

STATE-FEDERAL CATASTROPHIC DISASTER RESPONSE WORKING GROUP

State-Federal Documents

****Approved by Council of Governors and Federal Principals at July 19, 2018 Meeting****

Joint Document 1

Council of Governors State-Federal Catastrophic Disaster Response Working Group Charter:

This paper describes the mission, objectives, and timelines for the State-Federal Catastrophic Disaster Response Working Group to advance work agreed upon by the Council of Governors and Federal principals during the February 2018 plenary meeting.

Mission Statement

As established by the Council of Governors, the State-Federal Catastrophic Disaster Working Group (the “Working Group”) will work to identify opportunities to improve the response to catastrophic incidents and develop recommendations for consideration by the Council of Governors and the Federal principals.

Catastrophic Incident Definition

United States Code, Title 6, Section 311(3): The term "catastrophic incident" means any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area.

Objectives

The initial objective of the Working Group is to provide recommendations on the authorization of Title 32, U.S. Code by the July 2018 Council Plenary Session.

The Working Group will develop recommendations to improve disaster management and response – to include processes; roles and responsibilities; the emergency management assistance compact and reimbursements; pay, protections and benefits; and the authorization of Title 32, U.S. Code duty status for State National Guard responders. These recommendations will be provided to the Council of Governors and the Federal principals for consideration and approval.

The Working Group will wholistically examine past disaster responses and develop consensus-based recommendations that are data-driven and informed by FEMA and federal planning scenarios. To achieve this objective, the Working Group will focus its efforts on four interrelated themes:

1. Processes

- Review the National Response Framework State and Federal disaster response responsibilities, including relevant non-governmental support such as that provided through NEMA.
- Review the Federal authorities and processes for requesting major disaster and emergency declarations.
- Review the transition from State-only response to Federally supported response under the Stafford Act.

- Review the processes for requesting Federal support and reimbursement under the Stafford Act.
 - Review resources and potential capabilities available from the States through mutual assistance and the Federal Government through the Stafford Act, as well as relevant nongovernmental organizations.
 - Review other mechanisms that could be leveraged for catastrophic incidents (to include potential waivers to policies and regulations and rarely used authorities to enhance national mobilization of resources during a catastrophic incident).
2. Emergency Management Assistance Compact (EMAC) and Reimbursements
- Review the process for EMAC utilization and assess the effectiveness and efficiency of EMAC during large-scale catastrophic incidents.
 - Assess the effectiveness and efficiency of the Stafford Act in supporting EMAC utilization in response to large-scale catastrophic incidents. Explore options for improving State and Federal responses to disasters through or in complement to EMAC.
 - Examine how National Guard personnel were deployed in support of the 2017 hurricane responses and any challenges of those deployments.
3. Pay, Benefits, and Protections
- Examine the variances in pay, benefits (e.g., medical, tax, licensure portability), and protections (e.g., employment and reemployment rights and liability) for National Guard members in State active versus Federal duty statuses based on State and Federal data
 - Develop courses of action to identify a minimum floor of pay, benefits, employment protections, and liabilities for National Guard members while in State Active Duty that is comparable to Federal pay, benefits, and protections.
 - If appropriate, make recommendations to NGB for revising the model State Military Code based on the courses of action identified above.
4. The Use of Title 32, U.S. Code. to Fund State National Guard Disaster Responses
- Review the legal feasibility of using Title 32, U.S. Code, to fund State National Guard responses, including those performed pursuant to an EMAC agreement.
 - i. If legally feasible, identify the process for States to request authorization of Title 32, U.S. Code.
 - ii. If not legally feasible, consider legislative options.
 - Establish clear policy guidelines or triggers that appropriately scope and limit the use of 502(f) to Catastrophic Incidents or Major Disasters where the Department of Defense will be reimbursed.
 - Review current statute governing the use of Title 32, U.S. Code, to fund State National Guard disaster responses.
 - Review prior requests and denials for use of Title 32, U.S. Code, to fund State National Guard disaster responses.
 - Review prior uses of Title 32, U.S. Code, in disaster responses.
 - Review State rationale and supporting data regarding the need for using Title 32, U.S. Code, to fund State National Guard catastrophic disaster responses.

