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**MEMORANDUM**

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**TO:** PROFESSOR LERNER  
**FROM:** ANDREA TIMASHENKA  
**SUBJECT:** FEMA RELIEF FOR COURTHOUSES AND OTHER GOVERNMENT ENTITIES  
**DATE:** 4/11/2006

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**Issue:** A number of courts hearing child abuse and neglect cases have been devastated by the hurricanes. Can government entities make claims for FEMA funds? Most specifically, can courts get FEMA money for rebuilding efforts? What about child welfare agencies -which, unlike courts, are also eligible for federal administrative matching funds?

**Brief Answer:** Both courts and child welfare agencies should be able to obtain FEMA funds to rebuild after the devastation of Hurricane Katrina and Rita. Following past disasters, courthouses have received funding for rebuilding efforts, and should likewise be able to receive funding now as long as FEMA's requirements for disaster assistance are followed. While the eligibility of child welfare agencies is not explicitly stated by FEMA or applicable federal code

as the courts' eligibility is, a child welfare agency will likely be viewed as an eligible applicant.

**Discussion:**

I. WHY COURTHOUSES AND CHILD WELFARE AGENCIES WOULD LIKELY RECEIVE DISASTER RELIEF FROM FEMA.

Courts

Courts can (and have!) received money for rebuilding efforts. In 2002, FEMA approved more than \$2.6 million dollars to repair damages caused by the Nisqually Earthquake to the King County Courthouse in the state of Washington.<sup>1</sup> The King County Courthouse suffered more than \$8 million in total damages; FEMA and the state are covering \$2.6 million, and the County is trying to get the rest from insurance. The eligibility of public entities to receive FEMA funds is codified in 44 CFR 206.223(c). One case that describes how this regulation, and related ones, is applied to government entities seeking FEMA relief is City of San Bruno v. FEMA.<sup>2</sup> The courthouses may also be eligible for FEMA funds through the Community Disaster Loan (CDL) Program created in 2005. The CDL Program was created to give up to \$1 billion in direct loans to local

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<sup>1</sup> <http://www.fema.gov/news/newsrelease.fema?id=4650>

<sup>2</sup> City of San Bruno v. FEMA, 181 F. Supp. 2d 1010 (D. Cal. 2001).

governments.<sup>3</sup> The funds must be used to "carry on existing local government functions of a municipal operation character, or to expand such essential functions to meet disaster-related needs."<sup>4</sup> If the activities of the courthouse are seen to meet this requirement (and others necessary for the funding) then the courthouses may also be able to receive money from CDL Program. The FEMA funds for the King County Courthouse repairs came from the FEMA Public Assistance Program. Over \$1.2 billion has been approved for similar projects of the Public Assistance Program for Hurricane Katrina relief.<sup>5</sup>

#### Child welfare agencies

Other entities, such as child welfare agencies, should also be able to claim FEMA funds under the FEMA Public Assistance Program. The FEMA Public Assistance Program provides disaster assistance to repair, replace, or restore publicly owned facilities and facilities of some Private Non-Profit (PNP) organizations.<sup>6</sup> According to the FEMA website, eligible applicants for the Public Assistance Program include state and local governments, Indian tribes,

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<sup>3</sup> [http://www.fema.gov/pdf/rrr/pa/fs\\_cd1.pdf](http://www.fema.gov/pdf/rrr/pa/fs_cd1.pdf)

<sup>4</sup> *Id.*

<sup>5</sup> <http://www.fema.gov/news/newsrelease.fema?id=23418>

and certain PNPs. Eligible PNPs "must be open to the public and perform essential services of a government nature."<sup>7</sup> FEMA's website lists the following as examples of eligible PNPs: medical care facilities, custodial care facilities, educational facilities, emergency facilities, utilities, museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, shelter workshops, and facilities which provide health and safety services of a governmental nature.<sup>8</sup> Child welfare agencies appear to fall into this eligible PNP category.

II. FEMA'S GROUNDS FOR NOT GRANTING A COURTHOUSE OR CHILD WELFARE AGENCY FEDERAL DISASTER RELIEF UNDER THE PUBLIC ASSISTANCE PROGRAM.

If FEMA tried to deny the courthouses or other government entities disaster relief, the most likely causes of this attempt would be claims that: the assistance was sought too late, the assistance was sought not as a last resort, or the project seeking funding otherwise did not meet the requirements to receive FEMA funding. Additionally, if a courthouse is denied funding by FEMA and then appeals this decision, FEMA would likely argue that its decision to deny funding cannot be overruled by

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<sup>6</sup> <http://www.fema.gov/rrr/pa/overview.shtm>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

the judiciary. Each of these possible claims will now be examined in turn.

#### Time bar

If the courthouse or other government entity does not apply for funding within the date restrictions set by FEMA, FEMA is may attempt to deny the funding request. After the President signs a major disaster declaration, FEMA will establish a time period in which those seeking disaster relief must apply for it. Usually the request forms for disaster relief under the Public Assistance Program should be submitted within thirty days of the disaster declaration.<sup>9</sup> However, FEMA is free to extend this deadline. FEMA has chosen to currently extend the deadline for the victims of Hurricane Katrina and Rita until March 11.<sup>10</sup> The deadline could be extended further in the future.<sup>11</sup> However, it is extremely important to meet the time deadline as FEMA has denied many applicants funding in the past for untimely filing.<sup>12</sup> If the

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<sup>9</sup> <http://www.fema.gov/rrr/pa/overview.shtm>.

