Kern), and Patricia J. Randolph, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant. ***484**
John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, and Richard M. Frank, Deputy Attorney General, for Defendants and Respondents.

MOSK, J.

We granted review in this proceeding to decide whether section 17556, subdivision (d), of the Government Code (section 17556(d)) is facially valid under article XIII B, section 6, of the California Constitution (article XIII B, section 6).

Article XIII B, section 6, provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

The Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, § 17500.) It created a "quasi-judicial body" (*ibid.*) called the Commission on State Mandates (commission) (*id.,* § 17525) to "hear and decide upon [any] claim" by a local government that the local government "is entitled to be reimbursed by the state for costs" as required by article XIII B, section 6. (Gov. Code, § 17551, subd. (a).) It defined "costs" as "costs mandated by the state"—"any increased costs" that the local government "is required to incur ... as a result of any statute ..., or any executive order implementing any statute ..., which mandates a new program or higher level of service of any existing program" within the meaning of article XIII B, section 6. (Gov. Code, § 17514.) Finally, in section 17556(d) it declared that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

For the reasons discussed below, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6. ***485**

I. Facts and Procedural History

The present proceeding arose after the Legislature enacted the Hazardous Materials Release Response Plans and Inventory Act (Act). (Health & Saf. Code, § 25500 et seq.) The Act establishes minimum statewide standards for business and area plans relating to the handling and release or threatened release of hazardous materials. (*Id.,* § 25500.) It requires local governments to implement its provisions. (*Id.,* § 25502.) To cover the costs they may incur, it authorizes them to collect fees from those who handle hazardous materials. (*Id.,* § 25513.)

The County of Fresno (County) implemented the Act but chose not to impose the authorized fees. Instead, it filed a so-called "test" or initial claim with the commission (Gov. Code, § 17521) seeking reimbursement from the State of California (State) under article XIII B, section 6. After a hearing, the commission rejected the claim. In its statement of decision, the commission made the following findings, among others: the Act constituted a "new program"; the County did indeed incur increased costs; but because it had authority under the Act to levy fees sufficient to cover such costs, section 17556(d) prohibited a finding of reimbursable costs.

The County then filed a petition for writ of mandate and complaint for declaratory relief against the State, the commission, and others, seeking vacation of the commission's decision and a declaration that section 17556(d) is unconstitutional under article XIII B, section 6. While the matter was pending, the commission amended its statement of decision to include another basis for denial of the test claim: the Act did not constitute a "program" under the rationale of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*), because it did not impose unique requirements on local governments.

After a hearing, the trial court denied the petition and effectively dismissed the complaint. It determined, inter

alia, that mandate under Code of Civil Procedure section 1094.5 was the County's sole remedy, and that the commission was the sole properly named respondent. It also determined that section 17556(d) is constitutional under article XIII B, section 6. It did not address the question whether the Act constituted a "program" under *County of Los Angeles*. Judgment was entered accordingly.

The Court of Appeal affirmed. It held the Act did indeed constitute a "program" under *County of Los Angeles, supra,* 43 Cal.3d 46. It also held section 17556(d) is constitutional under article XIII B, section 6. ***486**

(1) We granted review to decide a single issue, i.e., whether section 17556(d) is facially constitutional under article XIII B, section 6.

II. Discussion

We begin our analysis with the California Constitution. At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new "special taxes." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes." (*City of Sacramento, supra,* 50 Cal.3d at p. 59, fn. 1.)

Article XIII B of the Constitution was intended to apply to taxation—specifically, to provide "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an "appropriations limit" for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no "appropriations subject to limitation" in excess thereof (*id.,* § 2). (See *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 446.) It defines the relevant "appropriations subject to limitation" as "any authorization to expend during a fiscal year the proceeds of taxes ...." (Cal. Const., art. XIII B, § 8, subd. (b).) It defines "proceeds of taxes" as including "all tax revenues and the proceeds to ... government from," inter alia, "regulatory licenses, user charges, and user fees *to the extent that such proceeds exceed the costs reasonably borne by* [*government*] *in providing the regulation, product, or service* ...." (Cal. Const., art. XIII B, § 8, subd. (c), italics added.) Such "excess" proceeds from "licenses," "charges," and "fees" "are but ***487** *taxes*" for purposes here. (*County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 451, italics in original.)

Article XIII B of the Constitution, however, was not intended to reach beyond taxation. That fact is apparent from the language of the measure. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, p. 16.)

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such

revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.

In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.

The County argues to the contrary. It maintains that section 17556(d) in essence creates a new exception to the reimbursement requirement of article ***488** XIII B, section 6, for self-financing programs and that the Legislature cannot create exceptions to the reimbursement requirement beyond those enumerated in the Constitution.

We do not agree that in enacting section 17556(d) the Legislature created a new exception to the reimbursement requirement of article XIII B, section 6. As explained, the Legislature effectively—and properly—construed the term "costs" as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the requirement. Therefore, they need not be explicitly excepted from its reach.

The County nevertheless argues that no matter how characterized, section 17556(d) is indeed inconsistent with article XIII B, section 6. Its contention is in substance as follows: the source of section 17556(d) is former Revenue and Taxation Code section 2253.2; at the time of Proposition 4, subdivision (b)(4) of that former section stated that the State Board of Control shall not allow a claim for reimbursement of costs mandated by the state if the legislation contains a self-financing authority; the drafters of Proposition 4 incorporated some of the provisions of former Revenue and Taxation Code section 2253.2 into article XIII B, section 6, but did not incorporate former subdivision (b)(4); their failure to do so reveals an intent to treat as immaterial the presence or absence of a "self-financing" provision; and such an intent is confirmed by the "legislative history" set out at page 55 in Spirit of 13, Inc., Summary of Proposed Implementing Legislation and Drafters' Intent: "the state may not arbitrarily declare that it is not going to comply with Section 6 ... if the state provides new compensating revenues."

In our view, the County's argument is unpersuasive. Even if we assume arguendo that the intent of those who drafted Proposition 4 is as claimed, what is crucial here is the intent of those who voted for the measure. (See *County of Los Angeles, supra,* 43 Cal.3d 46, 56.) There is no substantial evidence that the voters sought what the County assumes the drafters desired. Moreover, the "legislative history" cited above cannot be considered relevant; it was written and circulated after the passage of Proposition 4. As such, it could not have affected the voters in any way.

To avoid this result, the County advances one final argument: "Based on the authority of [section 17556(d)], the Commission on State Mandates refuses to hear mandates on the merits once it finds that the authority to charge fees is given by the Legislature. This position is taken whether or not fees can actually or legally be charged to recover the entire costs of the program." ***489**

The County appears to be making one or both of the following arguments: (1) the commission applies section 17556(d) in an unconstitutional manner; or (2) the Act's self-financing authority is somehow lacking. Such contentions, however, miss the designated mark. They raise questions bearing on the constitutionality of section 17556(d) as applied and the legal efficacy of the authority conferred by the Act. The sole issue on review, however, is the facial constitutionality of section 17556(d).

III. Conclusion

For the reasons set forth above, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Broussard, J., Panelli, J., Kennard, J., and Best (Hollis G.), J.,* concurred.

ARABIAN, J.,

Concurring.

I concur in the determination that Government Code section 17556, subdivision (d)[1] (section 17556(d)), does not offend article XIII B, section 6, of the California Constitution (article XIII B, section 6). In my estimation, however, the constitutional measure of the issue before us warrants fuller examination than the majority allow. A literalistic analysis begs the question of whether the Legislature had the authority to act statutorily upon a subject matter the electorate has spoken to constitutionally through the initiative process.

Article XIII B, section 6, unequivocally commands that "the state shall provide a subvention of funds to reimburse ... local government for the costs of [a new] program or increased level of service" except as specified therein. Article XIII B does not define this reference to "costs." (See Cal. Const., art. XIII B, § 8.) Rather, the Legislature assumed the task of explicating the related concept of "costs mandated by the state" when it created the Commission on State Mandates and enacted procedures intended to implement article XIII B, section 6, more effectively. (See § 17500 et seq.) As part of this statutory scheme, it exempted the state from its constitutionally imposed subvention obligation under certain enumerated circumstances. Some of these exemptions the electorate expressly contemplated in approving article XIII B, section 6 (§ 17556, subds. (a), (c), & (g); see § 17514), while others are strictly of legislative formulation and derive from ***490** former Revenue and Taxation Code section 2253.2. (§ 17556, subds. (b), (d), (e), & (f).)