Timelines and Milestones

The Working Group will work to provide preliminary deliverables prior to the May 2018 intersession conference call. The Working Group will continue work to provide appropriate deliverables on priority issues based on available data prior July 2018 plenary meeting. This work will inform the Department of Defense's response to the Council's proposal to use Title 32, U.S. Code, to fund State National Guard catastrophic disaster responses.

After the July 2018 plenary meeting, the Working Group will meet as necessary to continue its work based on the direction of the Council of Governors and the Federal principals.

Other Consideration

1. The Working Group will work to establish milestones, timelines, due outs and deliverables
2. The Working Group will establish an "Executive Committee" that will facilitate regular information sharing and data collection
3. The Working Group will create a catalogue of key questions as they related to each topic, from both the state and federal perspective to help inform discussion and analysis
4. The Working Group will identify key stakeholders required for participation under each topic to ensure a wholistic review and assessment
5. The Working Group will work to hold meetings, at minimum, once a month and ensure minutes are maintained for all meetings - This will include weekly executive committee calls
6. The Working Group will ensure recommendations include adequate data and analysis
7. NGA staff will ensure that any final considerations and recommendations are reviewed and considered by all governors prior to final approvals.
8. Federal Partners will ensure any final considerations and recommendations are reviewed and considered by all federal principals prior to approvals.
9. NGA and Federal partners will coordinate a final letter affirming any agreed upon recommendations

Joint Document 2

State-Federal Catastrophic Disaster Working Group Terms of Reference

Catastrophic Incident: the term “catastrophic incident” means any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area. (Homeland Security Act § 501(3) (6 U.S.C. 311(3)))

Emergency: “Emergency” means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States. (Stafford Act § 102(1) (42 U.S.C. § 5122(1).)

Defense Support of Civil Authorities: Support provided by United States (U.S.) Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces (when the Secretary of Defense (SecDef), in coordination with the Governors of the affected States, elects and requests to use those forces in Title 32 United States Code (U.S.C.) status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. (DoD Directive 3025.18, “Defense Support of Civil Authorities,” dated March 2018)

Complex Catastrophe: Any natural or man-made incident, including cyberspace attack, power grid failure, and terrorism, which results in cascading failures of multiple, interdependent, critical, life-sustaining infrastructure sectors and causes extraordinary levels of mass casualties, damage or disruption severely affecting the population, environment, economy, public health, national morale, response efforts, and/or government functions. (DOD, Joint Publication 3-28, dated 31 July 2013)

Declaration of Major Disaster or Emergency: When the President declares a major disaster or emergency, there is authorized a wide array of direct and financial assistance in support of an impacted state or federally recognized tribe as provided in the Stafford Act and other statutes.

Disaster Relief Fund (DRF): When a major disaster or emergency is declared, the DRF is the primary fund source for those requirements in support of the particular operation. The DRF thus provides budget authority allowing FEMA to direct, coordinate, manage, and fund eligible response and recovery efforts associated with domestic major disasters and emergencies that overwhelm state, territorial and tribal resources pursuant to the Stafford Act. Through the DRF, FEMA can also fund authorized Federal disaster support activities.

