



Potential Stafford Act Declarations for the Gulf Coast Oil Spill: Issues for Congress

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Summary

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288, presents several options, and could provide a number of programs, to address the Gulf Coast oil spill. That spill is currently being addressed by a law fashioned for that purpose, the Oil Pollution Act of 1990, P.L. 101-380.

An emergency declaration under the Stafford Act would appear a potential approach to the current situation since it is intended to lessen the impact of an imminent disaster. A major disaster declaration would open up more Stafford Act programs that might be especially appropriate for the needs generated by the spill. FEMA assistance can be rapid and flexible, but it also would need to be carefully delineated to avoid duplication of benefits and general confusion when working in the milieu of P.L. 101-380. Under that law, which provides both authorities and a fund for compensation, the incident is currently being addressed and the federal response coordinated.

During the previous large spill, the *Exxon Valdez* in 1989, the President turned down the governor of Alaska's two requests for an emergency declaration. The rationale for the turndowns was that a declaration by the President would hinder the government's litigation against Exxon that promised substantial compensation for the incident.

Using a Stafford Act declaration, either an emergency or a major disaster declaration, for Gulf Coast states that are now approaching the fifth anniversary of the Hurricane Katrina landfall would present not only a reminder of difficult, lingering issues from that disaster in 2005 but also an opportunity for a second chance at long-term recovery assistance. Managing public expectations is difficult even in the smallest disaster event. Working with a region that is aware of the potential aid under Stafford and mistrustful of its delivery is a hard challenge. Since FEMA would be attempting to work in coordination with another set of authorities being carried out by other agencies and departments, the complexity would only increase.

Although FEMA has new leadership, it has compiled a mixed record over the last few years, from an accelerated response to Hurricanes Gustav and Ike to an arbitration process on large projects from the Katrina recovery, that has called into question the judgment and accuracy of its processes. Also, any additional work would add to the imbalance in the largely depleted Disaster Relief Fund (DRF). The DRF is currently awaiting congressional action on the President's request for \$5.1 billion in supplemental funds, which was made months before the oil spill occurred.

Disasters can be complex events, raising thorny issues that resist the simplest solutions. When several federal authorities are at work, those issues could multiply as questions of compensation for individuals and communities are considered. It could be argued that the absence of increased federal involvement could serve to simplify the response. At least one area, long-term recovery, is not directly addressed in P.L. 101-380. Some might argue it is also an area that the federal government did not address in the aftermath of Katrina. In response to congressional direction, FEMA has published a draft National Disaster Recovery Framework (NDRF). Perhaps amidst the current complications of overlapping authorities and funds, implementing that framework could provide a viable and limited option for the use of Stafford Act authorities.

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The Stafford Act Declaration Process

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (referred to as the Stafford Act, 42 U.S.C. 5721 et seq.) authorizes the President to issue “major disaster” or “emergency” declarations before or after catastrophes occur. Emergency declarations trigger aid that protects property, public health, and safety and lessens or averts the threat of an incident becoming a catastrophic event. A major disaster declaration, issued after a catastrophe occurs, constitutes broader authority for federal agencies to provide supplemental assistance to help state and local governments, families and individuals, and certain nonprofit organizations recover from the incident.¹

In determining an effective response to the Gulf Coast oil spill, policy makers may be weighing the utility of the Stafford Act, which authorizes the governors of affected states, and the President, to exercise their discretion in such a situation. The governors may choose to request aid, and the President may choose whether or not to grant the request for supplemental aid.

Emergency Declarations

The emergency declaration is intended to lessen the impact of a potential event, and may appear to be particularly apt for the situation created by the present spill, in which oil is approaching land areas and measures might be taken to mitigate the damage that the event may cause. Emergency declarations, like major disaster declarations, can be requested by the governor of a state anticipating disaster damage. The President has the authority to declare an emergency, but not a major disaster, without the governor’s request if the President determines that “the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.”²

While the emergency declaration contains many of the authorities present under a major disaster declaration, there are some notable exceptions, such as the Disaster Unemployment Assistance (DUA) program that can provide help to an individual whose unemployment was caused by the disaster, if the individual is not eligible for any other unemployment compensation.³ This may be relevant if some of the unemployment in coastal areas is not covered by the state unemployment program. FEMA has provided DUA to fishermen affected by natural events such as the El Niño effect on Pacific coast salmon in 1994. In that instance, FEMA had three major disaster declarations for Washington, Oregon, and California and expended over \$10 million in Individual Assistance (IA), which can include DUA as well as temporary housing and other aid.⁴ In the intervening years, similar problems have been addressed by programs at the Department of Commerce that pertain to fishery issues.⁵

¹ See CRS Report RL34146, *FEMA’s Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

² 42 U.S.C. 5192.

