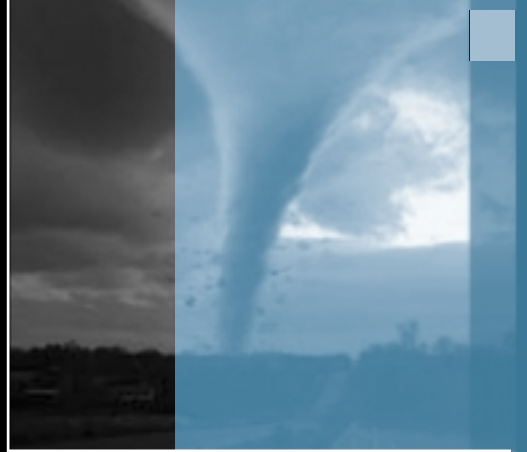



Disaster

An Electric Cooperative's Introduction to FEMA



NRECA

A Touchstone Energy Cooperative 

An Electric Cooperative's Introduction to FEMA

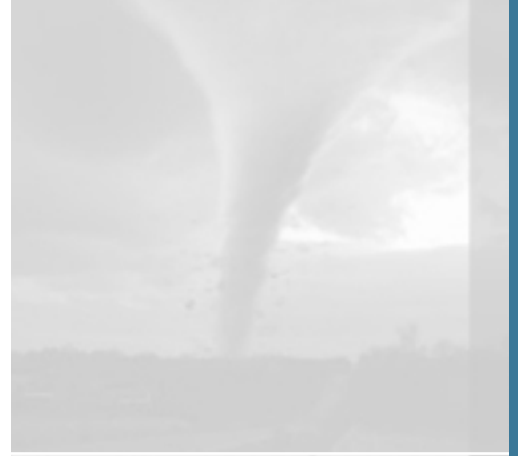
Prepared by

Ernest B. Abbott, Esq.
FEMA Law Associates PLLC
805 Fifteenth Street N.W., Suite 510
Washington, D.C.

for

National Rural Electric
Cooperative Association
4301 Wilson Boulevard
Arlington, Virginia 22203-1860

March 2003



© An Electric Cooperative's Introduction to FEMA

Copyright © 2003 by National Rural Electric Cooperative Association.

Reproduction in whole or in part strictly prohibited without prior written approval of the National Rural Electric Cooperative Association, except that reasonable portions may be reproduced or quoted as part of a review or other story about this publication.

Legal Notice

This document was prepared by the organization named below as an account of work sponsored by the National Rural Electric Cooperative Association (NRECA). Any opinions, recommendation, and conclusions contained therein are those of the author, not of NRECA. Neither NRECA, members of NRECA, the organization named below, nor any person acting on their behalf (a) makes any warranty or representation, express or implied, with respect to the accuracy, completeness, or usefulness of the information contained in this document, (b) assumes any liability with respect to the use of, or damages resulting from the use of, any information, apparatus, method, or process disclosed in this manual, or (c) makes any warranty or representation that the use of any information, apparatus, method, or process disclosed in this manual may not infringe on privately owned rights.

Prepared by:

Ernest B. Abbott, Esq.
FEMA Law Associates PLLC
805 Fifteenth Street N.W., Suite 510
Washington, D.C

Phone 202 329 9319
Fax 202 326 9323
E-mail eabbott@fema-law.com

Contents

	PAGE
Foreword	v
Executive Summary	vii
The Disaster Mitigation Act of 2000.....	ix
Words of Advice	x
Introduction: What Federal Help Means	1
Disaster Declarations and Electric Cooperatives	2
Eligibility Hurdle 1: Cooperatives as Nonprofit Entities	3
Eligibility Hurdle 2: Facilities Must be the Cooperative’s “Responsibility” ..	4
Eligibility Hurdle 3: Qualifying Facilities.....	4
Federal Grant Requirements	4
Predisaster Protection for your Co-op.....	5
Identifying Costs of Emergency Services	6
Keeping Track of Donated Resources.....	6
Emergency Measures Versus Permanent Repairs	7
Labor Costs	7
Operating Costs and Lost Revenues Are Excluded	7
Eligibility of System Improvements	7
Potential Penalties for Failure to Mitigate.....	8
Codes and Standards.....	8
Cost-Effective Mitigation.....	8
“Particular Project”	9
Preapproval.....	10
Partial Funding.....	10
Improvements and Mitigation	10
Duplication of Benefits	10
Counting Both Potential and Actual Proceeds	11
Document Recovery Efforts	12
Debris Removal Complications	12
Read, Reread, and Reread Again.....	13
Conclusion: Words of Advice.....	13

Foreword

An ice storm hits. Lines go down and power shuts off in two or three states. Co-ops scramble to get the lights back on. When everything is cozy again, some affected co-ops receive money from the Federal Emergency Management Agency and some do not. Why? After all, it's the same disaster.

Maybe the co-ops are in different counties or states. Maybe one has signed a mutual aid agreement and one has not. Maybe one has bid out repair work correctly and one has not.

In this little booklet, Ernie Abbott, General Counsel of FEMA from 1997 to 2001, clearly explains these and other critical intricacies of FEMA operations as they apply to co-ops. These are the rules to know in order to maximize your FEMA reimbursement potential.

Jonathan Hemenway Glazier
NRECA Association Counsel

Executive Summary

The Federal Emergency Management Agency (FEMA) was set up by the United States government to help states, counties, municipalities, and utilities deal with major disasters: floods, tornados, earthquakes, hurricanes, and the like. FEMA provides funds to help the affected communities recover from the major disaster, once it has been declared such by the President of the United States. (See box “All about FEMA.”)

Although FEMA offers handbooks that describe its disaster grant programs for aid applicants in general, some of its rules may be confusing, and often they are inconsistently applied by FEMA disaster staff, many of whom are temporary employees. This NRECA report focuses on electric cooperatives as aid applicants. It clarifies the rules and procedures that co-ops should follow in seeking federal aid when they most need it. The report also points out pitfalls that can trigger a denial of federal aid, even though the co-op may in fact be eligible for it, and recommends ways to avoid the pitfalls.

FEMA employees are motivated by a desire to help communities and individuals recover from disasters. Nevertheless, it is important to keep in mind that FEMA staff members are aware of their responsibility to the American taxpayer as well as to disaster victims. As a result, they are on the lookout for applicants that do not qualify, for types of damage that is not covered, for violations of procedural rules, and for costs that seem unreasonably high. All FEMA grants are subject to audit. Under these conditions, it is critically important for cooperatives to understand and abide by FEMA’s rules.

For example, consider a co-op whose facilities have been badly damaged by a flood, declared a major disaster by the President. The flood debris prevents the co-op’s work crews from getting into substations to repair and replace damaged transformers, so the co-op hires a local construction company—one that has regularly done work for the co-op—to use its front-end loaders to clear away the debris. The co-op then presents the bill for its debris-removal expenses to FEMA. FEMA denies the claim. Why? Because the co-op did not seek competitive bids for the debris removal. No matter that the situation was urgent, that the co-op’s consumers had been without power for days, that the contractor was known and trusted.

All about FEMA

The Federal Energy Management Agency was officially formed in 1979 when an executive order by President Jimmy Carter merged many separate disaster-relief agencies into a single organization. Hitherto, federal emergency and disaster activities were fragmented; more than 100 federal agencies were involved in various aspects of disasters. Carter’s order was intended to consolidate disaster relief efforts so that response would be faster and more effective. The new FEMA accordingly absorbed such agencies as

- Federal Insurance Administration
- National Fire Prevention and Control Administration
- National Weather Service Community Preparedness Program
- Federal Preparedness Agency of the General Services Administration
- Federal Disaster Assistance Administration from the Department of Housing and Urban Development
- Defense Civil Preparedness Agency from the Department of Defense

The new agency dealt with such early emergencies as the Love Canal contamination, the Cuban refugee crisis, and the Three Mile Island nuclear power plant meltdown. Later came the Loma Prieta earthquake in California and Hurricane Andrew. Meanwhile FEMA continually managed relief for thousands of lesser, but locally crippling, disasters. The terrorist attacks of September 11, 2001, focused the agency’s attention on national preparedness and homeland security. Today, FEMA employs 2500 people and can call on 5000 standby disaster reservists.