The majority find section 17556 valid notwithstanding the mandatory language of article XIII B, section 6, based on the circular and conclusory rationale that "the Legislature effectively—and properly—construed the term 'costs' as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the [subvention] requirement. Therefore, they need not be explicitly excepted from its reach." (Maj. opn., *ante,* at p. 488*ante,* at p. 488.) In my view, excluding or otherwise removing something from the purview of a law is tantamount to creating an exception thereto. When an exclusionary implication is clear from the import or effect of the statutory language, use of the word "except" should not be necessary to construe the result for what it clearly is. In this circumstance, "I would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 [177 Cal.Rptr. 852, 635 P.2d 446] (conc. opn. by Mosk, J.).)

Of at least equal importance, section 17500 et seq. constitutes a legislative implementation of article XIII B, section 6. As such, the overall statutory scheme must comport with the express constitutional language it was designed to effectuate as well as the implicit electoral intent. Eschewing semantics, I would squarely and forthrightly address the fundamental and substantial question of whether the Legislature could lawfully enlarge upon the scope of article XIII B, section 6, to include exceptions not originally designated in the initiative.

I do not hereby seek to undermine the majority holding but rather to set it on a firmer constitutional footing. "[S]tatutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative rather than defeat them. In so doing, sections of the Constitution, as well as the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose v. State of California* (1942) 19 Cal.2d 713, 723 [123 P.2d 505]; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202].) To this end, it is a fundamental premise of our form of government that "the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and ... it is competent for the Legislature to exercise all powers not forbidden ...." (*People v. Coleman* (1854) 4 Cal. 46, 49.) "Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the ***491**

Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] *In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited.'* [Citation.] [¶] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' [Citations.]" (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], italics added.) "Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. [Citations.]" (*Dean v. Kuchel* (1951) 37 Cal.2d 97, 100 [230 P.2d 811].)

As the majority opinion impliedly recognizes, neither the language nor the intent of article XIII B conflicts with the exercise of legislative prerogative we review today. Of paramount significance, neither section 6 nor any other provision of article XIII B prohibits statutory delineation of additional circumstances obviating reimbursement for state mandated programs. (See *Dean v. Kuchel, supra,* 37 Cal.2d at p. 101; *Roth Drugs, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 729 [57 P.2d 1022]; see also *Kehrlein v. City of Oakland* (1981) 116 Cal.App.3d 332, 338 [172 Cal.Rptr. 111].)

Furthermore, the initiative was "[b]illed as a flexible way to provide discipline in government spending" by creating appropriations limits to restrict the amount of such expenditures. (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 447 [170 Cal.Rptr. 232]; see Cal. Const., art. XIII B, § 1.) By their nature, user fees do not affect the equation of local government spending: While they facilitate implementation of newly mandated state programs or increased levels of service, they are excluded from the "appropriations subject to limitations" calculation and its attendant budgetary constraints. (See Cal. Const., art. XIII B, § 8; see also *City Council v. South* (1983) 146 Cal.App.3d 320, 334 [194 Cal.Rptr. 110]; *County of Placer v. Corin, supra,* 113 Cal.App.3d at pp. 448-449; Cal. Const., art. XIII B, § 3, subd. (b); cf. *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1505 [246 Cal.Rptr. 21] [" 'fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of "special taxes" [limited by California Constitution, article XIII A]' "]; *Terminal Plaza Corp. v. City* ***492** *and County of San Francisco* (1986) 177 Cal.App.3d 892, 906 [223 Cal.Rptr. 379] [same].)

This conclusion fully accommodates the intent of the voters in adopting article XIII B, as reflected in the ballot materials accompanying the proposition. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) In general, these materials convey that "[t]he goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61; *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 109- 110 [211 Cal.Rptr. 133, 695 P.2d 220].) To the extent user fees are not borne by the general public or applied to the general revenues, they do not bear upon this purpose. Moreover, by imputation, voter approval contemplated the continued imposition of reasonable user fees outside the scope of article XIII B. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Limitation of Government Appropriations, Special Statewide Elec. (Nov. 6, 1979), arguments in favor of and against Prop. 4, p. 18 [initiative "Will curb excessive user fees imposed by local government" but "will Not eliminate user fees ..."]; see *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 452.)

"The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 56; see *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66 [266 Cal.Rptr. 139, 785 P.2d 522].) "Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to

local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61.) An exemption from reimbursement for state mandated programs for which local governments are authorized to charge offsetting user fees does not frustrate or compromise these goals or otherwise disturb the balance of local government financing and expenditure.[2] (See ***493** *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 452, fn. 7.) Article XIII B, section 8, subdivision (c), specifically includes regulatory licenses, user charges, and user fees in the appropriations limitation equation only "to the extent that those proceeds exceed the costs reasonably borne by [the governmental] entity in providing the regulation, product, or service ...."

The self-executing nature of article XIII B does not alter this analysis. "It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. [Citations.]" (*Chesney v. Byram* (1940) 15 Cal.2d 460, 465 [101 P.2d 1106].) " ' "Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." [Citations.]' " (*Id.,* at pp. 463-464; see also *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].) Section 17556(d) is not "merely [a] transparent attempt[] to do indirectly that which cannot lawfully be done directly." (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541 [234 Cal.Rptr. 795].) On the contrary, it creates no conflict with the constitutional directive it subserves. Hence, rather than pursue an interpretive expedient, this court should expressly declare that it operates as a valid legislative implementation thereof.

"[Initiative] provisions of the Constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. [Citations.] As opposed to that principle, however, 'in examining and ascertaining the intention of the people with respect to the scope and nature of those ... powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential and, perhaps, ... indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers and that they do not so apply.' [Citation.]" (*Hunt v. Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628-629 [191 P.2d 426].) ***494**

This court is not infrequently called upon to resolve the tension of apparent or actual conflicts in the express will of the people.[3] Whether that expression emanates directly from the ballot or indirectly through legislative implementation, each deserves our fullest estimation and effectuation. Given the historical and abiding role of government by initiative, I decline to circumvent that responsibility and accept uncritically the Legislature's self-validating statutory scheme as the basis for approving the exercise of its prerogative. It is not enough to say a broader constitutional analysis yields the same result and therefore is unnecessary. We provide a higher quality of justice harmonizing rather than ignoring the divers voices of the people, for such is the nature of our office. ***495**

Footnotes

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

1 Unless otherwise indicated, all further statutory references are to the Government Code.

2 This conclusion also accords with the traditional and historical role of user fees in promoting the multifarious functions of local government by imposing on those receiving a service the cost of providing it. (Cf. *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 454 ["Special assessments, being levied only for improvements that benefit particular parcels of land, and not to raise general revenues, are simply not the type of exaction that can be used as a mechanism for circumventing these tax relief provisions. [Citation.]"].)

3 See, e.g., *Zumwalt v. Superior Court* (1989) 49 Cal.3d 167 [260 Cal.Rptr. 545, 776 P.2d 247]; *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]; *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171 [148 Cal.Rptr. 875, 583 P.2d 729]; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575 [131 Cal.Rptr. 361, 551 P.2d 1193]; *Blotter v. Farrell* (1954) 42 Cal.2d 804 [270 P.2d 481]; *Dean v. Kuchel, supra,* 37 Cal.2d 97; *Hunt v. Mayor & Council of Riverside, supra,* 31 Cal.2d 619.

55 Cal.App.4th 976, 64 Cal.Rptr.2d 270, 97 Cal. Daily Op. Serv. 4510, 97 Daily Journal D.A.R. 7464

REDEVELOPMENT AGENCY OF THE CITY OF SAN MARCOS, Plaintiff and Appellant,
v.
CALIFORNIA COMMISSION ON STATE MANDATES, Defendant and Respondent;
CALIFORNIA DEPARTMENT OF FINANCE, Intervener and Respondent.

No. D026195.
Court of Appeal, Fourth District, Division 1, California.
May 30, 1997.

SUMMARY

The trial court denied a petition for a writ of administrative mandate brought by a city's redevelopment agency that challenged the California Commission on State Mandates' denial of the agency's test claim under Gov. Code, § 17550 et seq. (reimbursement of costs mandated by the state). In its claim, the agency sought a determination that the State of California should reimburse the agency for moneys transferred into its lowand moderate-income housing fund pursuant to Health & Saf. Code, §§ 33334.2 and 33334.3, of the Community Redevelopment Law. Those statutes require a 20 percent deposit of the particular form of financing received by the agency (tax increment financing generated from its project areas) for purposes of improving the supply of affordable housing. The agency claimed that this tax increment financing should not be subject to state control of the allocations made to various funds and that such control constituted a state-mandated new program or higher level of service for which reimbursement or subvention was required under Cal. Const., art. XIII B, § 6. The trial court found that the source of funds used by the agency was exempt, under Health & Saf. Code, § 33678, from the scope of Cal. Const., art. XIII B, § 6. (Superior Court of San Diego County, No. 686818, Sheridan E. Reed and Herbert B. Hoffman, Judges.)

