Establishing a Deductible for FEMA’s Public Assistance Program
Docket ID FEMA-2016-0003

Association of State Floodplain Managers’ Comments in Support of the Deductible

Summary of ASFPM comments to the SANPRM: submitted 4-12-17

Our responses to the Supplemental Advanced Notice of Proposed Rulemaking are below, and while we strongly support the concept of a PA deductible, these comments explain where we think the proposal may work well and how it can be improved in certain areas.

ASFPM appreciates the added detail put into the SANPRM and use of examples and estimates of how the PA deductible might work in each state. We realize the base deductible, estimates of credits and resultant PA deductibles will need to be refined for each state, which will require FEMA to work closely with each state to agree on which state activities receive credit and how much credit each will be given.

Key Points: ASFPM positions are:

1. We strongly agree with the proposed PA deductible concept—a simple adjustment to the per capita concept will only shift costs, but the proposed concept will reduce disaster costs in the long term and create more resilient states and communities.
2. We strongly support the focus on state programs only (not local or regional).
3. We will not comment on calculations for base deductible for each state, but leave that for each state to comment on, as long as the result is equitable across the board. The key is to reward states doing the most.
4. We support the Total Taxable Resources (TTR) method to determine state financial capacity, along with the bond rating. However, we are concerned with using surplus and reserve funding, as those are more indicative of political decisions rather than fiscal capacity, especially if only using a one-year period. At a minimum, TTR and bond rating should be weighted more heavily when calculating a state’s fiscal capacity.
5. We support use of Hazus-based AAL. An open source tool is critical, but Hazus must be updated to project future damage based on future conditions that include sea level rise, watershed development and more intense hydrology. This should be doable since the proposed PA deductible has a long phase-in period.
6. The risk index approach seems reasonable, but the example that another Katrina in New Orleans may not be as damaging next time is not necessarily true. NOLA still only has 1% storm event protection, with a huge amount of residual risk.
7. The seven factors providing credit seem reasonable, but credit for any measure must:
   a. Apply statewide and be fully implemented and fully enforced.
   b. Truly reduce future federal taxpayer costs for disasters.
8. The proposed ratio for credits is appropriate, with strong support for 3:1 credit for mitigation actions. And if those mitigation actions include future conditions, it should get more credit—4:1 or 125%.
9. We agree the alternatives considered are not as effective as the proposed concept in meeting the stated objectives of reducing federal taxpayer costs and creating more resilient communities.
10. ASFPM does not support using credit for CRS activities.
11. We do not believe these incentives for state mitigation expenditures will lessen private mitigation expenditures. In fact, it should increase that private investment.
12. The pilot period and phase-in period are good approaches that allow adjustments as the process evolves. The process is significant enough that time and adjustments will be important.
Background

The number of federally-declared disasters has gone up dramatically over the past decades, from an average of 13 per year in 1950 to an average of 141 recently. Even more dramatic, the percentage of the disaster costs picked up by the federal taxpayers has increased from just 20 percent to more than 75 percent. No one knows for sure how much flood disasters alone cost the nation, but some viable estimates run from $20 billion/year to maybe five times that amount. Furthermore, recent estimates are that the U.S. spends about $500 in disaster relief for every $1 in mitigation. Since mitigation saves taxpayers $4 for every dollar spent, programs to incent mitigation are critically important.

ASFPM has long been concerned that the nation’s disaster relief program is not being used effectively to build state capability to mitigate hazards. Instead, it has created an atmosphere where states are taking fewer steps and investments to mitigate existing hazards or prevent creating new hazards because they believe federal taxpayers will pay for most of the disaster costs when disaster strikes. This does not need to be the case. **This proposal for a Public Assistance deductible for states is an important first step to reverse this trend.** It will provide some reward for states, tribes and territories that mitigate and prevent creating future disasters. This will also help them build capability to handle future disasters. In fact, **we believe this is one of the most important proposed policy adjustments in disaster programs since the 1993 adjustments to the Hazard Mitigation Grant Program.**

Too many states have come to believe natural disasters are the problem of the federal government, when actually, public safety is the primary responsibility of state and local governments that have authority to guide development to be at more or be less at risk to natural hazards. States must provide local governments with the authority, technical assistance and support to become resilient. Too many small disasters are being declared federal disasters, and too much of the cost is being picked up by federal taxpayers. Solving this problem is difficult enough, but solving it in a way that equitably shares the cost of disasters among all levels of government and property owners is a special challenge. The concept of the proposed PA deductible is a positive step in this direction.