FEMA administers the nation’s Public Assistance Program under authority of the Stafford Disaster Relief and Emergency Assistance Act of 1988, named for its sponsor, Senator Robert T. Stafford of Vermont. In times of emergency, electric cooperatives are most likely to interact with FEMA through the Public Assistance Program. The Disaster Mitigation Act of 2000 amended the Stafford Act in ways that are important—and largely beneficial—to cooperatives.

FEMA’s Web site, www.fema.gov, offers a wealth of information about the agency and its policies.

There are ways to avoid such situations. The co-op could have conducted at least an informal competition, perhaps just by phone or e-mail, to demonstrate to FEMA the going price for the work. Better yet, the co-op could have entered into predisaster contracts, arranging with eligible contractors for emergency work before the need arises and when time and office systems

are available to conduct negotiations.

Overall, your cooperative should devote attention to the issues in the following checklist to make sure that you receive all the aid you are entitled to from FEMA:

✓ **Disaster declaration.** Ensure that your damage is included in FEMA's preliminary damage assessment (PDA) process. Several factors could allow FEMA inspectors to overlook damage to a cooperative: (1) Damage may be geographically dispersed. (2) The cooperative may already have made major repairs before the FEMA team gets there. (3) The value of overall damage to the county may not have reached the requisite level of \$2.66 per capita, even though your co-op is devastated.

Whenever a cooperative incurs significant damage, but the damage is not in a county that has been declared a federal disaster area, the cooperative should follow the PDA process and be sure that its documented damage has been included in the information provided to FEMA. And when the devastated co-op is in a county where damage hasn't reached the \$2.66 per capita level, the co-op should argue that the "extraordinary concentration of damage" to "critical facilities" justifies a declaration.

✓ **Eligibility hurdles.** FEMA awards grants only to state and local government entities and to nonprofit organizations performing what FEMA calls "government-like" functions available to the public. Electric cooperatives generally meet FEMA's nonprofit test. If, however, a FEMA staff member should challenge your cooperative's eligibility for federal disaster assistance, you should make FEMA's public assistance coordinator aware of your IRS tax-exempt status or your state's laws governing nonprofit status of co-ops.

What if facilities are shared with for-profit companies? Damaged facilities must be the responsibility of your cooperative, as a nonprofit enterprise; for-profit businesses are not eligible for assistance. Sometimes, responsibility is mixed. A cooperative might be a partial owner of a damaged generating plant whose other owners are investor-owned utilities. Or a cooperative might have leased space on its poles to a telephone or cable TV company. Or it might have assigned possession of a facility under construction to a private contractor.

In shared use, the facility will be eligible only if most of it is used for eligible (nonprofit) purposes, and only then to the extent of the eligible uses. Whenever shared use casts doubt about the eligibility of a facility, your cooperative should carefully review the adequacy of its partners' insurance—before a disaster occurs. For example, in construction or renovation projects in which control is transferred to a contractor, the contractor's insurance should cover the potential loss of the entire structure, not just the contractor's liability for damage or accidents.

There are still other qualifications that a nonprofit facility

must meet. It must provide educational, utility, emergency, medical, custodial care, or "other essential governmental-type services" to the general public. A cooperative's facilities will generally qualify under FEMA's definition of "utility," but if a cooperative provides ancillary, nonutility services, the facilities for those services may be deemed ineligible, particularly if they are not available to the general public.

✓ **Meeting contract requirements—especially competitive bidding.** If a cooperative's contracts do not comply with federal grant requirements, it runs the risk that FEMA will declare the costs of the contracts ineligible for federal assistance. The most frequent source of conflict in this area is FEMA's requirement for competitive bidding. Don't assume that you can ignore the requirement because a state of emergency exists and you urgently need debris removal, structure repairs, new transformers, and the like. FEMA will not necessarily agree with you that sole-source procurement is appropriate.

As noted, you can protect yourself by encouraging at least an informal competition among potential contractors, or better yet, by entering into predisaster agreements for recovery work, when conditions are conducive to normal business procedures.

✓ **Identifying costs of emergency services.** The most common legal issues in dealing with emergency service reimbursements are determining whether certain costs are really incurred in connection with a disaster—and sorting out actual costs from donated resources. For example, regular-time pay and benefits of a co-op's workforce are not eligible for FEMA assistance because these costs would have been incurred with or without the disaster, but overtime pay is eligible. However, both regular pay and overtime pay for temporary employees hired as a result of the disaster *are* eligible costs.

Then there is the question of mutual aid. In a disaster, the whole community takes part in the recovery effort. Neighboring communities, too, send people, equipment, and materials. FEMA tries to determine which of these resources generated "costs" the co-op is responsible for. If FEMA considers the mutual aid a charitable donation, it will not reimburse the cooperative for it.

A cooperative should keep track of donated resources, not only so that it can separate them from its eligible expenses, but also because they count toward the 10 to 25% cost-sharing that FEMA requires. For example, the volunteer labor by a member-consumer who helps linemen remove debris from damaged lines can be applied to the shared cost, even though it is not eligible for monetary reimbursement. Such donated resources can add up quickly and go far to help a co-op meet its cost-sharing obligation.

In sorting out recovery costs for eligibility, FEMA distinguishes between emergency measures and permanent pro-

jects. “Emergency measures”—which reduce imminent threats to life, safety, and property—are clearly eligible for reimbursement. Restoration of power to businesses and residences is generally considered an emergency measure.

“Permanent projects”—which repair, reconstruct, or replace the public infrastructure—are not so clear-cut. Frequently, emergency measures to restore power are also permanent projects: damaged poles and transformers are replaced, and lines are restrung. Such measures, too, are eligible for reimbursement. But what if the cooperative wants to make improvements or include mitigation measures—steps that will protect its facilities if a similar disaster strikes later on. Those permanent measures may or may not be eligible; they constitute an issue in themselves, discussed below in the next item in the checklist.

Keep in mind that FEMA funds only the cost to repair or replace damaged facilities; it does not reimburse cooperatives for lost revenue during the recovery period. Nor does it consider increases in operating costs (such as the cost of purchasing more expensive power to replace power that would have been supplied by a damaged generator).

✓ **System improvements—are they eligible?** A disaster is not a time just to mourn over lost facilities and infrastructure. It is a time to build for the future. And frequently, a structure damaged by a disaster may be old, depreciated, constructed under obsolete codes and electrical requirements, and perhaps designed before growth has changed the load distribution. FEMA is flexible enough to support postdisaster improvements in several ways:

- Damaged electric systems must be updated in accordance with the building codes in your community that were in effect at the time of the disaster.
- If improvements will directly reduce the possibility of future disaster damage, FEMA is likely to fund them if their cost adds up to less than 15% of the cost of simply repairing or replacing the facility. In fact, FEMA will fund as much as 100% of the cost of such measures as elevating pad-mounted transformers in flood-prone areas or burying them in high-wind areas, replacing wood poles with poles made of spun concrete, anchoring mechanical and electrical equipment in critical facilities, and bracing overhead pipes and electrical lines in earthquake areas.
- FEMA recognizes that a co-op may want to make improvements even if they are not eligible for federal funding. In these situations, FEMA will estimate the cost of restoring a facility to its predisaster condition (including upgrades required by applicable codes and standards), and allow the co-op to use these funds for construction of the improved structure.