³ 42 U.S.C. 5177. For further information on this assistance, see CRS Report RS22022, *Disaster Unemployment Assistance (DUA)*, by Julie M. Whittaker and Alison M. Shelton.

⁴ FEMA Summary of Obligations, 1988-2007, available from author.

⁵ For additional information, see CRS Report RL34209, *Commercial Fishery Disaster Assistance*, by Harold F. Upton.

Major Disaster Declarations

A major disaster declaration under Stafford Act authority could include DUA and other assistance programs.⁶ However, such a disaster declaration must be requested by the governor of the affected state, who must certify that the situation is of such “severity and magnitude” that it is beyond the capabilities of the state and the affected local governments.⁷ The state must also report on the amount of state and local resources that have been committed to addressing the disaster and provide preliminary estimates of the severity of the damage and estimates of losses. The governor also must specify the anticipated amount and types of federal assistance needed.⁸ The major disaster declaration can cover many programs, depending on the governor’s request. It can include temporary housing, crisis counseling, infrastructure repair and replacement, emergency protective measures, community disaster loans, and many other options.

Post-Declaration Actions

The declaration by the President, if issued, would specify the anticipated cost-shares for the programs being implemented. For several significant FEMA programs, such as the programs for emergency help and infrastructure repair, the cost-share is 75% federal and 25% state and local. The Gulf Coast oil spill, given the unique nature of the situation, its scope, and questions of responsibility and liability, could possibly result in an adjusted cost-share by the President. There are some exceptions to the cost-share rules for some Stafford Act programs, such as disaster temporary housing, which is 100% federal funds.⁹

If an emergency or a major disaster is declared, FEMA and the state will establish an agreement, called the federal-state agreement, that certifies, among other administrative details, the Stafford Act programs employed for that disaster and the anticipated federal-state cost-shares for those programs.¹⁰

FEMA will then work with the state to hold a series of “kickoff meetings” with local governments to explain the process for requesting assistance and reimbursement for eligible costs under various FEMA programs, especially the Stafford Act Section 406 Public Assistance (PA) program, which covers debris removal, emergency measures, and infrastructure repair.¹¹

With regard to help for families and individuals, FEMA will announce the activation of its National Processing Service Centers (NPSCs) 1-800-FEMA number to take calls and online applications from the areas (e.g., counties and/or parishes) designated by the President in the

⁶ For additional information, see CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea.

⁷ For more information on this process, see CRS Report RL34146, *FEMA’s Disaster Declaration Process: A Primer*, by Francis X. McCarthy.

⁸ 42 U.S.C. 5170.

⁹ For additional information in this area, see CRS Report R41101, *FEMA Disaster Cost-Shares: Evolution and Analysis*, by Francis X. McCarthy.

¹⁰ U.S. Department of Homeland Security, Federal Emergency Management Agency (FEMA), “Labor Costs-Emergency Work, Recovery Policy 9525.7,” November 16, 2006, <http://www.fema.gov/government/grant/pa/9525.7.htm>. This is an example of the detail that is contained in the FEMA-State Agreement that can have a significant impact on the response and recovery process.

¹¹ DHS/FEMA, “FEMA Frequently Asked Questions,” June, 20, 2009, <http://www.fema.gov.government/grant/pa/faq.shtm#09>.

initial declaration.¹² FEMA will also announce the locations of any Disaster Recovery Centers (DRCs), where people can meet in person with representatives from FEMA and other federal entities as well as voluntary organizations that may be providing assistance.

While the first steps in most disaster declarations involve assistance to families and communities, a declaration for the oil spill could emphasize the federal government's role in assisting states and communities in organizing and planning their long-term recovery efforts.

FEMA's Role in the *Exxon Valdez* Incident

In considering what role Stafford Act assistance might play in the current Gulf Coast oil spill, it is instructive to consider the course of events from a previous significant event, the wreck of the *Exxon Valdez* in waters off Alaska.

On April 11, 1989, Governor Steve Cowper of Alaska submitted two requests for a presidential emergency declaration to President George H. W. Bush.¹³ Both were turned down by the President.