ASFPM supports the long-term goal of more resilient communities. While we realize the threshold for declaring a disaster has not kept pace with inflation, it makes sense to use a different approach than the dollar threshold in order to foster more mitigation/resilience than to unilaterally raise the threshold. We know the current system of disaster relief tends to reward states that do the least to prevent future disasters with higher federal taxpayer cost shares. Those states tend to have high risk and experience catastrophic disasters, often because little is being done to guide development away from those high-risk areas.

The PA deductible is an option with significant potential to incentivize mitigation and build state capacity. A deductible should identify and reward recipients who take steps to make themselves more resilient, mitigate disasters and/or build state and community capacity.

**ASFPM points out a problem** with the current PA that also does not align with this incentive/reward concept. Currently, communities are eligible for PA and other federal dollars even if they do not belong to the NFIP. That is wrong and this rule provides an opportunity to correct that. No flood-prone community should be eligible for **any category of PA** for any disaster unless they are in good standing in the NFIP.

Many states will claim poverty, and data will likely show the states that speak loudest are likely the ones that have claimed the most federal taxpayer funds for disasters in the past. Somehow, this system must be set up in a way that builds capacity in those states to reduce future disaster costs.
ASFPM’s In-depth Comments on the Concept of a PA Deductible

Specific comments
Our responses to the Supplemental Advanced Notice of Proposed Rulemaking are below and while we strongly support the concept of a PA deductible, we explain where we think the proposal may work well and how to improve it in certain areas.

Calculating the deductible
We agree with moving away from calculating the deductible using the PA per capita indicator as this does not measure the effort the state is putting into its actions to reduce future disaster costs (neither do metrics like population or total risk). ASFPM continues to support using the Total Taxable Resources (TTR) as a key basis to evaluate the state’s fiscal capacity. While we can support use of bond rating, we are concerned using the state’s budget surplus/deficit and reserve funds are less appropriate since those indicators are more subject to political decisions than long-term fiscal policy to mitigate disasters. Providing federal taxpayer funds to a state unwilling to mitigate and plan for disasters or build up funds for the next disaster simply rewards bad behavior and puts inappropriate burden on the federal taxpayers. For example, take a state that makes a fiscal policy decision to cut income taxes. While its TTR has not decreased, its possible budget surplus, revenue and even state staffing/capability in important programs such as hazard mitigation or floodplain management is likely reduced. Such a state should not have a deductible reduced due to its own short-term policies. This system must be set up to reward good behavior and decision making by states, and show other states how to do the same.

In terms of calculating the deductible, we do not advocate using the measurement of disaster risk as each state’s risk profile is different and ever changing (and the risk can become even higher if the state allows more development in high-risk areas) making such a calculation difficult if not impossible. Rather, the concept of reduced disaster risk should be applied in terms of the applicability of the deductible.

Scope or applicability of the deductible
We agree the deductible should only be applied to the recipient state, tribal or territorial government disaster applicants and should apply to all PA costs. The deductible should not be passed onto the community level. And by the same token, actions by sub-recipients (communities) should of course not count toward the state deductible. The state portion of direct funding for those actions would count. For example, community actions under CRS should not be counted because this is not a statewide action. Providing some proportional credit for CRS also is inappropriate. The CRS actions by communities are not appropriate to count as credit because they are (1) not applied statewide (2) are already credited under the NFIP and (3) the CRS program is designed for an insurance program, not directed to reduction of federal taxpayer costs for disasters.

One aspect on applicability that is unclear is whether the state’s contribution to the deductible, because it is actually PA costs, reduces the basis for calculating the mitigation amount that would be provided as part of the disaster under HMGP. ASFPM strongly recommends the final rules make clear that the basis for the purposes of calculating HMGP available is inclusive of the state’s contribution to the deductible since it would otherwise be counted as part of PA.

Satisfying the deductible
The intended outcome of the proposal is to make meaningful improvements in mitigating risk to existing development, and especially to public infrastructure, which supports that development, as well as preventing added development
and infrastructure that will expose federal taxpayers to added disaster funding in the future. The credits listed in the SANPRM do not always match the actions of the listed states as we know them, but we think that will be a negotiated action between each state and FEMA. First, however, FEMA will have to set up a listing of creditable actions and how much credit each might get. This will need vetting to arrive at an agreed upon list. In general, ASFPM supports the seven activities and the ratio applied to them. We especially support the 3:1 ratio for mitigation. Additional credit should be given for mitigation that promotes social equity like favoring low to moderate income neighborhoods, such as 4:1 or 125%. FEMA must ensure nonstructural and nature-based approaches receive full or even added credit. ASFPM supports the approach that credit for mitigation is not capped—the more mitigation the more we reduce disaster damage. Finally, consideration should be given for additional credit (or even a higher ratio such as 4:1) to states that either require (as part of their mitigation strategy) or significantly contribute to ensuring 406 mitigation is fully utilized. We believe FEMA would be justified in a higher ratio as proportionally more federal taxpayer funding goes to PA than to individuals after a disaster.