✓ **Duplication of benefits.** The entire Public Assistance Program prohibits, by law, any federal disaster payments that duplicate benefits, whether they come from insurance or any

other source. FEMA extends the prohibition beyond the benefits that a co-op receives from its insurers to the benefits that the co-op *might* receive if it applied for them or insisted on them. If FEMA decides that the co-op settled for too low an amount from an insurer, it will dun the co-op for the missing funds.

To protect your co-op, first advise FEMA of the insurance proceeds you expect. Then be sure to record and document your efforts to recover your insurance claims. Make separate claims for your FEMA-eligible losses and your noneligible losses, and make sure your insurer issues separate checks for them. If your insurer wants to settle for less than you think your claim is worth, talk to the FEMA staff about it. In such cases, FEMA may be willing to take over litigation for you.

If you receive assistance from any charitable, state, or other federal sources, and the assistance applies to non-FEMA-eligible expenses, make sure that FEMA knows—otherwise FEMA could assume that the assistance duplicates its benefits and deduct it from your grant.

✓ **Debris removal—one of the difficult issues.** While the responsibility for management of debris removal is on the community or cooperative, the financial responsibility will also be on those entities if FEMA disallows cost. FEMA staff is perpetually on the lookout for debris removal cost abuses; the inspector general has prosecuted fraud by unscrupulous debris removal contractors. Any cooperative that contracts for removal of debris in a federally declared disaster should read, re-read, and re-read again FEMA’s debris management guidance. Obtain written confirmation from FEMA’s federal coordinating officer of the eligibility of your community’s debris removal program, including contracting/competition, eligibility of commingled private property, and monitoring and record keeping.

THE DISASTER MITIGATION ACT OF 2000

Congress amended the Stafford Act, the 1988 legislation that authorizes FEMA to conduct the federal Public Assistance Program, with the Disaster Mitigation Act of 2000 (DMA 2K). The amended Act contains some changes of major importance to cooperatives. Although the Stafford act allows FEMA to fund not less than 75% of eligible recovery costs, DMA 2K reduces the reimbursable cost to as little as 25% for facilities that have been damaged more than once in the preceding 10 years by the same type of event. This change makes it more important than ever for co-ops to pursue mitigation efforts—that is, to repair facilities in such a way that they are protected from a recurrence (by burying cable, for example).

Under the new rules, the cost of mitigation can be as much as 200% of the cost of simply restoring facilities to their original condition, provided that certain conditions are met. The conditions are spelled out in a FEMA policy document. Moreover, the rules for calculating cost are more generous than the old ones in regard to equipment, labor, and mutual aid. Cooperatives must

obtain FEMA's approval, however, for any postdisaster mitigation work.

WORDS OF ADVICE

The most important lessons you and your cooperative can learn from this report are these:

1. There is nothing more satisfying than knowing that you are helping your community and its citizens overcome tragedy and what will seem to be unimaginable devastation. You will work harder, and be under more pressure, than ever before, but it will be an experience of a lifetime.
2. Failure to properly follow and document the procedures required by FEMA rules can jeopardize the FEMA funding that your cooperative is eligible for—and which will allow recovery and rebuilding to occur.
3. Prepare in advance. Review your cooperative's mutual aid agreements. Make sure that your cooperative's insurance is adequate. Develop contracting strategies that can readily be followed in the disaster environment. Identify programs that will help your cooperative identify and address its vulnerability to disaster events—and minimize the likelihood that failure to address known risks will trigger a reduction in federal assistance.
4. Know whom to call for help on FEMA regulatory and grant issues. Develop contacts with your state's emergency management agency. The state's director for public assistance will usually have dealt with FEMA issues with some frequency, and therefore is usually a good resource for general—and free—information about FEMA programs.

An Electric Cooperative's Introduction to FEMA

Introduction: What Federal Help Means

Every year rural electric cooperatives lose poles, lines, and transformers to ice storms, thunderstorms, tornados, floods, landslides, and so on. Whenever these minidisasters occur, cooperatives mobilize to evaluate damage, restore power to customers, and make emergency and long-term repairs to lines and facilities.

Fortunately, most cooperatives only rarely face the much wider scale of destruction that accompanies what the federal government calls a *major disaster*. And so far, cooperatives have not been a target of terrorist attacks, which also trigger federal responses. Yet some 50 times a year, in communities across the country, an event will be so widespread, and cause so much damage, that not only cooperatives but also entire communities across one or more states are overwhelmed—and the President declares a major disaster.

In a major disaster, cooperatives are called on to restore power to more customers, and repair or replace more lines, poles, and transformers, than perhaps ever before. Even access to damaged facilities may be difficult, as debris, flood water, or heavy snow clogs roads and disables communications. Fortunately, in a federally declared disaster, electric cooperatives are eligible for significant help from the Federal Emergency Management Agency (FEMA),¹ which will fund a major portion of the cost of emergency work to restore power and the cost of repairing, restoring, rebuilding, or replacing damaged facilities.

Federal assistance, however, means that a whole new set of federal rules and procedures come into play—rules and regulations that cooperatives in a disaster area need to know to protect their eligibility for federal funding. FEMA has published a number of handbooks and other policy documents generally describing its disaster grant programs and the disaster grant application process.² However, these publications are directed

to disaster applicants generally, and not to the particular issues faced by rural electric cooperatives. This report summarizes the most common problems that cooperatives have encountered in dealing with FEMA—problems that have triggered FEMA's denial of funding of disaster costs to cooperatives that should have been eligible for assistance. The report also shows how to avoid these problems.

Even though FEMA is generally proud of the speed and simplicity with which it delivers assistance under catastrophic conditions, some of its rules are plain confusing. Indeed, NRECA members have even seen inconsistent application of FEMA's rules by FEMA disaster staff, many of whom are temporary employees. While agency employees are motivated by the desire to help communities and individuals recover from disaster events, FEMA staff members are also aware that statutes and regulations contain prohibitions and restrictions against providing assistance:

Some rules are plain confusing.

- To certain types of applicants
- For certain types of damage
- Where some physical or financial mitigation rules have been violated
- When costs seem (to them) unreasonably high

In short, FEMA's disaster recovery staff has responsibility to the American taxpayer as well as to disaster victims, and recognizes that all grants are subject to audit. In this environment, understanding of and attention to FEMA's rules and procedures can be critically important.

Under FEMA's Public Assistance Program, the federal government pays "not less than 75%" of certain emergency costs—including debris removal and emergency power restoration—and the cost of repairing, restoring, reconstructing, or replacing virtually any public facility.³ State and local governments, public authorities, and "nonprofit entities providing government-type

¹ As of March 1, 2003, the Federal Emergency Agency became a part of the new Department of Homeland Security. The responsibilities of the Director of FEMA are being vested in an Undersecretary for Emergency Preparedness and Response in the new department. Because the full organization of the part of the Department is not yet known in this transitional period, this report uses the term "FEMA."

² See FEMA Publication 323, Public Assistance Applicant Handbook (September 1999); FEMA Publication 322, Public Assistance Guide (October 1999); FEMA Publication 321, Public Assistance Policy Digest (October 2001). All of these publications can be obtained online at <http://www.fema.gov/r-n-r/pa/padocs.htm>.

services” are eligible for assistance. Rural electric cooperatives are eligible nonprofit entities under this program. *Accordingly, if a major disaster is declared, a cooperative should receive a federal check covering from 75% to 100% of the cost of “emergency measures” to restore power, and the cost to repair, restore, reconstruct, or replace its damaged lines, poles, transformers, generators, vehicles, and other facilities used to provide electric service to its member-consumers.*

While the program can be described simply, there are a number of troublesome issues that can trip up the unwary. Here is a quick checklist of issues that are of particular importance to rural electric cooperatives:

1. Failure to include damage to cooperatives in disaster declarations
2. Eligibility hurdles
 - Cooperatives as nonprofit entities
 - Facilities must be the cooperative’s “responsibility”
 - Qualifying facilities and ancillary services
3. Compliance with contracting requirements in federal grants.
4. Identifying emergency services costs
 - Mutual aid
 - Donated resources
5. Emergency measures and permanent repairs
 - Operating costs and lost revenues excluded
 - Eligibility of system improvements
6. Debris Removal Complications
7. Duplication of Benefit: Insurance

Disaster Declarations and Electric Cooperatives

Federal grants to repair and replace damage to cooperatives are available—provided that the cooperative’s facilities are in a county that the President has declared a major disaster area. While many disasters are “declared” without factoring in the damage to cooperatives, damage to electric cooperatives is occasionally critical to the President’s determination of whether a disaster event is big enough to justify federal assistance in a state—

or whether the declaration will extend to the particular counties in which a cooperative operates. This is particularly likely in events—such as ice storms—where damage to infrastructure is concentrated on overhead lines.