Federal Coordinating Officer: Immediately upon his declaration of a major disaster or emergency, the President shall appoint a Federal coordinating officer to operate in the affected area. The functions of the Federal coordinating officer are to: (1) make an initial appraisal of the types of relief most urgently needed; (2) establish such field offices as he deems necessary and as are authorized by the President; (3) coordinate the administration of relief, including activities of the State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, which agree to operate under his advice or direction, except that

nothing contained in this chapter shall limit or in any way affect the responsibilities of the American National Red Cross under chapter 3001 of title 36; and (4) take such other action, consistent with authority delegated to him by the President, and consistent with the provisions of this chapter, as he may deem necessary to assist local citizens and public officials in promptly obtaining assistance to which they are entitled. Where the area affected by a major disaster or emergency includes parts of

more than 1 State, the President, at the discretion of the President, may appoint a single Federal coordinating officer for the entire affected area, and may appoint such deputy Federal coordinating officers to assist the Federal coordinating officer as the President determines appropriate. (Title 42, U.S. Code, Chapter 68 § 5143)

Immediate Response Authority: A Federal military commander's, DoD Component Head's, and/or responsible DoD civilian official's authority temporarily to employ resources under their control, subject to any supplemental direction provided by higher headquarters, and provide those resources to save lives, prevent human suffering, or mitigate great property damage in response to a request for assistance from a civil authority, under imminently serious conditions when time does not permit approval from a higher authority within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. (DoD Directive 3025.18)

Major Disaster: "Major disaster" means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby. (Title 42, U.S. Code, Chapter 68 § 5122)

Mission Assignment (MA): In an emergency or major disaster, the President may direct any Federal agency, with or without reimbursement, to utilize its authorities and resources granted to it under Federal law in support of eligible State and local emergency assistance response or recovery efforts. Stafford Act §§ 402(1) and 502(a)(1) (42 U.S.C. 5170a(1) and 5192(a)(1)).

Purpose Statute: Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law. (Title 31, U.S. Code, § 301(a))

Reimbursement of Federal agencies: Federal agencies may be reimbursed for expenditures under this chapter from funds appropriated for the purposes of this chapter. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this chapter shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies. These funds would come from the DRF. (Stafford Act § 304 (42 U.S.C. § 5147).)

State Coordinating Officer: When the President determines assistance under this chapter is necessary, he shall request that the Governor of the affected State designate a State coordinating officer for the purpose of coordinating State and local disaster assistance efforts with those of the Federal Government. (Title 42, U.S. Code, Chapter 68 § 5143)

Other Relevant Information

General Accounting Guidance: DSCA is provided on a cost reimbursable basis unless directed to be provided on a non-reimbursable basis by the President or SecDef or otherwise in accordance with the law. Requests for DSCA may be submitted in accordance with the Stafford Act or under non-Stafford Act conditions.

Stafford Act

A. Under the Stafford Act, the President may direct SecDef to utilize DoD resources to help State and local governments respond to emergencies and major disasters. A Governor may request Federal assistance under the Stafford Act. Once this request is received and it is certified in accordance with conditions in the Stafford Act, the President may make an emergency or major disaster declaration.

B. The Stafford Act provides a system of emergency preparedness to protect life and property in the U.S. from hazards and to apportion responsibility for assistance in a disaster among the Federal Government, States, and their political subdivisions. FEMA is the primary Federal agency responsible for disaster relief efforts within the U.S. and administers assistance provided by the Stafford Act. Federal departments and agencies, including DoD, support FEMA when requested by FEMA. FEMA provides reimbursement for the assistance requested from disaster relief funds appropriated to FEMA for this purpose. Federal departments and agencies may seek reimbursement from FEMA for eligible costs incurred during the performance of the requested support.

Non-Stafford Act

A. A Federal entity with primary responsibility and statutory authority for handling an incident (i.e., the requesting agency) that needs support or assistance beyond its normal operations may request Department of Homeland Security coordination and facilitation through the National Response Framework (NRF). Agencies

providing disaster assistance under their own authorities independent of a Stafford Act declaration use their own appropriated mission funding. DoD may provide assistance to other Federal departments and agencies by executing inter-agency reimbursable agreements with the requesting agency and requesting reimbursement from the requesting agency for eligible expenditures. Generally, the requesting agency provides funding to DoD for the assistance requested consistent with the provisions of the Economy Act, unless other statutory authorities are available for this purpose.