The SANPRM indicates states picking up the non-federal share of FEMA mitigation programs does not count towards the deductible. ASFPM finds this general position problematic for two reasons. First, when states contribute cost share to mitigation, it allows for the implementation of more mitigation in rural and low income communities where even a 25% cost share can be burdensome. When states do not, mitigation projects tend to be concentrated in areas that have some sort of funding mechanism locally disaster after disaster (which is typically in larger more urban communities). So state contributions tend to ensure better distribution of mitigation resources around a state or disaster-impacted area. As we said earlier, this is something that should be credited.

Second, it is politically easier and often more successful to approach a state Legislature with a proposal to provide the non-federal cost share for a mitigation program versus standing up their own program or initiate new activities. In these cases, FEMA should not assume states are simply providing matching dollars for largely federal projects. In some states, the state “match” to HMGP has been used to reduce cost share, but to also broaden the mitigation resources available overall and allow more mitigation projects to be funded. For example, let’s say the amount of federal HMGP is $7.5 million. The amount considered non-federal match would be $2.5 million and a state decided to provide that full amount of funding. One may think that the total mitigation funding is now $10 million. Yet administratively, the state decides each project would get 75% federal funding, 12.5% state funding and require 12.5% local funding unless there was a particular hardship. In that case, the total mitigation funding would be $11.25 million, thereby allowing more mitigation projects to be funded. The bottom line is that picking up the non-federal share for mitigation programs can be implemented in a variety of ways and should not automatically be excluded from counting towards the deductible.

Land use and building codes are some of the most effective tools for reducing future disaster costs, especially for wind driven hazards. But those program standards must be applied statewide. The type of mitigation action matters. Some mitigation actions like buyouts and open space restrictions are a “one and done” for the federal taxpayer who will never again pay disaster costs for damage on that property. Other actions like elevation, levees, etc. still leave residual risk and retain exposure to federal taxpayers. So if credited, the credit should be partial. State actions to identify hazards using state-funded mapping of hazards for flood, landslides, dam failure zones, etc. should get credit. Added credit must be provided for states that map or regulate based on future conditions like sea level rise, watershed development and increased hydrology. And states that map and manage residual risk areas below dams and behind levees and avoid the 500-year flood area for critical facilities save future disaster costs for federal taxpayers and deserve credit. Hazard mapping, LiDAR, building footprints and first floor elevations need credit since key data is the first step in managing risk to the built infrastructure from any natural hazard.
We also suggest a sliding-scaled approach for state actions. For example, a fully adopted (and this includes all provisions that apply to specific hazards for which the state is at risk), implemented and enforced statewide building code should get a certain amount of points or dollar credits:

- scaled at 50% for adoption,
- another 25% for implementation, and
- another 25% if the code is being enforced adequately statewide (the Building Code Effectiveness Grading Schedule rating is a good tool for this factor).

For state floodplain management programs, a minimum number of points or dollar credits would be provided for states that only provide matching funds for their CAP-SSSE grant (to coordinate the NFIP) and more if state funds support staffing beyond that. A higher amount of points or dollar credits would be provided for states that have adopted their own higher state development standards and/or conducts state permitting, and passing state laws such as mandating that permits issued by local floodplain managers must be performed by certified floodplain managers (or requiring the local FPA to obtain continuing education and training credits). Credit is appropriate for states undertaking flood mapping activities, or have a state program that adheres to ASFPM’s Effective State Programs principles. State programs or policies investing in nature-based restoration, protecting natural functions of floodplains, and green infrastructure not only reduce risk and disaster costs, but also enhance natural floodplain functions. For example, Minnesota recently passed a statewide stream buffer mapping and protection program.

**State hazard mitigation programs**

States with an enhanced mitigation plan, by definition, are undertaking more state mitigation activities and/or more points or dollar credits. We agree states that have their hazard mitigation programs that are EMAP certified deserve credit, but it is very important that a continual verification process be in place to ensure the state continues the program elements it met in the EMAP application process. For mitigation projects, only state contributions should be counted, not local contributions. An example is a state mitigation fund that cost shares mitigation projects with communities: credit the amount from the state fund. Additionally, actual mitigation actions must get more points than plans, such as statewide hazard mitigation plans, which are already required in order for the state to get disaster assistance. Plans should have some credit, but sliding scale to reward state plans or state requirements that local plans must be coordinated with other plans such as THIRA, community comprehensive plans, etc.

The credit concept should also apply toward other programs like dam safety and wildfire, or program that manage high-risk hazard that will result in a federal disaster declaration. Still, it is essential for these programs to be effectively administered and enforced statewide.