A brief review of the process of disaster and emergency declarations will help illustrate this point. It will also illustrate what a cooperative should do to avoid losing out on federal funding because its damages are not reflected in declaration decisions. The review is relevant primarily to “close calls”—events in which destruction is not so substantial that the need for a disaster declaration and federal assistance is obvious.⁴

The governor of a cooperative’s state or territory *must* ask the President for a declaration, and tell the President that the “situation is beyond the resources of state and local government,” before the president can declare a “major disaster” and trigger federal funding for cooperatives. Immediately after a disaster event

occurs, a damage assessment team of state and FEMA officials tours the disaster area and prepares a preliminary damage assessment (PDA) identifying the impact and magnitude of damage to individuals, businesses, the public sector, and the community as a whole.⁵ The governor includes the data from this joint assessment in the request for a declaration, and FEMA staff then apply numerical tests to the data in making their recommendation on whether the situation is in fact beyond the capability of state and local resources, thus warranting a federal declaration.⁶ The numerical tests that “indicate” that a federal declaration for Public Assistance is appropriate are:

- Estimated damage under the Public Assistance Program of \$1.07 per capita in the state.
- Estimated damage under the Public Assistance Program of \$2.66 per capita in the county.
- Even if these indicators are not met, a declaration may be recommended if there are “extraordinary concentrations of damages . . . particularly where critical facilities are involved.”⁷
- A county adjacent to one declared under the \$2.66 test will generally also be declared even though it does not meet the \$2.66 county-wide impact indicator.

A co-op should receive a check for 75 to 100% of the cost of emergency measures.

³ The Public Assistance Program is authorized under Sections 403, 406, 407, and 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121 et seq. Be sure to check pocket parts; the statutory provisions governing the Public Assistance Program were significantly amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106-390, 114 Stat. 1552 (2000). Implementing regulations are at 44 CFR Part 44. The text of FEMA’s regulations and principal policies can—sometimes after some exploration—be found in the www.fema.gov Web site. As of October 4, 2002, you can get most of the policy and guidance documents relevant to disaster response from the following index page: www.fema.gov/rrr/pa/policy/shtm.

⁴ In the event of an unusually catastrophic event, shortened procedures are available. 44 CFR §206.36(d).

⁵ 44 CFR §206.33.

⁶ See 44 CFR §206.48(a)(1) for state-wide indicator and FEMA Readiness, Response and Recovery Policy No. 9122.1 for county-wide indicator. Both indicators are adjusted annually for inflation.

⁷ 44 CFR §206.48(a)(2).



An electric cooperative affected by a disaster event must make sure that its damage is included in this preliminary damage assessment process; if damage to cooperatives is ignored, a cooperative's county could be excluded from a declaration. Several factors could allow cooperative damage to be overlooked:

1. First, damage to electric cooperatives may be geographically dispersed, making damage estimates more difficult to obtain by the time required for inclusion in the governor's letter.
2. If there is delay in getting damage assessment teams into rural areas to observe damaged facilities, a cooperative may already have made significant repairs before the assessment teams get there. The scale of the damage will then be less observable by damage assessment teams.
3. In some disasters, even though most of the damage has been suffered by cooperatives, county officials have not been willing to dedicate resources to include damage to cooperatives in estimates of county damage.
4. In counties that include both heavily populated areas and rural areas served by cooperatives, the amount of damage may not reach the \$2.66 per capita level even though the damage is devastating to the cooperative.

If damage to cooperatives is ignored, a cooperative's county could be excluded from a declaration.

Whenever a cooperative incurs significant damage from a storm event, but that damage is not in a county that has been declared a federal disaster area, the cooperative should follow up the PDA process and be sure that its documented damages

have been included in the information provided to FEMA for its declaration recommendation. In addition, where a cooperative is devastated, but the county has not exceeded the "county-wide impact indicator" of \$2.66 per capita, the cooperative should argue that the "extraordinary concentration of damage" to "critical facilities" justifies a declaration.

ELIGIBILITY HURDLE 1: COOPERATIVES AS NONPROFIT ENTITIES

The Stafford Act authorizes disaster grants only to state and local government entities and to nonprofit organizations that perform what FEMA calls "government-type" functions open to the public.⁸ FEMA regulations define nonprofit organizations as those with either an effective ruling letter from the IRS granting tax exemption, or with "satisfactory evidence from the state that the non-revenue producing organization or entity is a non-profit one organized or doing business under state law."⁹ Rural electric cooperatives generally meet FEMA's nonprofit test under *both* prongs of FEMA's regulation. Rural electric cooperatives are eli-

⁸ 44 CFR §206.221(e) and (e)(2);

⁹ 44 CFR §206.221(f)

gible for exemption under Section 501(c)(12) of the Internal Revenue Code,¹⁰ and are also organized under state laws that require nonprofit operation either directly or indirectly.

If FEMA staff challenge a cooperative's eligibility for federal disaster assistance, the cooperative should provide to FEMA's Public Assistance coordinator for the disaster either its effective ruling letter from the IRS, or the state cooperative law under which the cooperative is organized, demonstrating its nonprofit status.

ELIGIBILITY HURDLE 2: FACILITIES MUST BE THE COOPERATIVE'S "RESPONSIBILITY"

Since government entities and nonprofits are eligible for disaster assistance, and for-profit businesses are ineligible for assistance, FEMA frequently must figure out whether it is an eligible or ineligible entity that had responsibility for a structure at the time a disaster occurred. This arises in a number of ways that are important to cooperatives. A cooperative might be a partial owner of a damaged generating plant whose other owners were investor-owned utilities. Or a cooperative might have leased space on its poles to a telecommunications or cable television provider—or signed a contract under which a private contractor has physical possession of a facility while it is under construction. How does FEMA determine whether the facility is in fact the cooperative's facility and eligible for assistance?

FEMA rules and policies provide that it will look to the documents establishing who has legal responsibility for repair or restoration of a damaged structure. Thus, where eligible public or nonprofit applicants have contracted with ineligible applicants to transfer control of a structure—for example, by lease or in a construction contract—assistance is available to the eligible applicants only to the extent that they are "legally responsible" for performing the work.¹¹ This most frequently occurs in connection with construction or remodeling projects. Where a single facility has both eligible and ineligible uses (for example, a pole carrying both electric wires and a cable television line), the entire facility will be eligible only if most of the facility is used for eligible purposes, and then only to the extent of the eligible uses.

Whenever there is doubt about the eligibility of a facility

because of relationships with other organizations, cooperatives should take particular care in reviewing the adequacy of insurance required of their partners. For example, in construction renovation contracts that will transfer control of a facility to a contractor, insurance must be adequate to cover not only losses that might arise as a result of the contractor's activity but also the potential total loss of the entire structure.

ELIGIBILITY HURDLE 3: QUALIFYING FACILITIES

Nonprofit facilities are eligible only if they provide educational, utility, emergency, medical, custodial care, or "other essential governmental type services" to the general public.¹² A cooperative's facilities will generally qualify under FEMA's definition of "utility," which includes "buildings, structures, or systems of energy, communication, water supply, sewage collection and treatment, or other similar public service facilities." Indeed, under the Stafford Act and FEMA's regulations, facilities that provide power are considered "critical facilities," eligible for grant assistance

whether or not a cooperative could qualify for a low-interest disaster loan from the Small Business Administration. If a cooperative provides ancillary, nonutility services, FEMA may consider those facilities to be ineligible, particularly if the services are not available to the general public.