The Court of Appeal affirmed. It held that under Health & Saf. Code, § 33678, which provides that tax increment financing is not deemed to be the "proceeds of taxes," the source of funds used by the agency was exempt ***977** from the scope of Cal. Const., art. XIII B, § 6. Although Cal. Const., art. XIII B, § 6, does not expressly discuss the source of funds used by an agency to fund a program, the historical and contextual context of this provision demonstrates that it applies only to costs recovered solely from tax revenues. Because of the nature of the financing they receive (i.e., tax increment financing), redevelopment agencies are not subject to appropriations limitations or spending caps, they do not expend any proceeds of taxes, and they do not raise general revenues for the local entity. Also, the state is not transferring any program for which it was formerly responsible. Therefore, the purposes of state subvention laws are not furthered by requiring reimbursement when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of Health & Saf. Code, §§ 33334.2 and 33334.3. (Opinion by Huffman, J., with Work, Acting P. J., and McIntyre, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 11--Fiscal Matters--Subvention:Words, Phrases, and Maxims--Subvention.
"Subvention" generally means a grant of financial aid or assistance, or a subsidy.

(2)
State of California § 11--Fiscal Matters--Subvention--Judicial Rules.
Under Gov. Code, § 17559, review by administrative mandamus is the exclusive method of challenging a decision of the California Commission on State Mandates to deny a subvention claim. The determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, § 6, is a question of law. On appellate review, the following standards apply: Gov. Code, § 17559, governs the proceeding below and requires that the trial court review the decision of the commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, the appellate court is generally confined to inquiring whether substantial evidence supports the trial court's findings and judgment. However, the appellate court independently reviews the trial court's legal conclusions

about the meaning and effect of constitutional and statutory provisions.

(3a, 3b)
State of California § 11--Fiscal Matters--Subvention--State-mandated Costs--Statutory Set-aside Requirement for Local Redevelopment Agency's Tax Increment Financing.
The California Commission on State Mandates properly denied a test claim brought by a city's redevelopment agency seeking a determination that the state should reimburse the agency for moneys transferred into its lowand ***978** moderate-income housing fund pursuant to Health & Saf. Code, §§ 33334.2 and 33334.3, which require a 20 percent deposit of the particular form of financing received by the agency, i.e., tax increment financing generated from its project areas. Under Health & Saf. Code, § 33678, which provides that tax increment financing is not deemed to be the "proceeds of taxes," the source of funds used by the agency was exempt from the scope of Cal. Const., art. XIII B, § 6 (subvention). Although Cal. Const., art. XIII B, § 6, does not expressly discuss the source of funds used by an agency to fund a program, the historical and contextual context of this provision demonstrates that it applies only to costs recovered solely from tax revenues. Because of the nature of the financing they receive (i.e., tax increment financing), redevelopment agencies are not subject to appropriations limitations or spending caps, they do not expend any proceeds of taxes, and they do not raise general revenues for the local entity. Also, the state is not transferring any program for which it was formerly responsible. Therefore, the purposes of state subvention laws are not furthered by requiring reimbursement when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of Health & Saf. Code, §§ 33334.2 and 33334.3.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(4)
Constitutional Law § 10--Construction of Constitutional Provisions-- Limitations on Legislative Powers.
The rules of constitutional interpretation require a strict construction of a constitutional provision that contains limitations and restrictions on legislative powers, because such limitations and restrictions are not to be extended to include matters not covered by the language used.

(5)
State of California § 11--Fiscal Matters--Subvention--Purpose of Constitutional Provisions.
The goal of Cal. Const., arts. XIII A and XIII B, is to protect California residents from excessive taxation and government spending. A central purpose of Cal. Const., art. XIII B, § 6 (reimbursement to local government of state-mandated costs), is to prevent the state's transfer of the cost of government from itself to the local level.

COUNSEL
Higgs, Fletcher & Mack and John Morris for Plaintiff and Appellant.
Gary D. Hori for Defendant and Respondent. ***979**
Daniel E. Lungren, Attorney General, Robert L. Mukai, Chief Assistant Attorney General, Linda A. Cabatic and Daniel G. Stone, Deputy Attorneys General, for Intervener and Respondent.

HUFFMAN, J.

The California Commission on State Mandates (the Commission) denied a test claim by the Redevelopment Agency of the City of San Marcos (the Agency) (Gov. Code, § 17550 et seq.), which sought a determination that the State of California should reimburse the Agency for moneys transferred into its Low and Moderate Income Housing Fund (the Housing Fund) pursuant to Health and Safety Code [1] sections 33334.2 and 33334.3. Those sections require a 20 percent deposit of the particular form of financing received by the Agency, tax increment financing generated from its project areas, for purposes of improving the supply of affordable housing. (1)**(See fn. 2)**The Agency claimed that this tax increment financing should not be subject to state control of the allocations made to various funds and that such control constituted a state-mandated new program or higher level of service for which reimbursement or subvention was required under article XIII B of the California Constitution, section 6 (hereafter section 6; all further references to articles are to the California Constitution). [2] (Cal. Const., art. XVI, § 16; § 33670.)

The Agency brought a petition for writ of administrative mandamus to challenge the decision of the Commission. (Code Civ. Proc., § 1094.5; Gov. Code, § 17559.) The superior court denied the petition, ruling that the source of funds used by the Agency for redevelopment, tax increment financing, was exempt pursuant to section 33678 from the

scope of section 6, as not constituting "proceeds of taxes" which are governed by that section. The superior court did not rule upon the alternative grounds of decision stated by the Commission, i.e., the 20 percent set-aside requirement for lowand moderate-income housing did not impose a new program or higher level of service in an existing program within the meaning of section 6, and, further, there were no costs subject to reimbursement related to the Housing Fund because there was no net increase in the aggregate program responsibilities of the Agency.

The Agency appeals the judgment denying its petition for writ of mandate. For the reasons set forth below, we affirm. ***980**

I. Procedural Context

This test claim was litigated before the Commission pursuant to statutory procedures for determining whether a statute imposes state-mandated costs upon a local agency which must be reimbursed, through a subvention of funds, under section 6. (Gov. Code, § 17500 et seq.)[3] The Commission hearing consisted of oral argument on the points and authorities presented.

(2) Under Government Code section 17559, review by administrative mandamus is the exclusive method of challenging a Commission decision denying a subvention claim. "The determination whether the statutes here at issue established a mandate under section 6 is a question of law. [Citation.]" (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109 [61 Cal.Rptr.2d 134, 931 P.2d 312].) On appellate review, we apply these standards: "Government Code section 17559 governs the proceeding below and requires that the trial court review the decision of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court's findings and judgment. [Citation.] However, we independently review the superior court's legal conclusions about the meaning and effect of constitutional and statutory provisions. [Citation.]" (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810 [53 Cal.Rptr.2d 521].)

II. Statutory Schemes

Before we outline the statutory provisions setting up tax increment financing for redevelopment agencies, we first set forth the Supreme Court's recent summary of the history and substance of the law applicable to state mandates, such as the Agency claims exist here: "Through adoption of Proposition 13 in 1978, the voters added article XIII A to the California Constitution, which 'imposes a limit on the power of state and local governments to ***981** adopt and levy taxes. [Citation.]' [Citation.] The next year, the voters added article XIII B to the Constitution, which 'impose[s] a complementary limit on the rate of growth in governmental spending.' [Citation.] These two constitutional articles 'work in tandem, together restricting California governments' power both to levy and to spend for public purposes.' [Citation.] Their goals are 'to protect residents from excessive taxation and government spending. [Citation.]' [Citation.]" (*County of San Diego v. State of California*, *supra*, 15 Cal.4th at pp. 80-81.)

Section 6, part of article XIII B and the provision here at issue, requires that whenever the Legislature or any state agency mandates a "new program or higher level of service" on any local government, " 'the state shall provide a subvention of funds to reimburse such local government for *the costs of such program* or increased level of service ....' " (*County of San Diego v. State of California*, *supra*, 15 Cal.4th at p. 81, italics added.) Certain exceptions are then stated, none of which is relevant here.[4]

In *County of San Diego v. State of California*, *supra*, 15 Cal.4th at page 81, the Supreme Court explained that section 6 represents a recognition that together articles XIII A and XIII B severely restrict the taxing and spending powers of local agencies. The purpose of the section is to preclude the state from shifting financial responsibility for governmental functions to local agencies, which are ill equipped to undertake increased financial responsibilities because they are subject to taxing and spending limitations under articles XIII A and XIII B. (*County of San Diego v. State of California*, *supra*, at p. 81.)