B. In response to a request for assistance from a civil authority under imminently serious conditions where time does not permit approval from higher authority, Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials may exercise immediate response authority in order to save lives, mitigate great property damage, and prevent human suffering. (DoDD 3025.18).

(DoD 7000.14-R, Financial Management Regulation, Volume 11A, Chapter 19, dated July 2015)

Applicability Paragraph in DoDD 3025.18: b. Applies to the Army National Guard and the Air National Guard (hereafter referred to collectively as the “National Guard”) personnel when under Federal command and control. Also applies to National Guard personnel when the Secretary of Defense

determines that it is appropriate to employ National Guard personnel in title 32, U.S.C., status to fulfill a request for DSCA, the Secretary of Defense requests the concurrence of the Governors of the affected States, and those Governors concur in the employment of National Guard personnel in such a status.

Reimbursement of Federal agencies: Federal agencies may be reimbursed for expenditures under this chapter from funds appropriated for the purposes of this chapter. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this chapter shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies. (Title 42, U.S. Code, Chapter 68 § 5147)

Reimbursement Paragraph in DoDD 3025.18: All requests for DSCA shall be written, and shall include a commitment to reimburse the Department of Defense in accordance with sections 5121, et. seq., of the Stafford Act”, section 1535 of title 31, U.S.C. (also known as “The Economy Act”) or other authorities except requests for support for immediate response, and mutual or automatic aid, in accordance with paragraphs 4.i. and 4.o. of this section. IAW paragraph 4.i, support provided under immediate response authority should be provided on a cost-reimbursable basis, where appropriate or legally required, but will not be delayed or denied based on the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense. IAW paragraph 4.o, mutual aid is provided in accordance with a written agreement between the DoD installation and the local community. If there is no agreement, aid is provided under the immediate response authority.

Services of other agency personnel and volunteers: The Administrator may— (1) use the services of Federal agencies and, with the consent of any State or local government, accept and use the services of State and local agencies. (Stafford Act § 621(c)(1) (42 U.S.C. § 5197(c)(1).)

State-Federal Working Group Recommendations

Roles, Responsibilities, and Processes

1. The National Governors Association (NGA) should update its 2010 Governor’s Guide on disaster response. This guide will close the knowledge gaps that are at the root of many of the Council’s concerns.
2. The NGA has invited the Federal Emergency Management Agency (FEMA) to participate in the new governors’ orientation.
3. FEMA Regional Administrators are the primary interface with Governors on FEMA assistance.
4. FEMA Regional Administrators will meet with newly elected Governors upon their swearing in and explain the disaster assistance process to them and their senior staff, so they are clear on roles and responsibilities and the reimbursement process.

Emergency Management Assistance Compact (EMAC) and Reimbursements

1. NEMA should identify training and education gaps for States and Locals to ensure effective implementation of the Emergency Management Assistance Compact (EMAC) processes.
2. To broaden State and local knowledge of EMAC process, the National Emergency Management Association (NEMA) should promote available EMAC training opportunities for States and Locals including :
 - a. On-demand training for states to include local resource providers
 - b. Monthly Webinars for State Emergency Management Agencies
 - c. Online Training for States and Locals
 - i. Practice and Implementation of EMAC
 - ii. EMAC Just in Time Training
 - iii. EMAC Pre-Event Preparation for Resource Providers
 - iv. EMAC Reimbursement for State EMA
 - v. National Guard and EMAC
 - d. EMAC App in the Apple Store for Deployed Personnel
 - e. Training on EMAC for New State Emergency Management Agency Directors
 - f. Downloadable training materials and exercises on EMAC for State Emergency Management Agencies to download and conduct training

Pay, Benefits, and Protections

1. The NGA should assist the States in developing model legislation with minimum acceptable State military pay, benefits, and protections.