One FEMA attorney from that period offered an explanation for the turndown:

The Department of Justice opposed a declaration of disaster by then-President George H. W. Bush on the basis that it might impact adversely the case of the United States against Exxon. When asked at a Senate Appropriations Committee hearing by Senator Ted Stevens (R-Alaska) why no declaration of disaster had occurred, the then-Acting General Counsel of FEMA, George Watson, said on the record that he had issued a legal opinion stating that no declaration of an oil spill could be made under the Stafford Act.

When Sen. Stevens asked for a copy of the opinion, Mr. Watson said he would furnish one. Instead of an opinion, a somewhat garbled statement was given by FEMA's congressional liaison for insertion in the record. The statement basically concluded that where a parallel statutory scheme offered both compensation and better litigation rights to the United States than the Stafford Act, then the president would not declare a disaster or emergency.¹⁴

FEMA's position or interpretation may be defensible because the *Exxon Valdez* shipwreck that resulted in the oil spill arguably did not constitute a major disaster as defined in the Stafford Act. However, the current situation on the Gulf Coast caused by the explosion on the Deepwater Horizon drilling platform may arguably fall within the Stafford Act statutory language. Section 102 of the act defines a disaster in part as

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 Act to supplement the efforts and available resources of states, local

¹² George Haddow, Jane Bullock, and Damon P. Coppola, *Introduction to Emergency Management* (Burlington, MA: Butterworth-Heinemann, 2008), p. 160.

¹³ Request numbers 89023 and 89004.

¹⁴ William R. Cumming, Letter to the Editor, *Natural Hazards Observer*, January 2009, http://www.colorado.edu/hazards/o/archives/2009/jaan_observerweb.pdf.

governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.¹⁵

Possible FEMA Involvement in the Gulf Coast Oil Spill Response¹⁶

It can be argued that a Stafford Act declaration represents an opening of the federal checkbook. FEMA's principal power in developing and managing an effective response and recovery is the breadth of Stafford Act authorities coupled with the President's Disaster Relief Fund (DRF), which is a no-year account that is frequently supplemented by Congress to replenish funds that are expended on hundreds of open, declared disaster events across the nation.¹⁷

In addition to the FEMA programs already noted, such as DUA and PA, FEMA has the authority to mission assign (and reimburse) other federal agencies to carry out disaster-related missions. The authority to work from an array of federal expertise and skills presents a number of alternatives and approaches to a challenging event. Also, this authority specifically notes that the federal help includes the government performing "on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety."¹⁸ This authority could be employed to continue ongoing efforts related to the oil spill if they became mired in questions of process or funding with the "responsible parties" (i.e., British Petroleum) as defined in P.L. 101-380, the Oil Pollution Act of 1990.¹⁹ It is also useful as a broad authority when addressing immediate environmental damage that may become a long-term concern. Similar work was accomplished following Hurricane Katrina with all of the same agencies as are now involved (DHS/FEMA, Coast Guard, EPA, state agencies) working together to remove close to 9 million gallons of oil that had spilled.²⁰

Managing Expectations

An emergency or major disaster declaration by the President carries with it expectations that are difficult to manage in any disaster. That may be a consideration for the oil spill along the Gulf Coast, an area that has experienced recent disasters and may have a heightened awareness and understanding of what Stafford Act programs could provide under a declaration. If those programs were not initially offered due to potential duplication of benefits questions or other concerns, that would only exacerbate a difficult situation. In addition, the type of damage that is contemplated is different in some areas from the devastation Hurricane Katrina caused. Nevertheless, the impact may be similar in its effect on the local economies and the people of those communities. Explaining the Stafford Act programs and how they may be implemented

¹⁵ 42 U.S.C. 5122.

¹⁶ CRS Analyst Bruce R. Lindsay, Government and Finance Division, contributed to the NRF discussion and the DRF analysis in this report.

¹⁷ For additional information on disaster supplementals, see CRS Report R40708, *Disaster Relief Funding and Emergency Supplemental Appropriations*, by Bruce R. Lindsay and Justin Murray.

¹⁸ 42 U.S.C. 5170b. Essential Assistance.

¹⁹ For further information, see CRS Report RL33705, *Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress*, by Jonathan L. Ramseur.

²⁰ DHS/FEMA, "Oil Spill Recovery 95 Percent Complete in Louisiana," Release Number: 1603-141, November 4, 2005, <https://www.fema.gov/news/newsrelease.fema?id=20320>.

would likely require careful messaging at the time of the declaration to delineate the federal role and the assistance available.