To evaluate the Agency's argument that the provisions of sections 33334.2 and 33334.3, requiring a deposit into the housing fund of 20 percent of the tax increment financing received by the Agency, impose this type of reimbursable governmental program or a higher level of service under an existing program, we first review the provisions establishing financing for redevelopment agencies. Such agencies have no independent powers of taxation (***982** *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100,

106 [211 Cal.Rptr. 133, 695 P.2d 220]), but receive a portion of tax revenues collected by other local agencies from property within a redevelopment project area, which may result from the following scheme: "Redevelopment agencies finance real property improvements in blighted areas. Pursuant to article XVI, section 16 of the Constitution, these agencies are authorized to use tax increment revenues for redevelopment projects. The constitutional mandate has been implemented through the Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.). [¶] The Community Redevelopment Law authorizes several methods of financing; one is the issuance of tax allocation bonds. Tax increment revenue, the increase in annual property taxes attributable to redevelopment improvements, provides the security for tax allocation bonds. Tax increment revenues are computed as follows: The real property within a redevelopment project area is assessed in the year the redevelopment plan is adopted. Typically, after redevelopment, property values in the project area increase. The taxing agencies (e.g., city, county, school or special district) keep the tax revenues attributable to the original assessed value and pass the portion of the assessed property value which exceeds the original assessment on to the redevelopment agency. (Health & Saf. Code, §§ 33640, 33641, 33670, 33675). In short, tax increment financing permits a redevelopment agency to take advantage of increased property tax revenues in the project areas without an increase in the tax rate. This scheme for redevelopment financing has been a part of the California Constitution since 1952. (Cal. Const., art. XVI, § 16.)" (*Brown v. Community Redevelopment Agency* (1985) 168 Cal.App.3d 1014, 1016-1017 [214 Cal.Rptr. 626].) [5]

In *Brown v. Community Redevelopment Agency*, *supra*, 168 Cal.App.3d at pages 1016-1018, the court determined that by enacting section 33678, the Legislature interpreted article XIII B of the Constitution as not broad enough in reach to cover the raising or spending of tax increment revenues by redevelopment agencies. Specifically, the court decided the funds a redevelopment agency receives from tax increment financing do not constitute "proceeds of taxes" subject to article XIII B appropriations limits. (*Brown v. Community Redevelopment Agency*, *supra*, at p. 1019). [6] This ruling was based on section 33678, providing in pertinent part: "This section implements and fulfills the intent ... of Article XIII B and ***983** Section 16 of Article XVI of the California Constitution. *The allocation and payment to an agency of the portion of taxes specified in subdivision (b) of Section 33670 for the purpose of paying principal of, or interest on ... indebtedness incurred for redevelopment activity ... shall not be deemed the receipt by an agency of proceeds of taxes levied by or on behalf of the agency within the meaning of or for the purposes of Article XIII B ... nor shall such portion of taxes be deemed receipt of proceeds of taxes by, or an appropriation subject to limitation of, any other public body within the meaning or for purposes of Article XIII B ...* or any statutory provision enacted in implementation of Article XIII B. *The allocation and payment to an agency of this portion of taxes shall not be deemed the appropriation by a redevelopment agency of proceeds of taxes levied by or on behalf of a redevelopment agency within the meaning or for purposes of Article XIII B of the California Constitution.*" (Italics added.)

In *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451 [170 Cal.Rptr. 232], the court defined "proceeds of taxes" in this way: "Under article XIII B, with the exception of state subventions, the items that make up the scope of ' "proceeds of taxes" ' concern charges levied to raise *general revenues* for the local entity. ' "Proceeds of taxes," ' in addition to 'all tax revenues' includes 'proceeds ... from ... regulatory licenses, user charges, and user fees [*only*] *to the extent that such proceeds exceed the costs reasonably borne by such entity in providing the regulation, product or service....*' (§ 8, subd. (c).) (Italics added.) Such 'excess' regulatory or user fees are but *taxes* for the raising of general revenue for the entity. [Citations.] Moreover, to the extent that an assessment results in revenue above the cost of the improvement or is of general public benefit, it is no longer a special assessment but a tax. [Citation.] *We conclude 'proceeds of taxes' generally contemplates only those impositions which raise general tax revenues for the entity.*" (Italics added.) [7]

(3a) In light of these interrelated sections and concepts, our task is to determine whether the 20 percent Housing Fund set-aside requirement of a redevelopment agency's tax increment financing qualifies under section 6 as a "cost" of a program. As will be explained, we agree with the trial court that the resolution of this issue is sufficient to dispose of the entire matter, and ***984** accordingly we need not discuss the alternate grounds of decision stated by the Commission. [8]

III. Housing Fund Allocations: Reimbursable Costs?

1. *Arguments*

The Agency takes the position that the language of section 33678 is simply inapplicable to its claim for subvention

of funds required to be deposited into the Housing Fund. It points out that section 6 expressly lists three exceptions to the requirement for subvention of funds to cover the costs of state-mandated programs: (a) Legislative mandates requested by the local agency affected; (b) legislation defining or changing a definition of a crime; or (c) pre-1975 legislative mandates or implementing regulations or orders. (See fn. 4, *ante*.*ante*.) None of these exceptions refers to the source of the funding originally used by the agency to pay the costs incurred for which reimbursement is now being sought. Thus, the agency argues it is immaterial that under section 33678, *for purposes of appropriations limitations*, tax increment financing is not deemed to be the "proceeds of taxes." (*Brown v. Community Redevelopment Agency*, *supra*, 168 Cal.App.3d at pp. 1017-1020.) The Agency would apply a "plain meaning" rule to section 6 (see, e.g., *Davis v. City of* Berkeley (1990) 51 Cal.3d 227, 234 [272 Cal.Rptr. 139, 794 P.2d 897]) and conclude that the source of the funds used to pay the program costs up front, before any subvention, is not stated in the section and thus is not relevant.

As an illustration of its argument that the source of its funds is irrelevant under section 6, the Agency cites to Government Code section 17556. That section is a legislative interpretation of section 6, creating several classes of state-mandated programs for which no state reimbursement of local agencies for costs incurred is required. In *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [280 Cal.Rptr. 92, 808 P.2d 235], the Supreme Court upheld the facial constitutionality of Government Code section 17556, subdivision (d), which disallows state subvention of funds where the local government is authorized to collect service charges or fees in connection with a mandated program. The court explained that section 6 "was designed to protect the tax revenues of local governments from state mandates that ***985** would require expenditure of such revenues." (*County of Fresno v. State of California*, *supra*, at p. 487.) Based on the language and history of the measure, the court stated, "Article XIII B of the Constitution, however, was not intended to reach beyond taxation." (*Ibid.*) The court therefore concluded that in view of its textual and historical context, section 6 "requires subvention only when the costs in question can be recovered *solely from tax revenues*." (*Ibid.*, original italics.) Interpreting section 6, the court stated: "Considered within its context, the section effectively construes the term 'costs' in the constitutional provision as excluding expenses that are recoverable from sources other than taxes." (*Ibid.*) No subvention was required where the local authority could recover its expenses through fees or assessments, not taxes.

2. *Interpretation of Section 6*

Here, the Agency contends the authority of *County of Fresno v. State of California*, *supra*, *53* Cal.3d 482, should be narrowly read to cover only self-financing programs, and the Supreme Court's broad statements defining "costs" in this context read as mere dicta. It also continues to argue for a "plain meaning" reading of section 6, which it reiterates does not expressly discuss the source of funds used by an agency to pay the costs of a program before any reimbursement is sought. We disagree with both of these arguments. The correct approach is to read section 6 in light of its historical and textual context. (4) The rules of constitutional interpretation require a strict construction of section 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used. (*City of San Jose v. State of California*, *supra*, 45 Cal.App.4th at pp. 1816-1817.)

(5) The goals of articles XIII A and XIII B are to protect California residents from excessive taxation and government spending. (*County of Los Angeles v. State of California*, *supra*, 15 Cal.4th at p. 81.) A central purpose of section 6 is to prevent the state's transfer of the cost of government from itself to the local level. (*City of Sacramento v. State of California*, *supra*, 50 Cal.3d at p. 68.) (3b) The related goals of these enactments require us to read the term "costs" in section 6 in light of the enactment as a whole. The "costs" for which the Agency is seeking reimbursement are its deposits of tax increment financing proceeds into the Housing Fund. Those tax increment financing proceeds are normally received pursuant to the Community Redevelopment Law (§ 33000 et seq.) when, after redevelopment, the taxing agencies collect and keep the tax revenues attributable to the original assessed value and pass on to the redevelopment agency the portion of the ***986** assessed property value which exceeds the original assessment. (*Brown v. Community Redevelopment Agency*, *supra*, 168 Cal.App.3d at pp. 1016-1017.) Is this the type of expenditure of tax revenues of local governments, upon state mandates which require use of such revenues, against which section 6 was designed to protect? (*County of Fresno v. State of California*, *supra*, 53 Cal.3d at p. 487.)

