



March 11, 2021

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Federal Emergency Management Agency
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Wisconsin
President, NCSL

Martha R. Wigton
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Tim Storey
Executive Director

RE: FEMA–2020–0038 Federal Emergency Management Agency’s Notice of Proposed Rulemaking

On behalf of the National Conference of State Legislatures (NCSL), this statement is written in response to the Federal Emergency Management Agency’s (FEMA’s) request for additional comments to its Notice of Proposed Rulemaking, referenced in the Federal Register, Volume 85, Number 240 (Monday, December 14, 2020), to 44 CFR Part 206, entitled “Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program.” NCSL respectfully requests that FEMA withdraw this NPRM until such time as it has fully examined its impact through consultation with state and local stakeholders.

NCSL joined the nation’s governors, emergency managers, counties, and cities over a year ago asking FEMA to conduct a joint series of formal federalism consultations *before* the issuance of this proposed rule in accordance with Executive Order (EO) 13132 (Federalism, August 19, 1999) as well as Section 1239 of the Disaster Recovery Reform Act (Division D, Public Law 115-254). The letter advised FEMA that early consultation with state and local governments before it drafted or proposed the rule was paramount to developing sound disaster policy. Congress recognized the importance of this early consultation when it included language in the Disaster Recovery Reform Act (DRRA) expressly mandating that the FEMA administrator “in determining the capacity of a jurisdiction to respond to disasters, and prior to the issuance of such a rule ... shall engage in meaningful consultation with relevant representatives of State, regional, local, and Indian tribal government stakeholders.”

FEMA declined to comply with this statutory requirement, and the current NPRM reflects a lack of input from vital state and local stakeholders. The rule proposes to increase the Per Capita Impact Indicator (PCII) based on: 1) unaccounted for inflation from the 1986-1999; 2) a state’s Total Taxable Resources; and 3) raising the minimum threshold according to unaccounted for inflation from 1999-2019. Altering the PCII as proposed has the potential to burden state and local budgets with emergency response and recovery costs while limiting these jurisdictions’ abilities to prioritize resources on more immediate priorities.

The PCII plays a decisive role in determining when a disaster is large or costly enough to involve critical FEMA resources in circumstances where state capacity may be overwhelmed by the impact of a given catastrophic event. As FEMA states in the proposed rule, there is an 80% correlation between whether states meet the PCII threshold and whether a requested disaster declaration and accompanying Public Assistance funding are ultimately granted. The proposed rule claims to revise the PCII to better reflect a jurisdiction’s capacity to respond to a catastrophic event; however, no entity can know a state’s capacity to respond to a disaster better than state and local governments themselves.

The NPRM seeks to coerce states and localities to adopt FEMA’s generic priorities at the expense of tailored state and local actions that address their specific needs. Given FEMA’s lack of meaningful consultation and disregard of federal law, this approach is unacceptable. States require the ability to determine how best to address complex challenges like disaster recovery in their unique communities separate from the threat of losing critical recovery dollars. State and local

governments do not have the fiscal capacity of the federal government, and unlike the federal government 49 states are constitutionally or statutorily required to have balanced budgets. Despite balanced budget requirements, many states *are* choosing to prioritize disaster investments.

FEMA's proposed rule assumes that states will be "incentivized" to invest more heavily in pre disaster mitigation by reducing the likelihood that states will receive federal aid. To support its claim, FEMA cites an obsolete six-year-old Government Accountability Office study examining only 10 states to draw the conclusion that all states refuse to save for disasters because they expect the federal government to fund their recovery. If FEMA had initiated state consultation, it would have learned that state legislatures have enacted hundreds of bills to address disaster mitigation and recovery in recent years. In fact, in the 2019 and 2020 legislative sessions, despite ongoing challenges of competing funding priorities and pandemic-induced budget shortfalls, over two-thirds of states enacted at least 95 bills appropriating funds or creating financial incentives for disaster resilience activities. This commitment is even clearer in pre disaster mitigation trends. In 2019, 36 states considered 280 disaster mitigation bills, with 31 states ultimately enacting 92 laws. In 2020, at least 39 states considered 355 disaster mitigation bills, with 24 states ultimately enacting 82 laws.

The decision to make it more difficult for states to access disaster funding in the middle of a global pandemic, and with little regard to states' disaster mitigation commitments, is at best ill-timed. The proposed rule would increase the PCII to account for inflation from over 20-30 years ago. As the rule itself states, "in setting the per capita indicator in 1999, FEMA chose not to retroactively account for inflation from 1986-1999." This proposed rule continues a troubling pattern of shifting costs to states when they can least afford it.

Again, NCSL urges FEMA to withdraw the proposed rule and stands ready to work with the agency on disaster declaration reform that reflects states' economic realities, disaster mitigation investments, and relevant perspectives. If you have further questions, please contact Lucia Bragg lucia.bragg@ncsl.org | 202-624-3576.

Sincerely,

A handwritten signature in blue ink that reads "Tim Storey". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tim Storey
Executive Director, NCSL