

An hourglass-shaped graphic with a globe in the top bulb and a smaller globe in the bottom bulb. The hourglass is light blue and has a dark blue top cap. The globe in the top bulb is dark blue with light blue continents. The globe in the bottom bulb is light blue with dark blue continents. The hourglass is filled with a light blue liquid that is dripping down.

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Flood Insurance Requirements for Stafford Act Assistance

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CRS Report for Congress

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Summary

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) imposes flood insurance requirements upon eligibility for disaster assistance in two general cases: (1) if the entity seeking disaster assistance has received disaster assistance in the past, or (2) if the entity seeking disaster assistance is a state or local government or private nonprofit located in a federally designated special flood hazard area (SFHA) as determined under the National Flood Insurance Act of 1968. The requirements imposed by the Stafford Act operate independently of each other, and a potential applicant for disaster assistance may fall into both categories. This report will discuss the specific requirements imposed in each situation after briefly discussing the history of flood insurance and the relevant types of disaster assistance.

Overview of Federal Flood Insurance

Federally funded flood insurance was first made available in a pilot program under the Federal Flood Insurance Act of 1956 (FFIA), P.L. 84-1016, 70 Stat. 1078.¹ Twelve years later, Congress supplanted the FFIA with the National Flood Insurance Act of 1968 (NFIA).² Like the earlier FFIA, the NFIA authorized the federal government to insure individuals against damage to or losses of real or personal property caused by floods in the United States. Unlike its predecessor, the NFIA imposed a mandatory purchase requirement if federal financial assistance, including loans made by federally regulated lenders, was offered in designated special flood hazard areas (SFHA).³ Flood insurance

¹ One commentator noted that “the [Federal Flood Insurance Act] did not succeed in selling a single insurance policy” and that, after only one year, Congress failed to appropriate adequate funding for the program, ultimately leading to its “effective termination” by “financial starvation.” David A. Grossman, *Flood Insurance: Can A Feasible Program Be Created?* 34 LAND ECONOMICS 352 (Nov. 1958).

² Codified at 42 U.S.C. § 4001 *et seq.*

³ See 42 U.S.C. § 4012a(a). While this mandate is relevant to the discussion of previous disaster (continued...)

offers financial reimbursement to policy holders in the event that a flood damages or destroys covered property. Although traditional homeowners' insurance policies may cover damage caused by other hazards (*i.e.* fires, windstorms, or tornados), flood damage is generally not covered under homeowners' policies.⁴ Currently, federal flood insurance policies are sold under the National Flood Insurance Program (NFIP) to homeowners, renters, and businesses covering "structures and their contents."⁵

Overview of Federal Disaster Assistance

The Stafford Act authorizes, but does not require, the President to offer federal assistance to repair or replace damaged real property and its contents in the event of a major disaster, including a flood.⁶ The assistance provided can be classified, and will be discussed, according to the type of applicant involved: (1) state or local governments, (2) private nonprofits, and (3) individuals and households.

The first two categories of applicants are generally eligible for repair and rebuilding assistance under § 406 of the Stafford Act,⁷ which authorizes assistance to repair facilities owned by state or local governments and private nonprofits that provide critical services.⁸ Examples of such nonprofits include hospitals, schools, fire departments, museums, and shelters.⁹ An applicant under § 406 may also choose to receive a slightly reduced in-lieu contribution, if it would be in the public interest not to rebuild or repair the structure.

The third category of applicants, individuals and households, is eligible for major disaster assistance under § 408 of the Stafford Act.¹⁰ Assistance is available to provide housing assistance in the form of rent subsidies, actual units, and financial assistance to repair or replace destroyed housing or to build new housing.¹¹

Requirements for Previous Recipients of Disaster Assistance

Flood insurance may be a prerequisite for federal disaster assistance if the damaged or destroyed property had been previously restored or improved using federal disaster assistance. In some cases, the receipt of past federal disaster assistance creates an

³ (...continued)

relief recipients below, it is not the focus of this report, and operates independently of the requirements found in the Stafford Act.

⁴ In its findings supporting the NFIA, Congress noted that a variety of factors made it difficult for the insurance industry to offer affordable flood insurance. 42 U.S.C. § 4001(b).

⁵ 44 C.F.R. § 61.3.

⁶ The definition of a major disaster in the Stafford Act specifically includes flooding. 42 U.S.C. § 5122(2).

⁷ *Codified at* 42 U.S.C. § 5172.

⁸ 42 U.S.C. § 5172(a)(1), (3).

⁹ 44 C.F.R. § 206.222(e).

¹⁰ *Codified at* 42 U.S.C. § 5174.

¹¹ 42 U.S.C. § 5174(c).

obligation on the part of the recipient to prospectively maintain flood insurance on the property. Any flood damage incurred during any period in which flood insurance for such property has lapsed is not eligible for federal disaster assistance. The circumstances in which prospective flood insurance will be required are discussed below in the context of specific classes of recipients.