3. *Relationship of Appropriations Limitations and Subvention*

We may find assistance in answering this question by looking to the type of appropriations limitations imposed by article XIII B. In *County of Placer v. Corin*, *supra*, 113 Cal.App.3d at page 447, the court described the discipline imposed by article XIII B in this way: "[A]rticle XIIIB does not limit the ability to expend government funds collected from all sources. Rather, the appropriations limit is based on 'appropriations subject to limitation,' which consists primarily of the authorization to expend during a fiscal year the 'proceeds of taxes.' (§ 8, subd. (a).) As to local governments, limits are placed only on the authorization to expend the proceeds of taxes levied by that entity, in addition to proceeds of state subventions (§ 8, subd. (c)); no limitation is placed on the expenditure of those revenues that do not constitute 'proceeds of taxes.' " [9]

Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "*general revenues* for the local entity." (*County of Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 451, original italics.) The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of sections 33334.2 and 33334.3. (See *City of Sacramento v. State of California*, *supra*, 50 Cal.3d at p. 68.) The state is not transferring to the Agency the operation and administration of a program for which it was formerly legally and financially ***987** responsible. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 817 [38 Cal.Rptr.2d 304].) [10]

For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6 for this particular allocation of those revenues to the Housing Fund. Tax increment financing is not within the scope of article XIII B. (*Brown v. Community Redevelopment Agency*, *supra*, 168 Cal.App.3d at pp. 1016-1020.) Section 6 "requires subvention only when the costs in question can be recovered *solely from tax revenues*." (*County of Fresno v. State of California*, *supra*, 53 Cal.3d at p. 487, original italics.) No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes. Here, these costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues. (§ 33000 et seq.) Therefore, in light of the above authorities, this use of tax increment financing is not a reimbursable "cost" under section 6. We therefore need not interpret any remaining portions of section 6.

Disposition

The judgment is affirmed.

Work, Acting P. J., and McIntyre, J., concurred.

Appellant's petition for review by the Supreme Court was denied September 3, 1997.

Footnotes

1 All further statutory references are to the Health and Safety Code unless otherwise noted.

2 " 'Subvention' generally means a grant of financial aid or assistance, or a subsidy. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577 [15 Cal.Rptr.2d 547].)

3 In our prior opinion issued in this case, we determined the trial court erred when it denied the California Department of Finance (DOF) leave to intervene as an indispensable party and a real party in interest

in the mandamus proceeding. (*Redevelopment Agency v. Commission on State Mandates* (1996) 43 Cal.App.4th 1188, 1194-1199 [51 Cal.Rptr.2d 100].) Thus, DOF is now a respondent on this appeal, as is the Commission (sometimes collectively referred to as respondents). However, our decision in that case was a collateral matter and does not assist us on the merits of this proceeding.

4 Section 6 lists the following exclusions to the requirement for subvention of funds: "(a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." In *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 69 [266 Cal.Rptr. 139, 785 P.2d 522], the Supreme Court identified these items as exclusions of otherwise reimbursable programs from the scope of section 6. (See also Gov. Code, § 17514, definition of "costs mandated by the state," using the same "new program or higher level of service" language of section 6.)

5 Section 33071 in the Community Redevelopment Law provides that a fundamental purpose of redevelopment is to expand the supply of lowand moderate-income housing, as well as expanding employment opportunities and improving the social environment.

6 The term of art, "proceeds of taxes," is defined in article XIII B, section 8, as follows: (c) " *'Proceeds of taxes' shall include, but not be restricted to, all tax revenues* and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, 'proceeds of taxes' shall include subventions received from the state, other than pursuant to Section 6, and, with respect to the state, proceeds of taxes shall exclude such subventions." (Italics added.)

7 The issues before the court in *County of Placer v. Corin*, *supra*, 113 Cal.App.3d 443 were whether special assessments and federal grants should be considered proceeds of taxes; the court held they should not. Section 6 is not discussed; the court's analysis of other concepts found in article XIII B is nevertheless instructive.

8 The alternate grounds of the Commission's decision were that there were no costs subject to reimbursement related to the Housing Fund because there was no net increase in the aggregate program responsibilities of the Agency, and that the set-aside requirement did not constitute a mandated "new program or higher level of service" under this section.

9 The term of art, "appropriations subject to limitation," is defined in article XIII B, section 8, as follows: [¶] (b) " 'Appropriations subject to limitation' of an entity of local government means any authorization to expend during a fiscal year *the proceeds of taxes levied by or for that entity* and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes." (Italics added.)

10 We disagree with respondents that the legislative history of sections 33334.2 and 33334.3 is of assistance here, specifically, that section 23 of the bill creating these sections provided that no appropriations were made by the act, nor was any obligation for reimbursements of local agencies created for any costs incurred in carrying out the programs created by the act. (Stats. 1976, ch. 1337, § 23, pp. 6070-6071.) As stated in *City of San Jose v. State of California*, *supra*, 45 Cal.App.4th at pages 1817-1818, legislative findings regarding mandate are irrelevant to the issue to be decided by the Commission, whether a state mandate exists.

64 Cal.Rptr.2d 270, 97 Cal. Daily Op. Serv. 4510, 97 Daily Journal D.A.R. 7464

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54 Cal.3d 326, 814 P.2d 1308, 285 Cal.Rptr. 66
Supreme Court of California

FRANCES KINLAW et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S014349.
Aug 30, 1991.

SUMMARY

Medically indigent adults and taxpayers brought an action pursuant to Code Civ. Proc., § 526a, against the state, alleging that it had violated Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated new programs), by shifting its financial responsibility for the funding of health care for the poor onto the county without providing the necessary funding, and that as a result the state had evaded its constitutionally mandated spending limits. The trial court granted summary judgment for the State after concluding plaintiffs lacked standing to prosecute the action. (Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A041426 and A043500, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding the administrative procedures established by the Legislature (Gov. Code, § 17500 et seq.), which are available only to local agencies and school districts directly affected by a state mandate, were the exclusive means by which the state's obligations under Cal. Const., art. XIII B, § 6, were to be determined and enforced. Accordingly, the court held plaintiffs lacked standing to prosecute the action. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 7--Actions--State-mandated Costs--Reimbursement-- Exclusive Statutory Remedy.
Gov. Code, § 17500 et seq., creates an administrative forum for resolution of state mandate claims arising under Cal. Const., art. XIII B, § 6, and establishes ***327** procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid. It also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (Gov. Code, § 17612). In view of the comprehensive nature of the legislative scheme, and from the expressed intent, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce Cal. Const., art. XIII B, § 6.

(2)
State of California § 7--Actions--State-mandated Costs--Reimbursement-- Private Action to Enforce--Standing.
In an action by medically indigent adults and taxpayers seeking to enforce Cal. Const., art. XIII B, § 6, for declaratory and injunctive relief requiring the state to reimburse the county for the cost of providing health care services to medically indigent adults who, prior to 1983, had been included in the state Medi-Cal program, the Court of Appeal erred in holding that the existence of an administrative remedy (Gov. Code, § 17500 et seq.) by which affected local agencies could enforce their constitutional right under art. XIII B, § 6 to reimbursement for the cost of state mandates di not bar the action. Because the right involved was given by the Constitution to local agencies and school districts, not individuals either as taxpayers or recipients of government benefits and services, the administrative remedy was adequate fully to implement the constitutional provision. The Legislature has the authority to establish procedures for the implementation of local agency rights under art. XIII B, § 6; unless the exercise of a constitutional right is unduly restricted, a court must limit enforcement to the procedures established by the Legislature. Plaintiffs' interest, although pressing, was indirect and did not differ from the interest of the public at large in the financial plight of local government. Relief by way of reinstatement to Medi-Cal pending further

action by the state was not a remedy available under the statute, and thus was not one which a court may award.

[See **Cal.Jur.3d,** State of California, § 78; 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1127 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 112.]

COUNSEL

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Catherine I. Hanson, Astrid G. Meghrigian, Alice P. Mead, Alan K. Marks, County Counsel (San Bernardino), Paul F. Mordy, Deputy County Counsel, De Witt W. Clinton, County Counsel (Los Angeles), Robert M. Fesler, Assistant County Counsel, Frank J. DaVanzo, Deputy County Counsel, Weissburg & Aronson, Mark S. Windisch, Carl Weissburg and Howard W. Cohen as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

BAXTER, J.

Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of article XIII B (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to Code of Civil Procedure section 526a and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I State Mandates

Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides: ***329**

"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

A complementary provision, section 3 of article XIII B, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

"The appropriations limit for any fiscal year ... shall be adjusted as follows: [¶] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II Plaintiffs' Action

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services

to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981-1982 Reg. Sess.) (AB 799) (Stats. 1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly ***330** situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi- Cal program to the counties without adequate reimbursement violated the California Constitution. [1]

At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission). [2]

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6. [3] ***331**

III Enforcement of Article XIII B, Section 6

In 1984, almost five years after the adoption of article XIII B, the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (§ 17500.) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in section 17500:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state- mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.*" (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Costs," which commences with section 17500, the Legislature created the Commission (§ 17525), to adjudicate disputes over the existence of a state-mandated program (§§ 17551, 17557) and to adopt procedures for submission and adjudication of reimbursement claims (§ 17553). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member experienced in public finance. (§ 17525.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (§ 17554), [4] establishes the method of ***332** payment of claims (§§ 17558, 17561), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state mandates (§§ 17562, 17600, 17612, subd. (a).)