Federal Grant Requirements

The Public Assistance Program is a federal grant program and therefore subject to the Common Rule specifying uniform administrative requirements for grants to states and local governments.¹³ All Public Assistance grants are made to the state government, which then serves as an administrative conduit for subgrants to the eligible local government and nonprofit entities. The subgrants made to a cooperative are grants to reimburse eligible costs the cooperative has incurred—but if a cooperative's contracts don't comply with federal grant requirements, it runs the risk that FEMA may decide that the costs are not eligible for federal assistance.

Probably the most important area of conflict is the require-

Cooperatives should take care
in reviewing their partners'
insurance.

¹⁰ Internal Revenue Code of 1954, as amended, Section 501(c)(12). A cooperative must meet establish that its revenues come primarily from its members, subject to certain exemptions, in order for this exemption to apply.

¹¹ 44 CFR §206.223(a)(3).

¹² 44 CFR §206.221(e).

¹³ FEMA's version of the Common Rule is at 44 CFR Part 13. These regulations further incorporate by reference requirements in several circulars issued by the U.S. Office of Management and Budget (OMB) and applicable to particular types of grantees. In particular, OMB Circular A-87 applies to the costs of state or local governments. This circular is available on OMB's Web site at <http://www.whitehouse.gov/omb/grants/index.html>.



ment that contracts be competitively bid, unless “the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.”¹⁴ *Beware the emergency exception!* You should not assume that you can safely ignore competitive procurements just because the President has found the situation to be “beyond the capability of local resources” to respond or just because you are seeking assistance for what FEMA regulations call Category A and B “emergency work.” FEMA will probably not agree with you that sole source procurement is appropriate for any work performed more than 3 days after the disaster event.¹⁵

A mayor’s recent appeal from a denial of assistance based on the city’s failure to competitively bid a debris removal contract is particularly instructive:

The citizens of the County had no electricity, no heat, no water, and no telephone service. The County’s 800 miles of paved roads were impassable. Emergency vehicles could not serve the County’s citizens. The thaw compounded the problem by creating road washouts over 14 inches deep in some places and leading to severe rutting of the County’s paved roads. The body of one deceased resident remained uncollected for over two days because no emergency vehicle could reach him. The weather forecast included more subfreezing temperatures.

The County faced the possibility of more deaths due to lack of heat, food, running water and other necessities of life unless it could quickly reopen its roads.¹⁶

This county’s appeal was denied, on the grounds that the county’s sole-source contract covered not just the emergency clearing of one lane of road for emergency vehicles, but the entire debris removal operation. FEMA’s position in this case—which is now in litigation—is that the county could have conducted a competition (presumably after power and phone service had been restored), for the larger work of transporting and reducing the debris and placing it in a landfill.

PREDISASTER PROTECTION FOR YOUR CO-OP

What can you do to protect yourself? First, in the disaster environment, a cooperative should try to protect itself by encouraging at least an informal competition, that is, an effort to obtain bids from multiple sources, so that you can demonstrate not only that you attempted the best competition possible under the circumstances but also the rates that other bidders were willing to charge for similar work. Where some work must be done before any competition can take place, try to limit the scope of the work to allow for competition in later phases. You very well may end up with the same contractor—whose resources will already be mobilized in your community—and you very well may have to pay a

¹⁴ 44 CFR § 13.36(d)(4)(i).

¹⁵ See FEMA Public Assistance Policy Number 9580.4, Fact Sheet: Debris Operations—Clarification: Emergency Contracting vs. Emergency Work, January 19, 2001.

¹⁶ First Appeal filed by Scott County, Arkansas, FEMA-1354-DR-AR, PA ID#127-99127-00, PW 124 (March 9, 2001).

higher mobilization fee for the emergency work, but you are far more likely to avoid a denial of reimbursement for your costs.

Second, and particularly for cooperatives in disaster-prone areas, cooperatives should explore whether they can benefit from signing reputable disaster contractors to backup contracts, to be activated when a disaster is declared. A cooperative could then run a competition in the predisaster environment, when it has working telephones and office systems and time to evaluate the capabilities of the different firms with experience in the major disaster environment.

Mutual Aid. Predisaster execution of mutual aid agreements will also help avoid disallowance of costs. Traditionally, a cooperative overwhelmed by disaster can usually count on receiving help from neighboring cooperatives. This “neighbor helping neighbor” tradition has a strong grounding in North American history. Even in the middle of the War of 1812, when the United States was at war with Britain and therefore with Canada, residents of communities on the border between Maine and Canada would cross over to help each other put fires out. Mutual aid has continued as a significant part of the nation’s emergency response system until the present day.

Most early mutual aid arrangements among communities, and many early mutual aid agreements among cooperatives, were handled informally, without paperwork and without expectation of payment. Each community or cooperative recognized that if it helped a neighbor in need, that neighbor would reciprocate in time of need. But as the dollars involved rose—in overtime costs and in potential liabilities—more and more communities and cooperatives have begun to formalize these arrangements in a mutual aid agreement. And FEMA policies now make the formalization of mutual aid even more important: The costs incurred by a neighbor helping in response to a disaster event are eligible for assistance only if there was an expectation of payment—evidenced by a mutual aid agreement executed prior to the date of a disaster.¹⁷ In the absence of a signed agreement, FEMA will treat the assistance provided by a neighboring cooperative as a charitable donation, not as a cost eligible for assistance.

Accordingly, several years ago NRECA prepared a model mutual aid agreement that met FEMA policy requirements, and encouraged all cooperatives to sign the model agreement. Some 90% of NRECA members did so. NRECA is also watching for potential changes in FEMA’s mutual aid policy in the wake of the terrorist attacks of September 11, 2001.

Identifying Costs of Emergency Services

After the President has declared a major disaster, the costs incurred by applicants to perform emergency disaster-recovery work are eligible for federal disaster assistance. This seems a fairly simple proposition, but frankly, many of the issues in administering it arise from the difficulty in attributing particular costs to a disaster. The most common legal issues in dealing with emergency service reimbursements are determining whether certain costs are really incurred in connection with a disaster—and sorting out actual costs from donated resources. For example, regular-time pay and benefits of an applicant’s workforce (FEMA calls this “force account labor”) are not eligible for FEMA assistance because these costs would have been incurred with or without the disaster. Overtime pay for force

account labor performed as a result of the disaster is eligible. However, both regular pay and overtime pay for temporary employees hired as a result of the disaster *are* eligible costs.

Why do these rules beget conflict? First, in a disaster, the whole community takes part in the response effort. Neighboring

communities send resources to help out, sometimes with and sometimes without an invitation or request. Once a federal disaster is declared, and the immediate emergency conditions brought under control, FEMA necessarily must determine which of these resources generated “costs” the applicant is responsible for. Only if an eligible applicant is responsible for a cost will the federal government reimburse that applicant for it. Stated differently, the federal government does not reimburse a decision by an applicant to pay for what was in fact a charitable donation.

KEEPING TRACK OF DONATED RESOURCES

Even if FEMA determines that the cost of a resource is not attributable to the disaster, because it was in essence donated by citizens or by neighboring towns, it remains quite important to keep track of these and any other donated resources. Recall that FEMA Public Assistance grants in almost all disasters are cost shared, requiring a “nonfederal” contribution of from 10 to 25% of eligible costs. Depending on your state law, a portion of this nonfederal share might be paid by the state, but usually nonprofit cooperatives are responsible for the entire nonfederal cost share. Under FEMA’s donated resources policy, the value of any resources donated to the cooperative (for example, by a member-consumer helping linemen move debris to allow access to damaged

NRECA offers a model mutual aid agreement.