State and Local Governments. Section 311(a) of the Stafford Act requires all recipients of § 406 assistance to obtain adequate insurance on repaired or rebuilt property. For example, imagine that a city receives flood disaster assistance to rebuild a damaged police station. Under § 311(a) of the Stafford Act,¹² the city must promise to obtain and maintain flood insurance on that police station as a condition of receiving that assistance. Furthermore, § 311(b) makes that flood insurance a prerequisite of future disaster relief. If the policy subsequently lapses, and a second flood damages the police station, that damage would not be eligible for assistance under § 406.¹³

Under § 311(b), disqualification for future disaster assistance is not limited to cases where the prior and current disasters are of the same variety. Assistance under § 406 is unavailable in *any* type of major disaster if the applicant has not complied with *all* insurance requirements imposed as conditions of previous disaster assistance.¹⁴ But only insurance related to the earlier disaster is required.¹⁵ To extend the previous example, a police station initially damaged by a fire must maintain fire insurance in order to receive assistance in *any* type of later disaster, *e.g.* a flood. The police station's lack of flood insurance after the initial fire would not disqualify the property for assistance during the later flood.

Private Nonprofits. Since private nonprofits also receive disaster assistance under § 406, the flood insurance requirements for private nonprofits that have previously received disaster assistance are the same as those for state and local governments discussed above. If a private nonprofit has been damaged in a flood and uses federal assistance to make repairs, it must purchase and maintain flood insurance in order to remain eligible for future disaster assistance.

Individuals and Households. Section 311 does not apply to federal disaster assistance to individuals and households under § 408. However, individuals and households that have previously received flood disaster assistance under § 408 may be subject to a similar prospective flood insurance requirement in order to be eligible for future disaster relief.¹⁶ The terms of this flood insurance requirement are similar to the terms of § 311. Homes that were damaged in a flood and repaired or replaced using federal disaster assistance must obtain and maintain sufficient flood insurance as a

¹² *Codified at* 42 U.S.C. § 5154.

¹³ 42 U.S.C. § 5154(a), (b). States are permitted to satisfy the insurance requirement by acting as self insurers for state owned property. 42 U.S.C. § 5154(c).

¹⁴ *See* 42 U.S.C. § 5154(b) (stating that all insurance requirements must be met, not merely those implicated by the present disaster).

¹⁵ 44 C.F.R. § 206.252(d) and 206.253(b)(1).

¹⁶ 42 U.S.C. § 5154a(a). Individuals and households are only required to get prospective flood insurance if they receive assistance for property located in an SFHA.

condition of receiving the assistance.¹⁷ This purchase requirement operates independently of the NFIA’s mandatory purchase requirement that may be triggered by the receipt of other types of federal financial assistance.¹⁸

Individuals and households are only disqualified from federal disaster assistance if the previous disaster and the current disaster are both floods. A home that was repaired after an earthquake and subsequently damaged by a flood will not be denied assistance even if it was not covered by either a flood or earthquake insurance policy at the time of the flood. Similarly, a home that is first damaged by a flood, but later damaged by an earthquake, is also eligible for disaster assistance regardless of whether it is covered by flood insurance.

Requirements in Special Flood Hazard Areas

A Special Flood Hazard Area (SFHA) is an area that has been determined by the Federal Emergency Management Agency (FEMA) to have a 1% or greater likelihood of flooding in any given year.¹⁹ The risk assigned to an area impacts the cost of flood insurance policies.²⁰ For applicants under § 406 of the Stafford Act, flood insurance can also be a prerequisite for disaster assistance within an SFHA.

The Importance of Community Participation. Under the NFIA, no flood insurance policies may be provided within a community unless that community participates in the NFIP.²¹ Participation in the NFIP requires a community to enact adequate land use controls intended to limit or mitigate damage in the event of a flood.²² Importantly, the NFIA also prohibits federal officers from authorizing “financial assistance for acquisition or construction purposes” in an SFHA if the community does not participate in the NFIP.²³ The NFIA also explicitly includes flood disaster assistance within the definition of “financial assistance.”²⁴ Therefore, a flood victim in an SFHA is only eligible for federal disaster assistance if the community participates in the NFIP.

¹⁷ Individual and household flood victims may be eligible for a special group flood insurance policy backed by the NFIP. This policy provides coverage for three years and disaster assistance may reimburse the premiums. 44 C.F.R. § 206.119(d).

¹⁸ See *supra* note 3 and accompanying text.

¹⁹ 44 C.F.R. § 59.1. FEMA is the agency charged with evaluating the risk of flooding for purposes of the NFIP. 42 U.S.C. 4011(a).

²⁰ See 44 C.F.R. § 61.9 (establishing different chargeable rates for flood insurance policies based upon risk of flooding).

²¹ The term community means any governmental entity with “the authority to adopt and enforce flood plain management regulations for the areas within its jurisdiction.” 44 C.F.R. § 59.1.

²² 42 U.S.C. § 4022(a)(1). Criteria for land use controls are defined in 44 C.F.R. § 60.1 *et seq.*

²³ 42 U.S.C. § 4106(a).

²⁴ The definition of “financial assistance for acquisition or construction purposes” excludes Stafford Act assistance “other than assistance under such Act *in connection with a flood.*” 42 U.S.C. § 4003(a)(4) (emphasis added).