Federal Coordination, Mitigation, and Long-Term Recovery

Federal Coordination

A Stafford Act declaration would also mean the presidential appointment of a Federal Coordinating Officer (FCO), who would, as the title indicates, coordinate the federal response.²¹ In most disasters, a separate FCO is named for each affected state. However, the Post-Katrina Emergency Management Reform Act has provided the President with the discretion to appoint a single FCO for a multi-state event.²²

The current response, under the authority of P.L. 101-380, is being carried out under the National Contingency Plan (NCP), in which an On-Scene Coordinator (OSC) performs a role similar to the FCO's. The governing regulations stipulate that the Coast Guard "shall provide OSCs for oil spills."²³ If a declaration were made, a question might arise about how the FCO would fit into the existing structure. Similar issues, regarding the FCO and his or her relationship to the Principal Federal Official (PFO) named by the DHS Secretary, resulted in confusion and miscommunication during the early response to Hurricane Katrina.²⁴

Emergency Support Function (ESF) #10 of the National Response Framework (NRF)²⁵ names the United States Coast Guard and the Environmental Protection Agency as the primary agencies for leading the federal response. According to ESF #10, FEMA would provide coordination support, as well as recovery and mitigation assistance, if the incident were declared a disaster.

The appointment of an FCO could create unnecessary confusion in the federal response, given the current NRP OSC assignment or, alternatively, could put greater emphasis on not only the coordination function but also the long-term recovery of the affected area.²⁶ One of the challenges would be how to transition from current authorities to FEMA Stafford Act authorities. Some areas are quite similar, such as the current hiring of local fisherman to install booms and to assist in cleanup activities.²⁷ These activities are similar in spirit to Section 307 of the Stafford Act, which

²¹ 42 U.S.C. 5143.

²² P.L. 109-295, 120 Stat. 1448.

²³ 40 C.F.R., Chapter 1, Pt. 300, App. E, 3.3.1, July 1, 2009.

²⁴ U.S. House of Representatives, "A Failure of Initiative, Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina," pp. 189-190 (Washington: GPO, 2006). For additional information on this issue, see U.S. Senate, "A Nation Still Unprepared," Special Report of the Committee on Homeland Security and Governmental Affairs, Chapter 27, p. 564 (Washington: GPO, 2006).

²⁵ The NRF is the guide to how the nation responds to all hazards. DHS/FEMA National Response Framework, Emergency Support Function #10, January 2008, <http://www.fema.gov/pdf/emergency/nrf/nrf-esf-10.pdf>. DHS representatives have stated that this ESF has not been activated.

²⁶ It is interesting to note that the current OSC for the Gulf Coast oil spill, U.S. Coast Guard Commandant Thad Allen, also served as a multi-state FCO for the Hurricane Katrina response and recovery mission from September 2005 through May 2006, when he was named Commandant.

²⁷ British Petroleum, Press Release, "Update on Gulf of Mexico Oil Spill Response," May 5, 2010.

encourages the use of “firms and individuals residing or doing business primarily in the area affected by such major disaster or emergency.”²⁸

There will may be a need in the wake of this event for long-term planning help. As one observer noted in appraising the *Exxon Valdez* incident and its aftermath:

In the case of hurricanes, floods, earthquakes, and the like, communities, groups, and individuals often receive support from government and relief organizations such as the Red Cross. In some cases, survivors can obtain low interest loans to rebuild damaged homes and businesses. There are active programs to assist recovery efforts and help communities improve preparedness and enhance resiliency. These forms of support are relatively absent in environmental disasters.²⁹

One aspect of helping communities to enhance their recovery and resiliency is FEMA’s work in the areas of both mitigation and long-term recovery planning and assistance.

Mitigation³⁰

Hazard mitigation is frequently included in long-term recovery activities. Mitigation activities are designed to reduce the impacts from natural or man-made hazards. FEMA defines “mitigation” as

any sustained action taken to reduce or eliminate long-term risk to life and property from a hazard event. Mitigation, also known as prevention (when done before a disaster), encourages long-term reduction of hazard vulnerability. The goal of mitigation is to decrease the need for response as opposed to simply increasing the response capability. Mitigation can save lives and reduce property damage, and should be cost-effective and environmentally sound. This, in turn, can reduce the enormous cost of disasters to property owners and all levels of government. In addition, mitigation can protect critical community facilities, reduce exposure to liability, and minimize community disruption.³¹

The use of the term “mitigation” in reference to oil spill mitigation activities may not necessarily align with the regulatory and programmatic use of the term by FEMA for disaster mitigation grants. Oil spill mitigation frequently refers to any activity undertaken immediately after the spill in an attempt to contain and control the oil, such as deployment of a boom around a spill.