Donated resources can be significant.

¹⁷ FEMA Response and Recovery Policy No. 9523.6 Mutual Aid Agreements for Public Assistance, August 17, 1999.

lines) can count toward the nonfederal matching requirement, reducing the cooperative's obligation to match a federal grant with cash.¹⁸ Donated resources under this policy can be quite significant, and can include (for example) all of the efforts of residents to do what would be FEMA-eligible emergency work if performed by the local government.

EMERGENCY MEASURES VERSUS PERMANENT REPAIRS

FEMA distinguishes between its funding of “emergency measures”—which reduce imminent threats to life, safety, and property—and “permanent” projects to repair, restore, reconstruct, or replace public infrastructure. Electric power service to residences and businesses is considered a critical service, and costs incurred to restore power to residents generally qualify as emergency measures.

Frequently, emergency actions taken to restore power are also the actions that need to be taken to repair damaged facilities: damaged poles and transformers are replaced, and lines are restrung. In these situations, eligibility is clear regardless of whether the work is considered an emergency measure or permanent work. Indeed, once power is restored, there may not be any remaining “permanent work” projects. However, a cooperative may be able to implement temporary measures to restore power quickly, before it repairs or restores all damage to its system. Where this is possible, the temporary measures should be eligible as emergency measures. The cooperative would then have more time to design and engineer permanent repair or replacement of its damaged facilities. This is particularly important where the extra time allows the cooperative to include mitigation measures and other improvements into the rebuilding process. The possibility of federal funding of these improvements is discussed in “Eligibility of System Improvements.”

LABOR COSTS

Cooperatives should also be aware that FEMA defines the eligible labor costs differently for work that is considered emergency assistance than it does for work that is considered a permanent repair or restoration project. For “emergency measures,” FEMA reimburses only costs that would not have been incurred in the absence of the disaster event. Thus FEMA does not reimburse the regular salary of the cooperative's own work force, and reimburses overtime costs and contract services only. By contrast, for permanent repair and restoration, FEMA typically reimburses all reasonable costs, including both straight time and overtime, for all eligible work.

The restoration of power is of course a critical emergency measure for a cooperative and the community it serves—but it frequently also amounts to a “permanent” repair or replacement of damaged poles, lines, and transformers. Cooperatives should be alert, when working with FEMA, to disallowance of straight time labor by FEMA as an “emergency measure” in circumstances where great federal assistance would be available if the work in fact constituted a permanent repair and is so treated by FEMA.

OPERATING COSTS AND LOST REVENUES ARE EXCLUDED

FEMA funds only the cost to repair or replace damaged facilities. FEMA does not consider any lost revenues to be eligible for assistance. FEMA also does not consider any increases in operating costs (such as the purchase of more expensive power to replace that supplied by a damaged generating plant) to be eligible for assistance. However, the cost of establishing temporary emergency services in the event of a utility shutdown may be eligible. For example, the cost of renting and operating a portable generator that can supply power to a cutoff part of the system is likely to be eligible for assistance.



Eligibility of System Improvements

A disaster is not a time just to mourn over lost facilities and infrastructure. It is a time to build for the future. And frequently, a structure damaged by a disaster may be old, depreciated, constructed under obsolete codes and electrical requirements, and perhaps designed before growth has substantially changed the distribution of load on a cooperative's system. While FEMA policies should not determine the improvements that cooperatives incorporate into their rebuilding plans, they should know when proposed improvements may be eligible for FEMA assistance—and when proposed improvements require funding from other sources. In addition, cooperatives should be aware that the Stafford Act now includes

¹⁸ FEMA Response and Recovery Policy No. 9525.2 Donated Resources, August 17, 1999.

potential penalties that can take effect if owners do not, during repair and reconstruction, “mitigate” their damaged facilities, that is, make them more disaster resistant.

POTENTIAL PENALTIES FOR FAILURE TO MITIGATE

The potential penalties for not mitigating facilities damaged by disaster were added by the Disaster Mitigation Act of 2000 (DMA 2K).¹⁹ DMA 2K amended the Stafford Act section (Section 406) that authorizes FEMA to fund “not less than 75%” of the “eligible cost” of “repair, restoration, reconstruction, or replacement” of a rural electric cooperative’s facilities that are damaged or destroyed by a natural or non-natural event that is declared a major disaster by the President. After FEMA fully implements DMA 2K, the eligible reimbursable cost can be as little as 25% for facilities that have been damaged more than once in the preceding 10 years by the same type of event, and for which appropriate mitigation efforts have not been implemented. With the potential drop in amount of reimbursable funding if disaster-damaged facilities are rebuilt without mitigation, it is more important than ever to pursue mitigation efforts where possible.

The Public Assistance Program has substantial flexibility to support system improvements, including both improvements that reduce risk of damage to disaster and, to a limited extent, modernization improvements. This flexibility manifests itself in several ways.

CODES AND STANDARDS

First, the Public Assistance Program does not just fund repair or restoration of a facility back to the standards, and in accordance with building codes, under which it was originally constructed. Instead, the Stafford Act provides that the eligible cost estimate for Public Assistance grants should be developed: (1) on the basis of the design of the facility as it existed immediately before the major disaster and (2) in conformity with codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or under the Coastal Barrier Resources Act) applicable at the time the disaster occurred.²⁰

What this means is that damaged electric and other systems *must* be updated in accordance with the building codes and specifications in your community that were in effect as of the date of the disaster.

FEMA’s regulations²¹ specify which “codes and standards” trigger federal funding of improvements over the pre-existing condition of the building. The objective of the regulations is to fund code upgrades where the community requires that all new construction meet these standards, and not to fund upgrades where it appears that the code applies only, or principally, where federal funding is available.²² The work required to comply with applicable codes and standards is eligible for reimbursement if the code or standard:

A disaster is a time to build for the future.

- Applies to the type of repair or restoration required.
- Is appropriate to the predisaster use of the facility.
- Is found reasonable, in writing, and formally adopted by the state or local government on or before the disaster declaration date or is a legal federal or state requirement applicable to the type of restoration.

• Applies uniformly to all similar types of facilities within the jurisdiction of the owner of the facility.

- Is uniformly enforced.

In other words, if current government codes really require you to improve or upgrade a facility when repairing it, then the upgrade is eligible for federal assistance.

COST-EFFECTIVE MITIGATION

In addition, FEMA may fund upgrades to a structure that will have the effect of reducing future disaster damage.²³ FEMA makes these mitigation grants because it would not make sense to spend federal funds to reconstruct a facility to be just as susceptible to collapse as it was before the disaster. And while these grants are discretionary, FEMA has adopted a formal written policy specifying the types of upgrades to infrastructure systems that are eligible for federal funding.²⁴ Under this policy, FEMA may approve mitigation measures—beyond those required by applicable codes—instead of a mere repair and return to predisaster condition if they meet the following requirements:

1. The measure must be related to eligible disaster-related damages, in the sense that the proposed mitigation work must relate to the damaged elements for which restoration work on a facility is performed.

¹⁹ Public Law 106-390, October 30, 2000.

²⁰ Stafford Act §406(e)(1)(A) (as amended by the Disaster Mitigation Act of 2000). The amendment to the portion of §406(e) quoted here did not materially change the prior law with respect to codes and standards as it has been interpreted recently by FEMA.

²¹ 44 CFR § 206.226(c).

²² See FEMA Public Assistance Guide, FEMA Publication 322, at 28. See also Second Appeal Analysis, FEMA-1008-DR-CA, PA ID # 000-92040; University of California, Los Angeles, DSR # 02623; Royce Hall (UC Seismic Safety Policy), March 10, 1998.

²³ The very short regulation governing this “§406 Mitigation” is 44 CFR §206.226(d).

²⁴ Readiness, Response, and Recovery Policy No. 9526.1 (August 13, 1998).