<sup>10</sup> <http://www.fema.gov/news/newsrelease.fema?id=22199>. This press release specifically mentions that residents can still apply for individual assistance, such as temporary housing assistance, but author believes that this deadline also applies to the public assistance program.

<sup>11</sup> *Id.* ("As long we continue to hear from people who need disaster assistance, we want to make it available," said R. David Paulison, acting FEMA director. "We are renewing our efforts to identify and reach people who may not have registered for various reasons and need more time to apply.")

<sup>12</sup> See e.g., *Wagner v. Director, Federal Emergency Mgmt. Agency*, 847 F.2d 515 (9th Cir. 1988); *Wallace v. Federal Emergency Mgmt. Agency*, 2001 U.S. Dist. LEXIS 1547 (D. Cal 2001); *Crown Packing Corp. v. Guiffrida*, 1984 U.S. Dist. LEXIS 19881 (D. Mo. 1984).

claim, or any part of the application process, is not completed on-time, FEMA may deny the funding request.

#### Last resort

FEMA may also deny disaster relief funding if the money is not sought from FEMA as a last resort. "Under federal disaster relief law, the federal government is essentially a last resort provider of disaster relief." Hawaii v. FEMA, 294 F.3d 1152, 1154 (9th Cir. 2002). If assistance can be provided through insurance or other means, then FEMA requires that these options are fully explored before FEMA will provide funding. If FEMA authorizes funding for a project that is also covered by insurance, 42 U.S.C. § 5155(c) requires that FEMA is reimbursed. Hawaii, 294 F.3d at 1158. FEMA may deny a claim for funding if the assistance is not sought as a last resort.

#### Funding requirements

FEMA may also deny a funding request if the Public Assistance program's requirements are not met. The requirements include that the applicant and work must be eligible as well as other less major requirements.

#### *Eligible Applicant*

As explained above<sup>13</sup> only governmental bodies and certain agencies are eligible for assistance under the Public Assistance Program, and FEMA may try to argue that a courthouse or other entity, like a child welfare agency, is not an eligible applicant. However, FEMA'S broad definition of "local government" covers, "entities having an executive, administrative, legislative, or judicial nature. It may include school districts, sheriffs' offices, judicial bodies, district attorney offices, district courts, and water and sewage authorities."<sup>14</sup> Given its own definition, a claim by FEMA that a courthouse is not an eligible applicant would not likely pass judicial muster. As explained above, a child welfare agency or other governmental agency will likely be found as an eligible PNP organization; however, since a child welfare agency is not explicitly identified as an acceptable PNP, an attempted challenge to its status as an eligible applicant may be more difficult to show than a courthouse. If FEMA claims that the entity is not an eligible applicant, than it may deny funding.

*Eligible Work*

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<sup>13</sup> *Supra* I.

FEMA may also deny a funding request for a courthouse or other entity if it deems the work for which the funding is requested does not meet its eligibility requirements. In the Public Assistance Program, "[t]o be eligible, the work must be required as the result of the disaster, be located within the designated disaster area, and be the legal responsibility of an eligible applicant."<sup>15</sup> Once the work meets these requirements, it is then deemed either emergency or permanent work.<sup>16</sup> Emergency work includes: removing debris from public roads and private property of government interest and measures to end or lessen immediate, public threats.<sup>17</sup> Permanent work is "to restore an eligible damaged facility to its pre-disaster design" and can range from small repairs to major replacements.<sup>18</sup> Both types of work have time limitations. The deadline for emergency work to be completed is six months from the date of the disaster declaration; the deadline is eighteen months for permanent work.<sup>19</sup> If the work for which the funding is requested does not meet these requirements, then FEMA may deny funding.

#### Courts lack jurisdiction

If an entity applies for funding, FEMA denies the request, and the entity appeals to the judicial system, FEMA will likely

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<sup>14</sup> <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-20920.htm>.

<sup>15</sup> <http://www.fema.gov/rrr/pa/overview.shtm>

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

argue that it is outside of the court's province to award the funding to the entity. The "agency discretion exception" precludes governmental liability "based upon the exercise or performance of or the failure to exercise or perform a *discretionary function or duty* on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." Graham v. Fed. Emergency Mgmt. Agency, 149 F.3d 997, 1005 (9th Cir. 1998). "This provision 'precludes judicial review of all disaster relief claims based upon the discretionary actions of federal employees.'"<sup>20</sup> This principle has been applied in many cases where the court has determined that it does not have jurisdiction to decide whether FEMA's decision not to grant funding was appropriate or not.<sup>21</sup> Therefore, if FEMA denies funding to a courthouse or other entity, it may prove very difficult to persuade the court to re-examine FEMA's decision.

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<sup>19</sup> *Id.*

<sup>20</sup> *Graham*, 149 F.3d at 1005. (citing *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987)).

<sup>21</sup> See e.g., *Exim Mortgage Banking Corp. v. Witt*, 16 F. Supp. 2d 174 (D. Conn. 1998); *Rojek v. FEMA*, 234 F. Supp. 2d 999 (D. Iowa 1999).