State and Local Governments. If the community does not participate in the NFIP, FEMA has interpreted federal law to prohibit any building assistance to affected state and local governments.²⁵ If the community *is* participating, an applicant for § 406 assistance may still be subject to a reduction in assistance for failing to have sufficient flood insurance. Provided that an area has been designated as an SFHA for more than one year, § 406(d) reduces the amount of assistance to an uninsured applicant by the maximum amount a flood insurance policy would have provided.²⁶ In-lieu contributions to uninsured facilities in an SFHA are completely barred rather than reduced.²⁷

Having flood insurance would not necessarily increase the amount of assistance a damaged structure could receive under § 406. This is because § 312 of the Stafford Act mandates that assistance be reduced by the amount of insurance proceeds a covered entity actually receives.²⁸ Therefore, a structure with adequate flood insurance may not be subject to reduced assistance under § 406(d), but would be subject to reduced assistance under § 312. In this way, § 406(d) of the Stafford Act essentially acts as a presumption that any public structure in an SFHA for more than one year will have flood insurance; accordingly, the amount of assistance is reduced as though such flood insurance was in place.²⁹

Private Nonprofits. Like state and local governments that suffer flood damage, some private nonprofits are eligible for construction assistance under § 406.³⁰ Private nonprofit applicants are also subject to the § 406(d) flood insurance requirement if the damaged structure has been located in an SFHA for more than one year.³¹ The amount of the reduction in this case is the same as it is for similarly situated state and local governments.

But § 406(d)(3) of the Stafford Act appears to create an exception for private nonprofits located in non-participating communities. Under this provision, the reduction in assistance shall not apply if the only reason the applicant does not have adequate flood insurance is that flood insurance is not available because the community does not participate in the NFIP.³² This exception appears to be in conflict with a separate provision of the NFIA that prohibits any assistance to facilities located in a non-participating community that is also located in an SFHA.³³ It is possible to read § 406(d)(3) as implicitly repealing the NFIA insofar as they conflict with each other. The

²⁵ See 42 U.S.C. § 4106(a), 44 C.F.R. § 206.252(b).

²⁶ 42 U.S.C. § 5172(d).

²⁷ 42 U.S.C. § 5172(c).

²⁸ 42 U.S.C. § 5155.

²⁹ See 54 Fed. Reg. 11614 (“[A]ll buildings and their contents in an identified flood plain will be *treated as if* they were fully covered by the standard flood insurance policy available through the NFIP.”) (emphasis added).

³⁰ Eligible nonprofits must provide “critical services.” 42 U.S.C. § 5172(a)(3).

³¹ 42 U.S.C. § 5172(d)(1).

³² 42 U.S.C. § 5172(d)(3).

³³ 42 U.S.C. § 4106(a).

exception in § 406(d)(3) of the Stafford Act was enacted after the general prohibition located in the NFIA.³⁴ Section 406(d)(3) also deals with a particular factual scenario and type of assistance rather than the NFIA's broad language. Furthermore, it was arguably incongruous for Congress to make an exception to the reduction imposed by § 406(d) if it also intended the blanket preclusion of assistance under the NFIA to apply in these situations. In order to avoid reading § 406(d)(3) as meaningless, one could argue that it necessarily also created an exception to the general prohibition contained in the NFIA.³⁵

Nevertheless, FEMA has construed the exception in § 406(d)(3) as illusory. FEMA regulations state that the NFIA prohibition clearly prohibits *any* assistance to entities in non-participating communities that are also located in an SFHA.³⁶ In comments accompanying those regulations, they also noted that

private nonprofit facilities in special flood hazard areas which are not covered by flood insurance solely because of the local government's failure to participate in [the NFIP] are exempted from [the reduction in § 406(d)]. However, even though this exemption is reflected in [current regulations], it is *misleading* ... because the Flood Disaster Protection Act of 1973 prohibits Federal assistance in special flood hazard areas of nonparticipating communities.³⁷

Affected private nonprofit facilities may become retroactively eligible for assistance under § 406 if the community later becomes a participating community within six months of the flood disaster in which the facility was damaged.³⁸

Individuals and Households. Assistance to individuals and households located within an SFHA will not be limited solely because the applicant lacks adequate flood insurance. However, like state and local governments and private nonprofits, individuals and households that seek federal assistance to repair or rebuild housing located within an SFHA are ineligible for disaster relief if the community does not participate in the NFIP. However, FEMA regulations permit individuals and households to be eligible if the community begins participating in the NFIP within six months of a flood disaster.³⁹

³⁴ The NFIA prohibition was enacted as § 202 of the Flood Disaster Protection Act of 1973, P.L. 93-234, whereas § 406(d)(3) was enacted as part of the Disaster Relief and Emergency Assistance Amendments of 1988, P.L. 100-707.

³⁵ See, e.g., CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, at 10, 26-27, by George Costello.

³⁶ 44 U.S.C. § 206.252(b).

³⁷ 54 Fed. Reg. 11,614 (emphasis added).

³⁸ 44 U.S.C. § 206.252(b).

³⁹ 44 U.S.C. § 206.110(k)(2).