2. The measure must directly reduce the potential of future, similar disaster damages to the eligible facility.
3. The measure must not increase risks or impair the facility's operation.
4. The measure must meet existing legal requirements and standards of good professional judgment.
5. The measure must be "cost-effective." While an applicant can provide its own analysis to demonstrate the cost-effectiveness analysis of a mitigation measure, the following measures are deemed to be cost-effective if the combined cost of the repair and mitigation measure either (i) costs less than 115% of the cost of the eligible repair alone on a "particular project" or (ii) costs less than 200% of the cost of the eligible repair alone on a "particular project" and is one of the eight types of mitigation measures listed below:
 - a. Pad-mounted transformers—elevating above the base flood elevation, or lowering them or burying them in nonflood, high-wind areas
 - b. Using multiple poles to support transformers
 - c. Burying lines
 - d. Anchoring or otherwise protecting fuel tanks from movement in a disaster
 - e. Replacing damaged poles with higher-class pole, or with a different material pole such as replacing wood poles with spun concrete
 - f. Adding guy wire or other additional support to power lines
 - g. Removing large-diameter communication lines from power poles
 - h. Providing looped distribution service or other redundancies in the electrical service to critical facilities
[Note: although it remains in its written Policy, FEMA has indicated that it may remove this category from the Policy because it does not involve repair of a particular facility.]
6. Anchoring of mechanical and electrical equipment in critical facilities
7. Bracing of overhead pipes and electrical lines to meet seismic loads

The cost used in the calculations includes equipment costs. It includes labor costs as noted below. And it includes the costs incurred under any mutual aid agreement and the cost charged under repair/restoration contracts. If the mitigation measure does not meet either the 115% or the 200%

guidelines, FEMA nevertheless may approve it if it is otherwise shown to be cost-effective.

Proposed projects must be approved by FEMA prior to funding. They will be evaluated for cost-effectiveness, technical feasibility, and compliance with statutory, regulatory, and executive order requirements. In addition, the evaluation must ensure that the mitigation measures do not negatively impact a facility's operation or risk from another hazard.

"PARTICULAR PROJECT"

The list of mitigation measures considered by FEMA to be cost-effective if the 115% and 200% guidelines are met includes many, if not most, of the mitigation techniques available for cooperative transmission and distribution systems. It is important to note that reimbursement is available only for the cost of a "particular project" and that the 115% and 200% tests are computed with respect to that "particular project." Co-ops should take care in delineating the extent of mitigation efforts.

The following example demonstrates how the definition of a "particular project" can affect whether the project meets the 200% test and hence is deemed cost-effective. Consider this scenario:

- 20 miles of damaged line.
- The line could be repaired by replacing it overhead in pre-disaster condition for \$5/mile or \$100 total.
- The 5 miles of line most susceptible to damage could be buried (as allowed in the Policy Appendix) for \$20/mile or \$100 total for that segment of line.

In this situation, if 5 miles of line are buried (a mitigation procedure) and 15 miles restored to pre-disaster condition (not a miti-



gation measure), then FEMA would probably define the “particular project” for mitigation purposes only as placing the 5 miles underground. That project must meet the applicable guideline—in this case, the 200% guideline. In our example, the costs of burying the 5 miles would not be reimbursable, since it would exceed 200% of the cost of restoring the line to predisaster condition. If, however, the cooperative is able to demonstrate that it has an integrated plan for upgrading the 20-mile segment, that the selection of mitigation technique for different facilities in that segment depends on objective criteria, and that the cost of implementing the total mitigation plan, including repair, meets the applicable guidelines, then FEMA may be persuaded to approve the entire 20-mile project as cost-effective.

PREAPPROVAL

Remember that FEMA’s list of cost-effective measures does not constitute preapproval for reimbursement of the costs of those items. Nor will FEMA formally approve for reimbursement, on a case-by-case basis, the costs of any activities before a disaster occurs. FEMA welcomes, however, predisaster discussions of emergency, repair, and mitigation options.

PARTIAL FUNDING

During the rebuilding process there may be improvements that a cooperative wishes to make that are neither required by applicable codes and standards nor designed to reduce potential damage from future disasters. A cooperative may, for example, wish to increase the capacity of a segment of line to allow service to more customers. In these situations, the cost of the *improvement* is not eligible for federal assistance—but installation of the improvement does not jeopardize the eligibility of the damaged facility. FEMA will estimate the cost of restoring a facility to its predisaster condition and function (including upgrades required by applicable codes and standards), and allow the applicant to use these funds for construction of the improved structure. Indeed, if a damaged facility is eligible for assistance, but had become unnecessary to the cooperative’s operations and can be retired and not rebuilt, the cooperative can obtain reduced federal funding available for use in any of the cooperative’s facility construction projects.²⁵

The primary rule to remember is that a cooperative should not jump to rebuild exactly what has been destroyed. Rather, to the

extent permitted by the imperative of restoring power quickly, a cooperative should recognize that there are real opportunities to address longer-term needs as part of the disaster response. FEMA funding is generally limited to what it would cost to repair or replace the structure that was damaged, in accordance with code upgrades. But there may be potential additional FEMA funding available with appropriate structuring of the project.

IMPROVEMENTS AND MITIGATION

This report focuses on the Public Assistance Program, under which FEMA funds the rebuilding of damaged facilities after a disaster. Cooperatives should also recognize that there are other potential sources of funding of disaster mitigation costs. FEMA has both a predisaster mitigation program (Section 203 of the Stafford Act) and a postdisaster mitigation program (Section 404 of the Stafford Act); under both programs, a cooperative may be able to obtain federal grants financing a portion (usually 75%) of the cost of mitigating its facilities against disasters. Further information about these programs is available from NRECA. The success of cooperatives in obtaining funding under these programs will depend in large part on state and local governments including mitigation of cooperative facilities in state and local hazard mitigation plans. NRECA encourages cooperatives to participate in their government’s hazard mitigation planning activities where possible.

The Public Assistance Program prohibits federal disaster payments that duplicate benefits.

Duplication of Benefits

The entire Public Assistance Program is subject to a general statutory prohibition against making federal disaster payments that duplicate benefits:

The President...in consultation with the head of each Federal agency administering any program providing financial assistance to persons, business concerns, or other entities suffering financial losses as a result of a major disaster or emergency, shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.²⁶

²⁵ The Stafford Act makes a distinction between “replacement” of facilities substantially destroyed by a disaster (by building a new facility in another location) and use of disaster relief funds generated by damage to an eligible facility to construct another type of facility filling another type of community need (for example, replacing a community center with a school). The latter is considered an “alternate” or “in lieu of” project subject to a 10% to 25% reduction in federal funding. Stafford Act §406(c).

²⁶ Stafford Act §312(a).



The prohibition is not limited to duplicated assistance that an applicant in fact receives; it also extends to assistance that FEMA believes to be available to the applicant.²⁷ These provisions quite frequently lead to dispute over how much assistance is in fact “available to” the applicant and therefore how much is deducted from “eligible cost” for federal disaster grants. The issue usually arises where an applicant has insurance for some of its disaster losses; it can also arise where there are additional disaster grants or loans available from federal or state agencies or even from charitable organizations.

FEMA’s process for taking “assistance from other sources” into account would be relatively simple if insurance policies, or rules for other assistance programs, tracked FEMA’s eligibility rules, with specified coverage for each “project” eligible for assistance. All FEMA would have to do would be to reduce the eligible cost for the project by the specified coverage for that project. In fact, however, insurance policies and the rules of other assistance programs rarely track FEMA eligibility rules. Policies combine coverage for both ineligible losses (such as business interruption) and eligible losses (such as restoration of damaged structures). Policies also include overall per occurrence limits or aggregate deductibles; in cases where these limits are exceeded in a policy covering both eligi-

ble and ineligible losses, FEMA must make some allocation of proceeds between eligible losses (resulting in a reduction of assistance) and ineligible losses.

