



February 1, 2013

GENERAL MEMORANDUM 13-010

Tribal Amendment to the Stafford Act Finally Enacted; Tribal Participation Needed for Crafting Implementing Regulations

On January 29, 2013, the President signed a disaster aid appropriations bill, HR 152, as Public Law 113-2 (Act). The Act, which provides funding for recovery efforts necessitated by Super Storm Sandy, includes an important provision long sought by tribal governments – the authority to directly petition the President for a declaration of an emergency or major disaster. Prior to this Act, tribes experiencing an emergency or major disaster had to rely upon a state governor to petition the President on their behalf. The tribal provision is an amendment to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).

This amendment to the Stafford Act recognizes tribal sovereignty and the nation-to-nation relationship tribes have with the federal government. In the coming weeks, the Federal Emergency Management Agency (FEMA) will release interim guidance for implementing the Act and will reach out to tribes to plan consultation sessions. Because the Act gives the President considerable leeway to waive or change the cost share that tribes would be required to cover, it will be crucial for tribes to play an active role in shaping the implementing regulations for this provision.

Legislative History. The tribal amendment was FEMA's primary legislative priority in the 112th and 113th Congresses and enjoyed bipartisan support. It was introduced as a standalone bill by Representative Rahall (D-WV) and by Senator Tester (D-MT) and then attached to a variety of legislative vehicles by Representative Denham (R-CA) before it was finally enacted.¹ Copies of FEMA's and Representative Rahall's press releases are attached.

Summary. The Act expressly provides that the Chief Executive of an affected federally recognized Indian tribe may act in the same capacity as the governor of an affected state in the event of an emergency or major disaster. Tribes may now directly petition the President for a declaration of an emergency or a major disaster, and may also directly receive assistance in the same manner as affected state governments. Alternatively, the Act also provides that tribes retain the existing option to receive assistance through a declaration made by the President at the request of a state.

¹ See our General Memoranda 12-038 of March 9, 2012, and 12-114 of September 21, 2012.

The cost share requirements for disaster relief assistance can be substantial. Generally, it is 75 percent federal and 25 percent non-federal, but existing federal regulations authorize cost share adjustments under certain circumstances. For example, if the per capita amount of damages meet or exceed a certain threshold, the cost share may be adjusted to 90 percent federal and 10 percent non-federal. The Act provides that:

"(1) IN GENERAL. – In providing assistance under this title, the President may waive or adjust any payment of a non-Federal contribution with respect to the assistance if –

(A) the President has the authority to waive or adjust the payment under another provision of this title; and

(B) the President determines that the waiver or adjustment is necessary and appropriate.

(2) CRITERIA FOR MAKING DETERMINATIONS. – The President shall establish criteria for making determinations under paragraph (1) (B)"

The Act recognizes the special circumstances that tribes face and provides leeway for how the terms "necessary and appropriate" will be interpreted. In addition, the Act *requires* that these "unique conditions" be taken into account when drafting the implementing regulations:

"(e) REGULATIONS. –

(1) ISSUANCE. – The President shall issue regulations to carry out the amendments made by this section.

(2) FACTORS. – In issuing the regulations, the President shall consider the unique conditions that affect the general welfare of Indian tribal governments."

Other Provisions. In addition to empowering tribes and funding recovery efforts for Super Storm Sandy, the Act includes a number of non-tribal-specific amendments to the Stafford Act which:

- Streamline and expedite environmental and historic preservation reviews under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) for hazard mitigation projects
- Require the creation, with the input of the Council on Environmental Quality and the Advisory Council on Historic Preservation, of a "unified federal review process" for disaster recovery projects
- Extend reimbursement to state, tribal and local governments for costs relating to:
 - basic pay and benefits for permanent employees conducting emergency protective measures if the work is not typically performed by the employees and the type of work may otherwise be carried out by a contract or agreement with private organizations; or
 - overtime and hazardous duty compensation for permanent employees conducting emergency protective measures

Tribal support for the amendment to the Stafford Act resulted in a major step forward for Indian Country, but now tribes must actively participate in consultation with FEMA to shape the implementing regulations. We will provide updates on the timetable for tribal consultation sessions as those details emerge in the coming weeks and months.