The Use of Title 32, U.S. Code, to Fund State National Guard Disaster Responses

1. The Army and the Air Force should work with the States, through the National Guard Bureau, to establish processes and procedures by which a Governor may make his or her National Guard personnel available to support DoD missions in support of FEMA mission assignments, in accordance with DoD Instruction 3025.22, “The Use of the National Guard for Defense Support of Civil Authorities.”

Statement of Facts

Roles, Responsibilities, and Processes

1. In establishing the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), the intent of the Congress was to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters, including by providing Federal assistance programs for both public and private losses sustained in disasters.¹
2. The Federal Emergency Management Administration (FEMA) provides Federal leadership necessary to prepare for, protect against, respond to, recover from, or mitigate against a natural disaster, act of terrorism, or other man-made disaster, including coordinating the Federal Government’s response to, and aiding the recovery from, terrorist attacks and major disasters.²
3. Consistent with the Stafford Act, Congress established, and appropriates funding on an annual basis to FEMA’s Disaster Relief Fund (\$7.9 billion for Fiscal Year 2018), which provides Federal assistance to States and Tribes for responding to and recovering from emergencies and major disasters that are of such severity and magnitude that effective response is beyond the capability of states, localities and tribes in affected areas. In accordance with the Stafford Act, the Federal cost share of Federal assistance is not less than 75 percent of the cost of eligible assistance. In qualifying circumstances, FEMA may provide Federal assistance without a State cost share.
4. Assisted States are legally required to provide reimbursed funds to assisting States under an EMAC agreement, regardless of whether FEMA is reimbursing the assisted state under an Emergency or Major Disaster declaration.
5. FEMA can assist the States encountering challenges with “cash flow” and reimbursement. This included, but is not limited to:
 - a. When necessary, and when requested by the Governor of an affected State, FEMA can recommend that the President issue a pre-incident Emergency declaration.

¹ Section 101(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Public Law 93-288, as amended; 42 U.S.C. §5121(b)).

² Section 504 of the Homeland Security Act of 2002 (Public Law 107-296; 6 U.S.C. §314).

- b. When necessary, and when requested by the Governor of an affected State, FEMA can expedite its recommendation that the President issue a major disaster declaration.
 - c. In qualifying circumstances, FEMA can provide up to 50 percent of estimated emergency work costs up front.
 - d. Expedited assistance under its 428 program, during responses to disasters.
 - e. FEMA Integration Teams (currently a pilot program) can assist States with capability gaps identified by the state, of which one could be processing reimbursement requests.
 - f. State-contracted accounting support – or accounting support requested through an EMAC agreement – to help process State claims for reimbursement is a FEMA reimbursable cost.
 - g. According to FEMA, FEMA reimbursement for emergency protective measures improved from a ten-year average of 70 days to an average of 24 days in 2017.
6. Consistent with the Stafford Act, the Department of Defense (DoD) may, as a component of the Federal Government's assistance, provide support when requested by FEMA, by another Federal department or agency, or directly by the President.³ Unlike FEMA and other Federal departments and agencies, Congress has not established in law an authority for DoD to respond to disasters, provide financial or other support to States, or act on State requests for assistance independent of direction from the President or requests from FEMA or another Federal department or agency.
 7. Congress does not appropriate funds to DoD, unlike FEMA and other Federal departments and agencies, for the specific purpose of responding to disasters, providing financial or other support to States, or acting on State requests for assistance.
 8. The Federal Purpose Statute (i.e., 31 U.S.C. § 1301) (attached) provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Emergency Management Assistance Compact (EMAC) and Reimbursements

1. The States and the Federal Government believe that the Emergency Management Assistance Compacts (EMAC) arrangements and processes scaled up to meet the challenges of Hurricane Maria.
2. EMAC is a critical component of the National Response Framework, and allows for states to provide mutual assistance to other states separate from and complementary to Federal assistance.
3. An EMAC agreement is legally enforceable between two State governments and independent of FEMA Federal reimbursement. Therefore, assisted States are legally required to reimburse assisting States for support provided pursuant to an EMAC request from the assisted State.
4. No assisted State has ever failed to reimburse assisting States for support provide pursuant to an EMAC request from the assisted State.