Pursuant to procedures which the Commission was authorized to establish (§ 17553), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (§§ 17551, 17560), and reimbursement is to be provided only through this statutory procedure. (§§ 17550, 17552.)

The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (§ 17521.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (§ 17553.) Any interested organization or individual may participate in the hearing. (§ 17555.)

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (§ 17555.) The Commission must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (§ 17557.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (§ 17620 et seq.) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to Code of Civil Procedure section 1094.5. (§ 17559.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. The parameters and guidelines adopted by the Commission must be submitted to the Controller, who is to pay subsequent claims arising out of the mandate. (§ 17558.) Executive orders mandating costs are to be accompanied by an appropriations ***333** bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. (§ 17561, subds. (a) & (b).) Regular review of the costs is to be made by the Legislative Analyst, who must report to the Legislature and recommend whether the mandate should be continued. (§ 17562.) The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (§ 17600.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, and an injunction against enforcement. (§ 17612.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (§ 17615 et seq.)

(1) It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (§ 17612).

The legislative intent is clearly stated in section 17500: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. ..." And section 17550 states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, section 17552 provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6. ***334**

IV Exclusivity

(2) Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge.

(*Dunn v. Long Beach L. & W. Co.* (1896) 114 Cal. 605, 609, 610-611 [46 P. 607]; *Silver v. Watson* (1972) 26 Cal.App.3d 905, 909 [103 Cal.Rptr. 576]; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 506 [19 Cal.Rptr. 668]; *Elliott v. Superior Court* (1960) 180 Cal.App.2d 894, 897 [5 Cal.Rptr. 116].) The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse ... local governments* ...." (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6. Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723]; *Chesney v. Byram* (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost ***335** of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIII B or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, section 17563 gives the local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (§ 17555) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person.*" (§ 17553. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive. [7]

The alternative relief plaintiffs seek—reinstatement to Medi-Cal pending further action by the state—is not a remedy available under the statute, and thus is not one which this court may award. The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists ***336** and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (§ 17612.) [8]

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the

question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by section 17555. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard. [9]

Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

Lucas, C. J., Panelli, J., Kennard, J., and Arabian, J., concurred.

BROUSSARD, J.

I dissent. For nine years the Legislature has defied the mandate of article XIII B of the California Constitution (hereafter article XIII B). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the ***337** Legislature computes its own appropriations limit as if it fully funded the program. The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation—the medically indigent who are denied adequate health care—have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIII B; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIII B does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063] permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIII B. To prevent the state from avoiding the spending limits imposed by article XIII B, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIII B was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. Facts and Procedural History

Plaintiffs—citizens, taxpayers, and persons in need of medical care—allege that the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that as a result the state is violating article XIII B. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned ***338** itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds. [1]

At hearings below, plaintiffs presented uncontradicted evidence regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIII B became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $20 million per year. The county has inadequate funds to discharge its new obligation

for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated ...." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need ...." "The system is clogged to the breaking point. ... All community clinics ... are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people ...."

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIII B, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIII B, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda ***339** County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment for defendants were reversed. We granted review.

II. Standing

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIII B.*

Plaintiffs first claim standing as taxpayers under Code of Civil Procedure section 526a, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county ..., may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. ..." As in *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610], however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under Code of Civil Procedure section 526a, because there is an independent basis for permitting them to proceed." Plaintiffs here seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIII B. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9 [270 Cal.Rptr. 796, 793 P.2d 2], which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIII B. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIII B.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty.[2] Such an action may be brought by any person "beneficially interested" in the issuance of the writ. (Code Civ. Proc., § 1086.) In *Carsten* ***340** *v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276], we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796-797, quoting 3 Davis, Administrative Law Treatise (1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520

[170 Cal.Rptr. 724], which held that low- income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner v. City Council, supra,* 31 Cal.App.3d 48, which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop* (1924) 193 Cal. 498 [225 P. 862], which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com., supra,* 27 Cal.3d 793, held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron* (1953) 40 Cal.2d 344 [254 P.2d 6] held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board* (1969) 275 Cal.App.2d 14 [79 Cal.Rptr. 662] held that a member of a student organization had standing to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, ***341** plaintiff Kinlaw, a 60-year-old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under Government Code section 17563 "[a]ny funds received by a local agency ... pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention. [3]

This argument would be sound if the county were already meeting its obligations to MIA's under Welfare and Institutions Code section 17000. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by Welfare and Institutions Code section 17000, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under section 17000 of the Welfare and Institutions Code. If it refused, an action in mandamus would lie to compel performance. (See *Mooney v. Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIII B ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule that a plaintiff must be beneficially interested. "Where the question is one of public right ***342** and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Bd. of Soc. Welfare v. County of L. A.* (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627].) We explained in *Green v. Obledo* (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256], that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. ... It has often been invoked by California courts. [Citations.]"

Green v. Obledo presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (29 Cal.3d at p. 145.)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause v. Board of Supervisors, supra,* 49 Cal.3d 432. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green v. Obledo, supra,* 29 Cal.3d 126, 144, and concluded that "[t]he question in this case involves a public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." (49 Cal.3d at p. 439.) We should reach the same conclusion here.

B. *Government Code sections 17500-17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIII B.*

Four years after the enactment of article XIII B, the Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, state Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIII B. (***343** Gov. Code, § 17551, subd. (a).) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See Gov. Code, § 17559.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means for enforcement of article XIII B, and since that remedy is expressly limited to claims by local agencies or school districts (Gov. Code, § 17552), plaintiffs lack standing to enforce the constitutional provision.[4] I disagree, for two reasons.

First, Government Code section 17552 expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which *a local agency or school district* may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in Government Code section 17555 it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words—"the sole and exclusive procedure by which a local agency or school district may claim reimbursement"—limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius*—"the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

The case is similar in this respect to *Common Cause v. Board of Supervisors, supra,* 49 Cal.3d 432. Here defendants contend that the counties' right of action under Government Code sections 17551-17552 impliedly excludes ***344** any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under Elections Code section 304 impliedly excluded any citizen's remedy. We replied that "the plain language of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (49 Cal.3d at p. 440, fn. omitted.) Likewise in this case the plain language of Government Code sections 17551-17552 contain no limitation on the right of private citizens, and to infer such a

right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado v. Wyman* (1970) 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207]. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420 [25 L.Ed.2d at p. 460].) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

Second, article XIII B was enacted to protect taxpayers, not governments. Sections 1 and 2 of article XIII B establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIII B prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIII B, and the taxpayer-citizen can appear only if a government has first instituted proceedings, is inconsistent with the ethos that led to article XIII B. The drafters of article XIII B and the voters who enacted it would not accept that the state Legislature—the principal body regulated by the article—could establish a procedure ***345** under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into foregoing their rights to enforce article XIII B. An example is the Brown-Presley Trial Court Funding Act (Gov. Code, § 77000 et seq.), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation.[5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIII B.

The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to ***346** determine the amount of the mandate—which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIII B requires that standing to enforce that measure be given to those harmed by its violation—in this case, the medically indigent—and not be vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. *Even if plaintiffs lack standing this court should nevertheless address and resolve the merits of the appeal.*

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90 [181 Cal.Rptr. 549, 642 P.2d 460]), we recognized an exception to this rule in our recent decision in *Dix v. Superior Court, supra,* 53 Cal.3d 442 (hereafter *Dix*). In *Dix,* the victim of a crime sought to challenge the trial court's decision to recall a sentence under Penal Code section 1170. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning

the trial court's authority to recall a sentence under Penal Code section 1170, subdivision (d). We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (53 Cal.3d at p. 454.) In footnote we added that "Under article VI, section 12, subdivision (b) of the California Constitution ..., we have jurisdiction to 'review the *decision of a Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues—standing and merits. Nothing in article VI, section 12(b) suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review [ing]' the second subject addressed and resolved in its decision." (Pp. 454-455, fn. 8.)