COUNTING BOTH POTENTIAL AND ACTUAL PROCEEDS

Moreover, when dealing with insurance policies, FEMA also has grappled with an eligible applicant’s lack of incentive to seek all proceeds due under its insurance policies where, in the absence of insurance, FEMA will fund 75% to 100% of the cost to restore, and in some cases to enhance, damaged structures. The FEMA “insurance specialists” do not view their role as merely deducting actual insurance proceeds from eligible costs, but also deducting the proceeds that should have been received had the insured aggressively sought recovery under the policy. In several cases—frequently as the result of an audit by FEMA’s inspector general—FEMA has deducted from eligible cost its own determination of available insurance over the protest of an applicant that has settled with the carrier for a lower sum.²⁸ Further, in situations where an insured applicant reaches a settlement of insurance claims, FEMA has imposed its own allocation of proceeds between eligible and ineligible losses even if the parties to the settlement specify an allocation in the settlement.

FEMA deducts insurance proceeds that should have been received had the co-op aggressively sought recovery.

²⁷ See Stafford Act §312(c). A person receiving federal assistance is “liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source.” (Emphasis added.)

²⁸ For example, *Hawaii v. FEMA*, 93 F. Supp. 2d 1103 (D. Hawaii 2000), *reversed*, 294 F.3d 1152 (9th Cir. 2002).

DOCUMENT RECOVERY EFFORTS

So what should a cooperative do? First, it must be sure to advise FEMA of all potential insurance proceeds. Even more important, it must document its efforts to recover under its insurance policies, separately track insurance proceeds for “FEMA-eligible” losses, and beware of insurance checks that commingle eligible and ineligible losses. If there is a dispute over coverage, and the cooperative believes that it must settle for less than the policy amounts, it should talk to the FEMA staff in an effort to gain their concurrence in the settlement. Remember, if FEMA believes an insurance claim is worth more than the cooperative believes it to be worth, the cooperative may be able to ask FEMA to take the responsibility of litigating the matter against the insurance company—and thus take the risk of losing in court.

Finally, if there are any other forms of assistance available to a cooperative, from federal, state, or even charitable sources (including the donated resources discussed earlier) a cooperative should work, where possible, to make it clear what that other assistance is for, particularly if the other assistance is for losses that are not eligible for FEMA funding. This will help protect the cooperative from FEMA decisions that presume that the other funding duplicates FEMA funding—and then reduce the amount of FEMA grants by the amount of the presumed duplication.

Debris Removal Complications

Although debris removal on public rights of way is generally a governmental task and not the responsibility of electric cooperatives, a cooperative may have some need to clear debris in order to restore power and repair damage. The subject warrants special attention in this report because removal of debris frequently leads to the most difficult emergency management issues.

Debris removal complicates lines of authority because many different governmental and private organizations have physical or financial responsibilities. Contracting is frequently done in haste with previously unknown (to the buyer’s procurement staff) debris removal firms, using emergency procurements that

bypass or at least expedite normal competitive processes. Further, the debris itself consists of a dangerous pile of the collapsed and intermingled property of multiple owners. It covers both public and private property and blocks access to streets and utilities that are critical to the recovery effort. And in a disaster caused by a terrorist attack—as in the Oklahoma City bombing and the multiple attacks on the World Trade Center—the site of the debris is a crime scene and access to the site is restricted.

The Stafford Act generally authorizes FEMA to assist in the

removal of debris from both public and private lands, if the removal of debris is found “in the public interest.”²⁹ By regulation, FEMA has determined that it is in the public interest to remove debris from public and private property when public health and safety, or significant damage to improved property, or the economic recovery of the community is threat-

ened.³⁰ But FEMA has strictly limited who can obtain assistance for removal of debris on private property: debris removal is eligible for federal assistance only if it is performed or contracted for by an eligible entity. FEMA will not provide assistance directly to an individual or private organization, nor to an eligible entity that chooses to reimburse private individuals or organizations for their costs of debris removal.³¹

Further, FEMA policy is that “[d]ebris removal from private property is generally not eligible because it is the responsibility of the individual property owner;”³² Debris removal from private property is considered “the responsibility of the individual property owner aided by insurance settlements and assistance from volunteer agencies.”³³ FEMA policy is that debris removal on private property will be funded only if it causes a health and safety hazard to the general public, the work is preapproved by FEMA, and coverage under the property owners’ insurance is deducted from the federal assistance.³⁴ However, if residents move debris from their property onto public property (the side of the street), the removal of this debris is generally eligible for FEMA funding.

These are relatively sterile quotations from regulations and policy statements—but the importance of close review of debris removal procedures and contract documents cannot be stressed enough. A good portion of the disputes between FEMA and communities arises from disallowance of debris removal costs.

FEMA strictly limits assistance for removal of debris on private property.

²⁹ Stafford Act § 407(a), 42 U.S.C. § 5173(a).

³⁰ 44 CFR § 206.224(a)(2000); see FEMA Publication 322 (available at www.fema.gov/r-n-r/pa/paguided.htm), at 45.

³¹ 44 CFR § 206.224(c)(2000).

³² “Debris Removal” from FEMA Policy Digest, FEMA Publication 321, interactive version October 2001.

³³ FEMA Public Assistance Guide, *infra*.

³⁴ FEMA “Fact Sheet on Insurance Considerations for Applicants,” Response and Recovery Directorate Policy Number: 9580.3 (August 23, 2000) (Question 11).

FEMA staff is perpetually on the lookout for debris removal cost abuses; the inspector general has prosecuted fraud by unscrupulous debris removal contractors.

READ, REREAD, AND REREAD AGAIN

Any cooperative that contracts for removal of debris in a federally declared disaster should read, reread, and reread again FEMA's debris management guidance.³⁵ No matter what anyone at FEMA may say in the disaster environment, a grant for debris removal is a federal grant. While the responsibility for management is on the community or cooperative contracting to remove debris, the financial responsibility will also be on the local government or cooperative if FEMA disallows cost. Where possible, a cooperative should obtain written confirmation from FEMA's federal coordinating officer of the eligibility of its community's debris removal program, including contracting/competition, eligibility of commingled private property, and monitoring and record keeping. FEMA's debris management guide includes a sample community debris management plan that should help you avoid a number of debris management potholes.

Conclusion: Words of Advice

This report highlights some of the most significant issues that you will grapple with in federally declared disasters. What are the most important lessons for you to take away?

First, there is nothing more satisfying than knowing that you are helping your community and its citizens overcome tragedy and what will seem to be unimaginable devastation. You will work harder, and be under more pressure, than ever before, but it will be an experience of a lifetime.

Second, failure to properly follow and document the procedures required by FEMA rules can jeopardize the FEMA funding that your cooperative is eligible for—and which will allow recovery and rebuilding to occur.


Third, try to prepare in advance. Review your cooperative's mutual aid agreements. Make sure that your cooperative's insurance is adequate. Develop contracting strategies that can readily be followed in the disaster environment. Identify programs that will help your cooperative identify and address its vulnerability to disaster events—and minimize the likelihood that failure to address known risks will trigger a reduction in federal assistance.

Finally, know whom to call for help on FEMA regulatory and grant issues. Develop contacts with your state's emergency management agency. The state's director for public assistance will usually have dealt with FEMA issues with some frequency, and therefore is usually a good resource for general—and free—information about FEMA programs.

³⁵ The Debris Management Guide, FEMA Publication 325, can be found at <http://www.fema.gov/r-n-r/pa/dmgtoc.htm>. The Public Assistance Program's Debris Management Job Aid, FEMA Public Assistance Policy No. 9580.1 (August 2000) can be found at http://www.fema.gov/r-n-r/pa/9580_1.pdf.



**National Rural Electric
Cooperative Association**

A Touchstone Energy® Cooperative 

4301 Wilson Boulevard
Arlington, Virginia 22203-1860