We are pleased to see FEMA leverage other rating systems whenever possible to verify state actions and minimize the administrative burden. Systems such as EMAP, enhanced state mitigation plan certification and BCEGS statewide value are good as each of those systems/programs tend to have a rigorous verification mechanism. In turn, these will reduce the administrative effort FEMA and the state would have to undertake during subsequent reverification of the deductible credit.

All credited actions could be counted either on a point system or dollar system, which FEMA will have to develop, pilot test and discuss with all states in order to ensure equity. Eventually all such actions will have to translate to dollars if that is how the deductible is defined. The issue of crediting state reserve funds will have to be reviewed carefully.
Some states only use reserve funds for the 25 percent non-federal share of federal grants. In addition, some states that have short memories regarding disasters are using disaster reserve funds for other purposes when budgets get tight. If reserve funds are credited, there has to be a level of commitment and dedicated funding source to avoid the political pitfalls. It will be essential for states to track the actions that count toward the deductible and for FEMA to do annual audits to verify them. Furthermore, if the state is credited for something like a mitigation fund that is subsequently revoked, FEMA must adjust the formula for any incorrect credit.

Our final comment on satisfying the deductible is one of adherence once it is set. Time and again, we see Congress either modify or waive cost shares altogether based on a variety of reasons. Should the deductible fall prey to this type of manipulation, it will fail. ASFPM urges the deductible be constructed in such a way to resist such changes as much as possible.

Implementation considerations
ASFPM previously commented on specific actions a recipient may take that might be incentivized. Simply put, they should be actions that reduce future federal taxpayer disaster costs. Recipients will have sufficient opportunities to task actions to adjust their deductible.

From an implementation standpoint, it will be important to test and pilot the concept before implementation, so we strongly support the pilot testing and phase-in period. By doing rigorous testing and pilots, FEMA can build capacity for recipients to adjust to the new deductible as they will be quite aware of the changes coming. After testing and before implementation, states should be given time to implement as many states are on a biennial budget and implementation of any state investment in deductible satisfying activities will take time.

There are no circumstances we can envision where the deductible should be passed on to the sub-recipient. The easiest way to ensure this happens is to only credit activities the state undertakes. The proposed implementation sets very clear criteria that seems transparent and objective so everyone knows the rules up front and it is hopefully less subject to political manipulation.

We agree with the proposal for a state to apply for annual consideration of its credit. That will allow confirmation of an action that is continuously credited. FEMA regions will have to negotiate with the state the terms of what needs to be demonstrated during the annual accreditation process.

Finally, implementation of the deductible should be one piece of the broader mix of incentives and disincentives that need to be fully implemented and enforced as it relates to disaster assistance to promote better capability and responsibility for disaster costs. For example, Section 406(b)(2) of the Stafford Act has not been promulgated (Docket ID FEMA 2008-0006). This section of the Stafford Act promotes mitigation by reducing the federal cost share for repetitive loss public facilities where the owner has failed to implement mitigation. ASFPM strongly urges FEMA to promulgate that rule in conjunction with this effort. Section 406(d) of the Stafford Act reduces federal assistance if a private or public facility is damaged by flooding and is not covered by flood insurance. Yet numerous FEMA inspector general reports, including the most recent summary and key findings (OIG-17-13-D), show that implementation is problematic by including “routine waivers of the requirement by FEMA’s insurance specialists.” While the same IG report applauded FEMA for its progress in this area, including the promulgation of the Public Assistance Policy on Insurance (FP-206-086-1), we feel this policy is not adequate. There should never be a modification of the insurance requirement by FEMA or a certification by a state insurance commissioner that insurance is unavailable with respect to structures and flood insurance. NFIP policies up to the maximum policy limit are always available as long as a
community is participating in the NFIP (and their non-participation and/or sanctions is not a valid reason for unavailability). Yet this simple, explicit statement is not included in the policy. Implementation must be improved and fully implemented.

**Conclusion**

We believe the proposed deductible will incentivize states to adopt and implement effective programs and measures that will save future federal taxpayer funding for disasters. Especially important will be for states to build their capacity for handling disasters. We understand state emergency staff are 85% funded with federal disaster dollars on the average. We agree they need to be state funded, and some credit to build that capacity is good.

In some states the programs that can either reduce or increase the impacts of flooding are located in many different agencies. Examples are building codes, transportation standards for bridges, culverts and roads, dam and levee safety programs, landslide and mudslide programs, resource protection programs, etc. All agencies are under the jurisdiction of the Legislature and the governor, so all agency programs can be brought into this concept if state leaders have the willingness and foresight to do so in order to reduce future disaster costs.