I see no grounds on which to distinguish *Dix.* The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante,* p. 330, fn. 2*ante,* p. 330, fn. 2) shows that it is not opposed to an appellate decision on the merits. ***347**

The majority, however, notes that various state officials—the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research—did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (Maj. opn., *ante,* p. 336, fn. 9*ante,* p. 336, fn. 9.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae. [6]

The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great significance, far more significant than any raised in *Dix.* Judges rarely recall sentencing under Penal Code section 1170, subdivision (d); when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIII B. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing.*

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude ***348** that plaintiffs have standing both as persons "beneficially interested" under Code of Civil Procedure section 1086 and under the doctrine of *Green v. Obledo, supra,* 29 Cal.3d 126, to bring an action to determine whether the state has violated its duties under article XIII B. The remedy given local agencies and school districts by Government Code sections 17500- 17630 is, as Government Code section 17552 states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

III. Merits of the Appeal

A. *State funding of care for MIA's.*

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources. [7] From 1971 until 1982, and thus at the time article XIII B became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully

met through other sources, the counties had no duty under Welfare and Institutions Code section 17000 to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIII B became effective in 1980 the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIII B became effective. The state funded all such needs of MIA's.

In 1982, the Legislature passed Assembly Bill No. 799 (1981-1982 Reg. Sess.; Stats. 1982, ch. 328, pp. 1568-1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was ***349** initially relatively constant, generally more than $400 million per year. By 1990, however, state funding had decreased to less than $250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIII B "appropriations limit," i.e., as part of the base amount of appropriations on which subsequent annual adjustments for cost-of-living and population changes would be calculated. About $1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979-1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIII B.*

Our recent decision in *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487 [280 Cal.Rptr. 92, 808 P.2d 235] (hereafter *County of Fresno*), explained the function of article XIII B and its relationship to article XIII A, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.' (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

" 'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.' (*City of Sacramento, supra,* 50 Cal.3d at p. 59, fn. 1.)

"Article XIII B of the Constitution was intended ... to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument ***350** in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no 'appropriations subject to limitation' in excess thereof (*id.,* § 2). [8] (See *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 446.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes ....' (Cal. Const., art. XIII B, § 8, subd. (b).)" (*County of Fresno, supra,* 53 Cal.3d at p. 486.)

Under section 3 of article XIII B the state may transfer financial responsibility for a program to a county if the state

and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount.[9] Absent such an agreement, however, section 6 of article XIII B generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIII B. It does so by requiring that "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service ...."[10]

"Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles* [v. *State of California* (1987)] 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax ***351** revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra,* 53 Cal.3d at p. 487.)

C. *Applicability of article XIII B to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIII B. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIII B took effect. The purpose of article XIII B supports the plaintiffs' position.

As we have noted, article XIII A of the Constitution (Proposition 13) and article XIII B are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIII B, enacted one year later, froze both state and county appropriations at the level of the 1978-1979 budgets—a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIII B further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear that article XIII B was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIII B, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIII B was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIII B.

Our decisions interpreting article XIII B demonstrate that the state's subvention requirement under section 6 is not vitiated simply because the ***352** "program" existed before the effective date of article XIII B. The alternate phrase of section 6 of article XIII B, " 'higher level of service[,]' ... must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.*' " (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202], italics added.)

Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues

imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when Education Code section 59300 (hereafter section 59300), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIII B. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by section 59300 imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that section 59300 called for only an " 'adjustment of costs' " of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIII B. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at p. 834, italics added.)

We reversed, rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [¶] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing ***353** power of local governments. ... [¶] The intent of the section would plainly be violated if the state could, while retaining administrative control [11] of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article.*" (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835- 836, fn. omitted, italics added.)

The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar,* prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830: "[B]ecause section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—*an obligation the school districts did not have at the time article XIII B was adopted*—it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of ***354** article XIII B. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIII B became effective. I fail to see the distinction between a case—*Lucia Mar*—in which no existing statute as of 1979 imposed an obligation on the local government and one—this case—in which the statute existing in 1979 imposed no obligation on local government.

The state's argument misses the salient point. As I have explained, the application of section 6 of article XIII B does not depend upon when the program was created, but upon who had the burden of funding it when article XIII B went into effect. Our conclusion in *Lucia Mar* that the

educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIII B became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768] and *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706], which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide precisely the same level of services as the state provided under Medi-Cal. [13] Both are correct, but irrelevant to this case. [14] The county's obligation to MIA's is defined by Welfare and Institutions Code section 17000, not by the former Medi-Cal program. [15] If the ***355** state, in transferring an obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

The state's arguments are also undercut by the fact that it continues to use the approximately $1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIII B. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. Conclusion

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIII A of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIII B which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIII B both to those persons whom it was designed to protect—the citizens and taxpayers—and to those harmed by its violation—the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIII B and postpones the day when the medically indigent will receive adequate health care.

Mosk, J., concurred. ***356**

Footnotes

1 The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

2 On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (Code Civ. Proc., § 1094.5), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles v. State of California,* No. B049625.)

3 Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (Gov. Code, § 17612.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

4 The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (§ 17555.)

5 " 'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (§ 17518.)

6 " 'School district' means any school district, community college district, or county superintendant of schools." (§ 17519.)

7 Plaintiffs' argument that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions, is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

8 Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action. (See, e.g., *Mooney v. Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].)

9 For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063].) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

1 The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care .... They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action." (Maj. opn., *ante,* p. 336, fn. 8*ante,* p. 336, fn. 8)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

2 It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 56 [107 Cal.Rptr. 214] (overruled on other grounds in *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 127-128 [109 Cal.Rptr. 724].)

3 The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

4 The majority emphasizes the statement of purpose of Government Code section 17500: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under section 6 of article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

The "existing system" to which Government Code section 17500 referred was the Property Tax Relief Act of 1972 (Rev. & Tax. Code, §§ 2201-2327), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750].) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

5 "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate*; provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988-89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent

notification to continue in the program shall not constitute a waiver. [¶] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (Gov. Code, § 77203.5, italics added.)

"As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIII B of the California Constitution,* or Section 17561 of the Government Code, or both." (Gov. Code, § 77005, italics added.)

6 It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318], in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the state Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

7 Welfare and Institutions Code section 17000 provides that "[e]very county ... shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

8 Article XIII B, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

9 Section 3 of article XIII B reads in relevant part: "The appropriations limit for any fiscal year ... shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriation limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. ..."

10 Section 6 of article XIII B further provides that the "Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." None of these exceptions apply in the present case.

11 The state notes that, in contrast to the program at issue in *Lucia Mar,* it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar,* while appropriate to the facts of that case, was not intended to establish a rule limiting article XIII B, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

12 The state's repeated emphasis on the “temporary” nature of its funding is a form of post hoc reasoning. At the time article XIII B was enacted, the voters did not know which programs would be temporary and which permanent.

13 It must, however, provide a *comparable* level of services. (See *Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 564 [254 Cal.Rptr. 905].)

14 Certain language in *Madera Community Hospital v. County of Madera, supra,* 155 Cal.App.3d 136, however, is questionable. That opinion states that the “Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds,* notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden.” (P. 151.) Welfare and Institutions Code section 17000 by its terms, however, requires the county to provide support to residents only “when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.” Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

15 The county's right to subvention funds under article XIII B arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program “ 'mandated' ” by the state; i.e., that Alameda County has any option other than to pay these costs. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 836-837.)

West's Annotated California Codes
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 4. Fiscal Affairs (Refs & Annos)
Part 7. State-Mandated Local Costs (Refs & Annos)
Chapter 1. Legislative Intent (Refs & Annos)

West's Ann.Cal.Gov.Code § 17500

§ 17500. Legislative findings and declarations

Effective: January 1, 2005
Currentness

The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIIIB of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIIIB of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIIIB of the California Constitution.

Credits
(Added by Stats.1984, c. 1459, § 1. Amended by Stats.2004, c. 890 (A.B.2856), § 2.)

Notes of Decisions (10)

West's Ann. Cal. Gov. Code § 17500, CA GOVT § 17500
Current with all laws through Ch. 997 of 2022 Reg.Sess.

End of Document

West's Ann.Cal.Gov.Code § 17514

§ 17514. Costs mandated by the state

Currentness

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

Credits

(Added by Stats.1984, c. 1459, § 1.)

Notes of Decisions (16)

West's Ann. Cal. Gov. Code § 17514, CA GOVT § 17514
Current with urgency legislation through Ch. 17 of 2021 Reg.Sess

End of Document

West's Ann.Cal.Gov.Code § 17556

§ 17556. Findings; costs not mandated upon certain conditions

Effective: October 19, 2010
Currentness

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

(a) The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision. This subdivision applies regardless of whether the resolution from the governing body or a letter from a delegated representative of the governing body was adopted or sent prior to or after the date on which the statute or executive order was enacted or issued.

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. This subdivision applies regardless of whether a statute, executive order, or appropriation in the Budget Act or other bill that either provides for offsetting savings that result in no net costs or provides for additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(f) The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

Credits

(Added by Stats.1984, c. 1459, § 1. Amended by Stats.1986, c. 879, § 4; Stats.1989, c. 589, § 1; Stats.2004, c. 895 (A.B.2855), § 14; Stats.2005, c. 72 (A.B.138), § 7, eff. July 19, 2005; Stats.2006, c. 538 (S.B.1852), § 279; Stats.2010, c. 719 (S.B.856), § 31, eff. Oct. 19, 2010.)