³ Sections 402, 403, and 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Public Law 93-288, as amended; 42 U.S.C. §5170a, 42 U.S.C. §5170b; and 42 U.S.C. §5170b).

5. Current EMAC participants have options and protocols for dealing with an assisted State that is fiscally challenged and, therefore, potentially unable to reimburse assisting States for their support.
6. According to the National Emergency Management Association, which administers EMAC arrangements and processes, the “biggest slowdown in the (reimbursement) process is delays by assisting States in filing their reimbursement claims to the assisted State.” As of May 2018:
 - a. Approximately 30 percent of EMAC claims from States assisting Texas in the response to Hurricane Harvey were not yet submitted for reimbursement.
 - b. Approximately 70 percent of EMAC claims from States assisting Puerto Rico in the response to Hurricane Maria were not yet submitted for reimbursement.
7. Unless otherwise authorized in the Constitution or law, the deployment of State personnel or resources must be done with the consent of the Governor.
8. EMAC is implemented by the state emergency management agency on behalf of the Governor.

Pay, Benefits, and Protections

1. States determine State military pay, benefits, and protections. Governors may, as some already have, work with their State legislatures to improve State military pay, benefits, and protections.
2. Congress, and in some instances DoD, determines Federal military pay, benefits, and protections. The Secretary of Defense may, as he has done in the past, work with the Congress to improve Federal military pay, benefits, and protections.
3. Initial research indicates State and Federal military pay are comparable – With the exception of Puerto Rico, every State and territory provides pay at least at the Federal rate, including allowances, while several States and territories pay above the Federal rate.
4. Initial research indicates State and Federal worker’s compensation are comparable for line of duty injuries, with one notable exception being that Federal military personnel may be eligible for 100 percent disability compensation while States typically provide up to 75 percent. However, not all States provide continuation pay in State Active Duty status for such workers.
5. Initial research indicates that both the States (through Workers Compensation) and DoD provide death benefits to the surviving dependents of military members who die in the line of duty. Some States provide for burial expenses. All National Guard members are eligible for Serviceman’s Group Life Insurance.
6. Initial research indicates both the States and DoD provide tort liability protection to military members performing official military duties.
7. According to a 2018 NGA survey, some States (18) and DoD provide reemployment protection to military members performing official military duties.

The Use of Title 32, U.S. Code, to Fund State National Guard Disaster Responses

1. As confirmed in the Deputy Secretary of Defense's May 17, 2018, letter, DoD is not authorized to approve a governor's request to authorize a duty status under section 502(f) of title 32, U. S. Code, in order to fund the governor's use of his or her National Guard to support his or her State's response to disasters, or to support another governor's disaster response pursuant to a request based on an interstate mutual aid and assistance agreement, such as the EMAC.
2. As also confirmed in the Deputy Secretary of Defense's May 17, 2018, letter, the Secretary of Defense may, with the consent of the governors concerned, authorize a duty status under section 502(f) of title 32, U.S. Code, for National Guard personnel activated to perform DoD missions in support of reimbursable FEMA mission assignments. DoD codified the process, approval authority, and criteria for this in DoD Instruction 3025.22, "The Use of the National Guard for Defense Support of Civil Authorities."
3. FEMA reimburses DoD for the performance of DoD-approved, reimbursable FEMA mission assignments. As reaffirmed by FEMA in a March 28, 2018, letter to DoD, "FEMA is not authorized to reimburse DoD should DoD approve a governor's request for title 32." FEMA does not reimburse other Federal agencies for assistance provided under their own statutory authority.