Please let us know if we may provide additional information regarding this development or assistance in drafting comments when they are requested.

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HQ-13-005
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Statement

Statement by FEMA Administrator Craig Fugate on Sandy Recovery Improvement Act of 2013

Tribal governments can apply directly for emergency and major disaster declarations

WASHINGTON - Federal Emergency Management Agency (FEMA) Administrator Craig Fugate released the below statement following the President's signing of the Sandy Recovery Improvement Act of 2013, which includes a provision to amend the Stafford Act allowing Tribes direct access to federal disaster relief.

"FEMA has strong, long-standing relationships with Tribal governments, and they are essential members of the emergency management team. We commend the efforts of Members of Congress, Tribal leadership and their organizations, the Department of Homeland Security, and the President who have made this change a reality. This legislative change to the Stafford Act will provide federally recognized Tribal governments the option to choose whether to make a request directly to the President for an emergency or major disaster declaration, or to receive assistance, as they do presently, through a declaration for a State. This amendment to the Stafford Act follows on the President's commitments to Indian Country, strengthens the government to government relationship between FEMA and federally recognized Tribes, and will enhance the way FEMA supports Tribal communities before, during, and after disasters."

Fully implementing this historic provision will require consultation with Tribes and other stakeholders, particularly as FEMA develops the administrative and programmatic requirements and procedures necessary to execute the law. FEMA will provide interim guidance in the coming weeks explaining how and when Tribal governments may seek declarations, while more comprehensive consultations and administrative procedures are undertaken.

FEMA's mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.

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News from the House Committee on Transportation and Infrastructure

Rep. Nick J. Rahall, II — Ranking Member

<http://democrats.transportation.house.gov>

FOR IMMEDIATE RELEASE: January 29, 2013

CONTACT: John Noble, 202-225-4472

Rahall Legislation to Reinforce Indian Tribal Sovereignty During Major Disasters to Become Law

Washington, D.C. – Legislation authored by U.S. Representative Nick J. Rahall (D-WV), top Democrat on the House Transportation and Infrastructure Committee, that solidifies Indian Country's tribal sovereignty during disasters and emergency situations is expected to be signed into law by the President in the coming days. Rahall's language was included as part of H.R. 152 which was approved by the Senate last night after being passed in the House earlier this month.

"For more than a decade Indian tribes have sought a direct line to the Federal government in order expedite aid during an emergency or major disaster," said Rahall. "Now, with this action by both Houses of Congress, they will finally be able to access appropriate federal assistance when unforeseen adversity hits. This is a great day for Indian Country and for tribal sovereignty."

Under current law, Indian tribes experiencing a disaster or emergency situations must rely upon a State governor to request the President for an emergency declaration. Often if damage from a disaster is restricted to a reservation and does not have a broader impact on the state, federal disaster aid cannot be triggered.

The legislation that has now been approved by both the House and Senate would amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to authorize Indian tribes to directly request the President for emergency and disaster declarations.

"Current law is not only contrary to tribal sovereignty but it also requires the President to only consider the State's, not the tribe's, ability to pay for the damages," said Rahall. "Under the new law, tribes may still request the State to make the declaration on their behalf but it provides another avenue for those tribes who want to exercise their sovereignty or where a State may be unable or unwilling to make a request on a tribe's behalf."

Rahall's language was crafted with input from tribal leaders across the country who raised concerns that the current law undermines the principles of sovereignty and results in slow response times when disasters occur. Soon after Rahall introduced his original bill, FEMA announced its support for amending the Stafford Act and allowing tribal governments to directly apply for disaster assistance.