Editors' Notes

VALIDITY

A prior version of this section was held unconstitutional as impermissibly broad, in the decision of California School Boards Assn. v. State of California (App. 3 Dist. 2009) 90 Cal.Rptr.3d 501, 171 Cal.App.4th 1183.

Notes of Decisions (35)

West's Ann. Cal. Gov. Code § 17556, CA GOVT § 17556
Current with all laws through Ch. 997 of 2022 Reg.Sess.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Annotated California Codes
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 4. Fiscal Affairs (Refs & Annos)
Part 7. State-Mandated Local Costs (Refs & Annos)
Chapter 4. Identification and Payment of Costs Mandated by the State (Refs & Annos)
Article 1. Commission Procedure (Refs & Annos)

West's Ann.Cal.Gov.Code § 17564

§ 17564. Claims under specified dollar amount; claims for direct and indirect costs

Effective: January 1, 2008
Currentness

(a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars ($1,000). However, a county superintendent of schools or county may submit a combined claim on behalf of school districts, direct service districts, or special districts within their county if the combined claim exceeds one thousand dollars ($1,000) even if the individual school district's, direct service district's, or special district's claims do not each exceed one thousand dollars ($1,000). The county superintendent of schools or the county shall determine if the submission of the combined claim is economically feasible and shall be responsible for disbursing the funds to each school, direct service, or special district. These combined claims may be filed only when the county superintendent of schools or the county is the fiscal agent for the districts. All subsequent claims based upon the same mandate shall only be filed in the combined form unless a school district, direct service district, or special district provides to the county superintendent of schools or county and to the Controller, at least 180 days prior to the deadline for filing the claim, a written notice of its intent to file a separate claim.

(b) Claims for direct and indirect costs filed pursuant to Section 17561 shall be filed in the manner prescribed in the parameters and guidelines or reasonable reimbursement methodology and claiming instructions.

(c) Claims for direct and indirect costs filed pursuant to a legislatively determined mandate pursuant to Section 17573 shall be filed and paid in the manner prescribed in the Budget Act or other bill, or claiming instructions, if applicable.

Credits
(Added by Stats.1986, c. 879, § 9. Amended by Stats.1992, c. 1041 (A.B.1690), § 4; Stats.1999, c. 643 (A.B.1679), § 6; Stats.2002, c. 1124 (A.B.3000), § 30.9, eff. Sept. 30, 2002; Stats.2004, c. 890 (A.B.2856), § 23; Stats.2007, c. 329 (A.B.1222), § 9.)

West's Ann. Cal. Gov. Code § 17564, CA GOVT § 17564
Current with all laws through Ch. 997 of 2022 Reg.Sess.

End of Document

West's Ann.Cal.Gov.Code § 17573

§ 17573. Requests regarding reimbursements; limitations tolled; joint requests; contents; time period; term; statute adoption requirements; notice of actions taken; stay of proceedings

Effective: January 1, 2008
Currentness

(a) Notwithstanding Section 17551, the Department of Finance and a local agency, school district, or statewide association may jointly request of the chairpersons of the committees in each house of the Legislature that consider appropriations, and the chairpersons of the committees and appropriate subcommittees in each house of the Legislature that consider the State Budget, that the Legislature (1) determine that a statute or executive order, or portion thereof, mandates a new program or higher level of service requiring reimbursement of local governments pursuant to Section 6 of Article XIII B of the California Constitution, (2) establish a reimbursement methodology, and (3) appropriate funds for reimbursement of costs. For purposes of this section, "statewide association" includes a statewide association representing local agencies or school districts, as defined in Sections 17518 and 17519.

(b) The statute of limitations specified in Section 17551 shall be tolled from the date a local agency, school district, or statewide association contacts the Department of Finance or responds to a Department of Finance request to initiate a joint request for a legislatively determined mandate pursuant to subdivision (a), to (1) the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted pursuant to subdivision (a), or (2) the date on which the Department of Finance, or a local agency, school district, or statewide association notifies the other party of its decision not to submit a joint request. A local agency, school district, or statewide association, or the Department of Finance shall provide written notification to the commission of each of these dates.

(c) A joint request made under subdivision (a) shall be in writing and include all of the following:

(1) Identification of those provisions of the statute or executive order, or portion thereof, that mandate a new program or higher level of service requiring reimbursement of local agencies or school districts pursuant to Section 6 of Article XIII B of the California Constitution, a proposed reimbursement methodology, and the period of reimbursement.

(2) A list of eligible claimants and a statewide estimate for the initial claiming period and annual dollar amount necessary to reimburse local agencies or school districts to comply with that statute or executive order that mandates a new program or higher level of service.

(3) Documentation of significant support among local agencies or school districts for the proposed reimbursement methodology, including, but not limited to, endorsements by statewide associations and letters of approval from local agencies or school districts.

(d) A joint request authorized by this section may be submitted to the Legislature pursuant to subdivision (a) at any time after enactment of a statute or issuance of an executive order, regardless of whether a test claim on the same statute or executive order is pending with the commission. If a test claim is pending before the commission, the period of reimbursement established by that filing shall apply to a joint request filed pursuant to this section.

(e)(1) If the Legislature accepts the joint request and determines that those provisions of the statute or executive order, or portion thereof, mandate a new program or higher level of service requiring reimbursement of local agencies or school districts pursuant to Section 6 of Article XIII B of the California Constitution, it shall adopt a statute declaring that the statute or executive order, or portion thereof, is a legislatively determined mandate and specify the term and period of reimbursement and methodology for reimbursing eligible local agencies or school districts. If no term is specified in the statute, then the term shall be five years, beginning July 1 of the year in which the statute is enacted.

(2) For the purpose of this subdivision, "term" means the number of years specified in the statute adopted pursuant to this subdivision for reimbursing eligible local agencies or school districts for a legislatively determined mandate.

(f) When the Legislature adopts a statute pursuant to paragraph (1) of subdivision (e) on a mandate subject to subdivision (b) of Section 6 of Article XIIIB of the California Constitution, the Legislature shall do either of the following:

(1) Appropriate in the Budget Act the full payable amount for reimbursement to local agencies that has not been previously paid.

(2) Suspend the operation of the mandate pursuant to Section 17581 or repeal the mandate.

(g) The Department of Finance, or a local agency, school district, or statewide association shall notify the commission of actions taken pursuant to this section, as specified below:

(1) Provide the commission with a copy of any communications regarding development of a joint request under this section and a copy of a joint request when it is submitted to the Legislature.

(2) Notify the commission of the date of (A) the Legislature's action on a joint request in the Budget Act, or (B) the Department of Finance's decision not to submit a joint request on a specific statute or executive order.

(h) Upon receipt of notice that a joint request has been submitted to the Legislature on the same statute or executive order as a pending test claim, the commission may stay its proceedings on the pending test claim upon the request of any party.

(i) Upon enactment of a statute declaring a legislatively determined mandate, enactment of a reimbursement methodology, and appropriation for reimbursement of the full payable amount that has not been previously paid in the Budget Act, all of the following shall apply:

(1) The Controller shall prepare claiming instructions pursuant to Section 17558, if applicable.

(2) The commission shall not adopt a statement of decision, parameters and guidelines, or statewide cost estimate on the same statute or executive order unless a local agency or school district that has rejected the amount of reimbursement files a test claim or takes over a withdrawn test claim on the same statute or executive order.

(3) A local agency or school district accepting payment for the statute or executive order, or portion thereof, that mandates a new program or higher level of service pursuant to Section 6 of Article XIII B of the California Constitution shall not be required to submit parameters and guidelines if it is the successful test claimant pursuant to Section 17557.

Credits
(Added by Stats.2007, c. 329 (A.B.1222), § 11.)

West's Ann. Cal. Gov. Code § 17573, CA GOVT § 17573
Current with all laws through Ch. 997 of 2022 Reg.Sess.

End of Document

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On May 7, 2025, I served the:

- **Current Mailing List dated May 7, 2025**
- **Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued May 7, 2025**
- **Test Claim filed by the County of Sacramento on December 23, 2024**

  Emergency Shelters: Persons with Pets, 24-TC-06
  Statutes 2023, Chapter 344, Section 2 (AB 781); Government Code Section 8593.10(b), (c), and (d), effective January 1, 2024
  County of Sacramento, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 7, 2025 at Sacramento, California.

Jill Magee
_____

Jill Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/7/25

Claim Number: 24-TC-06

Matter: Emergency Shelters: Persons with Pets, 24-TC-06

Claimant: County of Sacramento

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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