Federal disaster mitigation assistance provides funding for mitigation activities. A primary source of federal disaster mitigation assistance is the Hazard Mitigation Grant Program, authorized by Section 404 of the Stafford Act.³² For FEMA programs, mitigation activities are generally categorized as structural and nonstructural. Structural mitigation activities may include physical changes to a structure or development of standards such as building codes and material specifications. Examples of physical changes to a structure are retrofitting a building to be more

²⁸ 42 U.S.C. 5150.

²⁹ Duane Gill, “Exxon Valdez Oil Spill Litigation and Community Resilience,” *Natural Hazards Observer*, November 2008, http://www.colorado.edu/hazards/o/archives/2008/nov08_observerweb.pdf.

³⁰ CRS Analyst Natalie Keegan, Government and Finance Division, wrote this section.

³¹ U.S. Department of Homeland Security, Federal Emergency Management Agency, *State and Local Mitigation Planning How-to Guide: Integrating Manmade Hazards into Mitigation Planning*, September 2003, p. vi.

³² 42 U.S.C. 5170c. For additional information on mitigation, see CRS Report R40471, *FEMA’s Hazard Mitigation Grant Program: Overview and Issues*, by Natalie Keegan.

resistant to wind hazards or earthquakes, or elevating a structure to reduce potential flood damage.

Nonstructural activities may include community planning initiatives, such as developing land-use zoning plans, disaster mitigation plans, and flood plans. Other nonstructural community activities may include participating in insurance programs and developing warning systems. The most common mitigation activities funded by FEMA programs involve either development of plans that include mitigation elements, or structural mitigation projects.

The extent of damage to structures as a result of the Gulf Coast oil spill has yet to be determined. Conceivably, homes located along the coastal area may experience short- and long-term effects from hazardous materials. FEMA mitigation programs could provide funding to buy out homes affected by disasters, although generally the programs are used for areas with significant flood hazards.³³ However, Section 404 of the Stafford Act states that “the President may contribute up to 75 percent of the cost of hazard mitigation measures which the President has determined are cost-effective and which substantially reduce the risk of future damage, hardship, loss, or suffering in any area affected by a major disaster.”³⁴ Under a Stafford Act declaration, Section 404 would provide the President with the authority to approve eligible hazard mitigation projects related to the oil spill, which might include property acquisition and relocation assistance.

Long-Term Recovery

The long-term recovery topic is especially salient at the moment, since FEMA is about to release a final version of the National Recovery Framework that was established to strengthen the federal government’s partnership with states and local communities in the recovery from major disasters. It is also important to consider since the problems associated with this spill may be longer term in their requirements for remediation and recovery. The NDRF is broadly designed for the differing scope of events, which could arguably make it useful for the oil spill recovery.

The *National Disaster Recovery Framework (NDRF)* draft outlines how community recovery is supported on a national level. The framework builds on scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities, linking local, state, tribal and federal governments, the private sector, and voluntary, faith-based and community organizations that play vital roles in recovery. It captures resources, capabilities, and best practices for recovering from disasters, recognizing that significant challenges can confront all recovery efforts, from a relatively localized event to a large-scale disaster that demands substantial resources.³⁵

Long-term community recovery is also included in the National Response Framework as Emergency Support Function #14 that describes the cooperation needed and the lead agencies.³⁶ However, as discussed below, there are conflicting arguments regarding the use of a Stafford Act declaration for this incident.

³³ 42 U.S.C. 5170c(b).

³⁴ 42 U.S.C. 5170c(a).

³⁵ DHS/FEMA, “National Disaster Recovery Framework – DRAFT,” February 10, 2010, <http://www.disasterrecoveryworkinggroup.gov/ndrf.pdf>.

³⁶ DHS/FEMA, “National Response Framework, Emergency Support Function #14, Long-Term Community Recovery Annex”, January 2008, <http://www.fema.gov/pdf/emergency/nrf/nrf-esf-14.pdf>.

