



FEMA LAW ASSOCIATES, PLLC
Latest FEMA Law Developments At a Glance

FEMA Law Associates is a private law firm that specializes in Emergency Management and Homeland Security issues. For more information on our services please visit our website at www.fema-law.com . Previous issues of this Newsletter can be obtained on the FEMA Law site.

Message From the President of FEMA Law Associates

As mentioned in our previous Newsletter, Congress enacted several pieces of legislation which amend the Federal law of emergency management and disaster response, before recessing for the election. This Newsletter is the second in our series summarizing these amendments. It discusses a second group of amendments to the Stafford Act that were included in the "Post-Katrina Emergency Management Reform Act of 2006 (the "PKEMRA"), enacted as part of the FY2007 DHS Appropriations Act, P.L. 109-295. All section numbers below refer to the Section numbers of that Act.

Ernie Abbott

More Stafford Act Amendments

Sec. 688. Definitions – This change in the definition of an eligible non-profit facility may significantly expand FEMA's public assistance program. The Stafford Act previously designated eligible non-profit facilities as follows: "educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities, [and] other private non-profit facilities which provide *essential* services of a governmental nature *to the general public* . . . as defined by [FEMA]." PKEMRA changed this definition so that the governmental services provided by an entity no longer must be "essential," and by eliminating the language requiring that an eligible facility be open to the general public, only that they "provide health and safety services of a governmental nature [as] defined by the President." This language expands potential availability of funds to faith based organizations. The PKEMRA also specifically made two types of facilities eligible for assistance: "performing arts facilities" (perhaps in reaction to the denial of eligibility to facilities such as the Houston Symphony, which lost much of its library after flooding caused by Tropical Storm Allison) and "community arts centers" (FEMA had previously approved funding of "community centers" but not "community arts centers.").

Sec. 689h. Repair, Restoration, and Replacement of Damaged Private Nonprofit Educational Facilities – This amendment adds one word, 'education', to the definition of "critical services" in Stafford Act (Sec. 406(a)(3)(B)) and also significantly expands eligibility of the public assistance program. With this amendment, nonprofit schools are now eligible for federal public assistance grants, without regard to their ability to pay off federal loans, to repair or replace damaged facilities. Although non-profit educational facilities had been the first type of non-profit institution to become eligible for federal disaster assistance in 1972 (P.L. 92-318), the Disaster Mitigation Act of 2000 determined that entities which are able to pay off federal loans would not be eligible for federal disaster assistance grants unless they were "critical facilities" – and educational facilities were not on the list of critical facilities. Now they are. This provision is immediately effective, but FEMA may interpret it as not applicable to facilities damaged by disasters – such as Hurricane Katrina – declared before enactment.

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Amendments to the Stafford Act Continued

Sec. 689(a), (c) Individuals with Disabilities – PKEMRA acknowledges the need to meet special needs of individuals with disabilities during emergency evacuation and response. First, Sec. 689(a) requires the FEMA Administrator to “develop guidelines to accommodate individuals with disabilities... guidelines include ‘the accessibility of, and communications and programs in, shelters, recovery centers, and other facilities; and devices used in connection with disaster operations, including first aid stations, mass feeding areas, portable payphone stations, portable toilets, and temporary housing.’ This provision is not codified in the Stafford Act. Second, Section 689(c) amends the Stafford Act’s Federal Assistance to Individuals and Households program (§408) to recognize that damage can render a home inaccessible to disabled persons, and thus, uninhabitable to them. Accordingly, temporary housing assistance can be provided to individuals with disabilities whose residence is rendered “inaccessible” as a result of a major disaster. Further, in locating readily fabricated dwellings, FEMA must now seek whenever practicable, sites that – “[meet] the physical accessibility requirements for individuals with disabilities.” The term ‘Individual with a Disability’ is defined by reference to section 3(2) of the Americans with Disabilities Act of 1990.

Sec. 689e. Disaster Related Information Services – The PKEMRA amended Stafford Act Section 616 to require the FEMA Director (other parts of the PKEMRA will make the “Director” an “Administrator”) (1) to figure out “in coordination with State and local governments” what population groups there are with limited English proficiency which must be taken into account in planning for an emergency or major disaster; (2) to ensure that information made available to individuals affected by a major disaster or emergency is made available in formats that can be understood...; and (3) to develop and maintain an informational clearinghouse of model language assistance programs and best practices... in providing services related to a major disaster or emergency.” This amendment is made to what used to be the Civil Defense Act but was incorporated into the Stafford Act as Title VI in 1994 – a reminder that Title VI authorities are exceptionally important even though they have on occasion been glossed over when addressing natural hazards.

Sec. 689a. Nondiscrimination in Disaster Assistance – Section 308(a) of the Stafford Act has long required that “the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished... without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.” This section has now been amended also to prohibit discrimination on the basis of “disability and English proficiency.” This amendment, coupled with the two previous amendments **Sec. 689 Individuals with Disabilities**, and **Sec. 689e. Disaster Related Information Services** (listed above), may make FEMA’s decisions in providing assistance to individuals with disabilities or with limited English proficiency judicially reviewable. While FEMA’s decisions to grant or withhold disaster assistance are generally protected from judicial review by sovereign immunity, courts have held that they can review FEMA compliance with its statutory prohibition against discrimination, this amendment opens the possibility for judicial review.

Sec. 689 (b) Essential Assistance: Household Pets and Service Animals. Hurricane Katrina demonstrated that people with pets and service animals take their animals with them when they evacuate a disaster area – or refuse to evacuate if they are forced to abandon their animals. Many shelters and temporary housing facilities were not able to accommodate animals. The Stafford Act now specifically authorizes the federal government to provide “rescue, care, shelter, and essential needs both to individuals with household pets and service animals and to those pets and service animals.” Congress apparently regarded this amendment as of utmost importance: Congress enacted this amendment twice (it was also passed in separate statute, the Pets Evacuation and Transportation Standards Act of 2006, PL 109-308)

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Sec. 689b and 689c. Reunification; National Emergency Family Registry and Locator System – Emergency evacuations in the wake of Hurricane Katrina split up many families as hundreds of thousands of evacuees were relocated to shelters, hotels, and apartment dwellings across the country. The federal government did not have an effective system for keeping track of who and where evacuees were and for reuniting family members. Sections 689b and 689c require the FEMA Administrator to establish both a National Emergency Child Locator Center (in cooperation with the Attorney General) within the National Center for Missing and Exploited Children, and (2) a National Emergency Family Registry and Locator System. The former focuses on information about displaced children, and adults who have information about displaced children; the latter focuses on allowing displaced adults to register, provide personal information to be entered into a database, and allow this personal information to be made accessible to “those individuals named by displaced individuals.” Neither section is explicitly incorporated into the Stafford Act. Implementation of this section will require negotiation of a memorandum of understanding with the Departments of Justice and Health and Human Services and with the American Red Cross and “other relevant private organizations.”

Sec. 689d. Federal Assistance to Individuals and Households – After Hurricane Katrina, FEMA took the position (which was not required by the Stafford Act) that payments to individuals for temporary housing could not include the cost of separately metered utilities – even though in many areas of the country an apartment without electricity is not habitable. PKEMRA overturns this construction of the Stafford Act by amending Section 408(c)(1)(A) specifically to include the “cost of utilities, excluding telephone service” in the financial housing assistance that the President can provide to households and individuals.

Sec. 689f. – Title IV of the Robert T. Stafford Act is amended by adding two new sections, respectively.

Sec. 425. Transportation Assistance provides that the President can provide transportation assistance “to relocate individuals displaced from their predisaster primary residences..., [or] to and from alternative locations for short or long-term accommodation or to return an individual or household to their predisaster primary residence or alternative location.” This section removes any concern that transportation of displaced persons after the end of “immediate threats to life and property” might not remain eligible for assistance.

Sec. 426. Case Management Services provides that the President “may provide case management services, including financial assistance, to State or local government agencies or qualified private organizations to provide such services, to victims of major disasters to identify and address unmet needs.” While the Stafford Act already authorized the President to coordinate with and in some cases to fund state and local governments and other relief organizations to distribute relief supplies (e.g. food, medicine) and in rehabilitation and restoration of housing and facilities (e.g., § 302(b)(3), § 309, § 403), this section allows funding of other organizations’ case management services incurred in providing “unmet needs” – i.e. needs that are not eligible for federal assistance under the Stafford Act or any other Act.

Sec. 689g. Designation of Small State and Rural Advocate – Title II of the Robert T. Stafford Act is amended by adding Sec. 326 – which designates within FEMA a position for a Small State and Rural Advocate to “... advocate for the fair treatment of small States and rural communities” and delegating responsibilities to “... participate in the disaster declaration process... to ensure that the needs of rural communities are being addressed; (2) assist small population States in the preparation of requests for major disaster or emergency declarations...”

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