Arguments Regarding a Stafford Act Declaration for the Response

Points Supporting a Stafford Act Declaration

- FEMA's broad authorities and the DRF could work quickly to direct coordinated leadership and funding to the area.³⁷ The Stafford Act could also provide authority for temporary personnel in areas that need expertise as well as the ability to hire equipment and services.³⁸ FEMA's Draft Disaster Recovery Framework could potentially be a useful catalyst for the Gulf Coast communities and families seeking to recover from this event, and a presidential declaration also could improve morale.
- FEMA Administrator Craig Fugate is the former head of emergency management in Florida and would have credibility in addressing that state's needs as well as the needs of Mississippi, which Florida assisted in the immediate response period for Hurricane Katrina.³⁹
- FEMA has experience working with the Gulf Coast leadership at the state and local levels and with the affected congressional delegations.
- A Stafford Act disaster declaration could make assistance available for problems not currently evident, such as the potential need for temporary shelters, temporary housing assistance, and crisis counseling. It could also provide additional assistance if the Oil Spill Liability Trust Fund, created by the Oil Pollution Act, P.L. 101-380, is not sufficient. As one author explained, Section 9001 of the act "established per-incident expenditure caps: no more than \$1 billion (or the maximum amount available in the fund) for all eligible costs, and no more than \$500 million for natural resource damages. Thus, a major spill, particularly one in a sensitive environment, could threaten the viability of the fund."⁴⁰

Points Against a Stafford Act Declaration

- There are existing authorities to address oil spill issues, and they are being implemented.⁴¹ A presidential declaration that activated FEMA Stafford Act aid could confuse the situation and lead to duplication of benefits and unnecessary federal expenditures. Under P.L. 101-380, third parties, such as local businesses, can submit third-party claims against the Oil Spill Liability Trust Fund.⁴² If it is concluded that supplemental federal funds are necessary, Congress and the

³⁷ The Stafford Act has flexible authorities that were enlarged by P.L. 109-295, the Post-Katrina Emergency Management Reform Act, which increased possible assistance resources for home repairs and added other authorities, such as case management to assist disaster victims.

³⁸ 42 U.S.C. 5149.

³⁹ William L. Waugh, Jr., "EMAC, Katrina and the Governors of Louisiana and Mississippi," *Public Administration Review*, December 2007, Special Issue, <http://www3.interscience.wiley.com/cgi-bin/fulltext/11845143/PDFSTART>.

⁴⁰ CRS Report RL33705, *Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress*, by Jonathan L. Ramseur.

⁴¹ P.L. 101-380, the Oil Pollution Act of 1990.

⁴² *Ibid.*, Title I, Sec. 1002 (b)(2).

President could choose to supplement the accounts of the agencies currently carrying out the response programs rather than switch authorities and agencies in the middle of the response.

- The announcement of a \$20 billion BP “rescue fund” to provide claimants with compensation for their losses, as well as a \$100 million BP contribution toward a fund for those unemployed by the drilling moratorium, may obviate the need for any additional federal program to provide any assistance.⁴³
- As the five-year anniversary of Hurricane Katrina’s landfall approaches this summer, DHS and FEMA are struggling to improve their image among state and local leadership and residents along the Gulf Coast. There have arguably been perceived improvements, as demonstrated by the response to Hurricane Ike in Texas. But recent arbitration rulings against FEMA for some large Louisiana projects may serve as a reminder of previous difficulties with FEMA administration of Stafford Act disaster recovery programs.⁴⁴
- The current status of the DRF is dire. According to FEMA, DRF expenditures average about \$350 million a month, and the current DRF balance is \$600 million. FEMA projects that the account could become insolvent sometime in May or June 2010.⁴⁵ The Obama Administration has requested an FY2010 DRF supplemental appropriation of \$5.1 billion to cover current and past disaster costs as well as anticipated natural disaster expenses. Part of that request was made in the Administration’s FY2011 budget proposal, and the Administration asked for the rest of the total amount by letter on February 12, 2010, long before the oil spill occurred. If DRF funds are used for the oil spill, the supplemental pending in the Senate may have to be revised.⁴⁶ Also, since DRF supplemental appropriations are generally considered emergency spending, and thus not offset, the potentially large amounts for the oil spill may complicate the debate on DRF spending in general.

Uncertain Prospects for Recovery of Disaster Relief Fund Expenditures⁴⁷

It is questionable whether, in the event of a Stafford Act declaration, FEMA could recover funds from the “responsible parties” for expenditures made in the disaster response and recovery process. Section 317 of the Stafford Act covers the “recovery of assistance” aspect of disaster relief. The law states:

⁴³ Richard Fischer, “BP claims process czar promises faster payout,” *Tri-Parish Times.com*, July 23, 2010, http://www.tri-parishtimes.com/articles/2010/07/21/page_1/179_50_bpclaimsprocessczarpg1.txt.

⁴⁴ Deon Roberts and Richard A. Webster, “Arbitration Panel Sets Charity Replacement at \$474m,” *New Orleans City Business*, January 27, 2010, <http://neworleanscitybusiness.com/blog/2010/01/27.arbitration-panel-sets-charity-replacement-at-475m>.

⁴⁵ Telephone conversation with a legislative liaison for the Department of Homeland Security, April 28, 2010.

⁴⁶ For more information on the Disaster Relief Fund, see CRS Report R40708, *Disaster Relief Funding and Emergency Supplemental Appropriations*, by Bruce R. Lindsay and Justin Murray.

⁴⁷ CRS Legislative Attorney Edward C. Liu, American Law Division, contributed to this section of the report.

Any person who intentionally causes a condition for which Federal assistance is provided under this Act or under any other Federal law as a result of a declaration of a major disaster or emergency under this Act shall be liable to the United States for the reasonable costs incurred by the United States in responding to such disaster or emergency to the extent that such costs are attributable to the intentional act or omission of such person which caused such condition.⁴⁸

While the current oil spill may turn out to have been caused by an “act or omission” of a responsible party, the requirement that the “act or omission” be “intentional” may limit FEMA’s ability to recover any funds pursuant to this provision if the spill is the result of negligence.

In the event of negligence, funds expended pursuant to the Stafford Act might be subject to recoupment in accordance with the Stafford Act’s “Duplication of Benefits” provision. Under this approach, any funding that is available to an affected state to provide assistance from non-Stafford resources can be used to reimburse or offset Stafford Act expenditures for those same purposes. Recoupment under this provision could apply to funds received from the “responsible parties” under the Oil Pollution Act of 1990, so long as the funds are provided for the same purposes as assistance under the Stafford Act.

Federal Options

- **No Action Under the Stafford Act**—The Oil Pollution Act of 1990 has both authorities and funding to address a major oil spill. Congress could choose to revisit and revise that law to clarify those authorities and increase the funding available to address the size and scope of this huge oil spill. That action could preclude the need for a Stafford Act declaration. In addition, the \$20 billion BP “rescue fund” adds to the available funds for claimants and may lessen the requirement for any declaration.
- **Emergency Declaration**—An emergency declaration, which is intended to “lessen or avert the threat of a catastrophe,” would seem to apply to the current situation.⁴⁹ Further, such an action might be needed for the federal government, in conjunction with the affected states, to take the steps necessary to reduce the imminent impact of the spill. However, an emergency declaration would not bring to bear all ancillary Stafford Act program authorities that might be necessary to effectively address the myriad problems the spill is likely to cause.
- **Major Disaster Declaration**—A major disaster declaration could set in place a number of options for the states to consider in assisting their citizens and their communities in recovering from this damaging event. Programs such as crisis counseling and disaster unemployment assistance would be available if needed under such a declaration. Stafford Act programs could fill in the gaps that might be left from assistance provided by the “responsible parties” to the spill.

In addition, a major disaster declaration could, at a minimum, set up a framework that was absent from both the *Exxon Valdez* experience and the Hurricane Katrina recovery: long-term recovery planning assistance for the affected states and

⁴⁸ 42 U.S.C. 5160.

⁴⁹ 42 U.S.C. 5192.

communities. This could be targeted and limited assistance. Such a plan must be driven by the local and state participants, but this would be an opportunity to implement the National Disaster Recovery Framework released in draft by FEMA last February. State and local leadership could be matched by federal resources and technical assistance. This is a major event with probably a broad and far-reaching impact on a region that was battered only five years ago and might welcome an opportunity to develop and enhance a forward-looking program for recovery.

- Limited Federal Involvement—On the other hand, a more limited role for the federal government might be the correct role, to encourage local initiative and private sector renewal. This is also a time when resources in the Disaster Relief Fund (DRF) are largely depleted. Given the regional distrust for government action, partly as a result of the Hurricane Katrina experience, perhaps less government involvement and a much lower federal profile would be of greater benefit for the region's recovery.

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