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April 12, 2017

Regulatory Affairs Division, Office of Chief Counsel
Federal Emergency Management Agency
8 NE, 500 C Street SW
Washington, D.C. 20472

RE: FEMA-2016-0003 Federal Emergency Management Agency's Supplemental Advanced Notice of Proposed Rulemaking

On behalf of the National Conference of State Legislatures (NCSL), this letter is written in response to the Federal Emergency Management Agency's (FEMA's) request for additional comments to its Supplemental Advanced Notice of Proposed Rulemaking, referenced in the Federal Register, Volume 82, Number 8 (Thursday, January 12, 2017), to 44 CFR Part 206, entitled "Establishing a Deductible for FEMA's Public Assistance Program." NCSL appreciates the opportunity to comment on this very impactful proposal early in the rulemaking process.

NCSL remains concerned about the details and implementation of this proposal and again urges FEMA not to alter the current statutory framework. As outlined below, our concerns encompass various aspects of state flexibility in the disaster response process, and that the proposal will limit the states' ability to budget and prioritize infrastructure, parks and conservation and other projects based on the actual needs of their state. Additionally, state and local governments do not have the fiscal capacity of the federal government, and unlike the federal government, 33 states are constitutionally required to balance their budgets each year. This fact alone may greatly constricts states' ability to absorb additional disaster costs. NCSL is also skeptical of adding additional or more burdensome administrative hurdles that would delay federal disaster recovery aid to states.

Lastly, I would like to address a few aspects of the deductible concept itself. The sections below address specific aspects of the deductible that remain of concern to NCSL and possible solutions to be considered.

State Flexibility on Federal Assistance Planning

FEMA's proposed disaster deductible assumes that states do not make significant contributions to disaster preparedness and mitigation. This is an unfair and inaccurate characterization. State legislators responsibly budget to maintain essential infrastructure to the extent that their state finances allow. Imposing a disaster deductible that is to be met as a condition of the receipt of federal assistance from FEMA would compel a state to over-prioritize the funding of those essential infrastructures solely to ensure that it remained eligible for federal funding. States would be incentivized to focus on spending limited resources on credit-eligible activities to offset the initial deductible amount, regardless of the expected risk of the disaster. The added expense to states would unreasonably burden states resources and may actually reduce response and resiliency capabilities. This is especially true in states that have been hit by multiple large disasters in a short timeframe, where the incentive to guarantee additional resources for projects would further exacerbate recovery. Because the economy of the states is subject to periodic recession, the proposed changes could compel a state to commit the expenditure of funds that it may not have thereby compounding the fiscal consequences of the disaster.

FEMA's suggested deductible totals may not be able to be met by some states that incur more devastating disasters within a short period of time, and that don't have as robust an economy or tax base. If states need to reevaluate spending on natural disasters, their emergency managers and legislators are in a better position to evaluate the risks, spending capabilities and projects that should be invested in. For a state like Louisiana, it may actually be more fiscally advantageous to accept the increase of the per capita indicator from \$1.41 to \$4.81, as this would make the disaster declaration threshold increase from \$6.3 million to \$25 million, which is still far below the proposed disaster deductible of \$73 million. Therefore, instead of only offering one solution to all states with some severely impacted negatively, consideration should be given to allowing states to make educated decisions based on their self-determined risk profile, financial capabilities and unique circumstances to consider multiple options and opt in to the solution that best addresses their needs while diminishing costs.

State Budgeting Issues

As previously mentioned, states already make significant investments toward disaster response and infrastructure resiliency, in accordance with their statutory and constitutional budget requirements. FEMA's formula to determine deductible and credit amounts do not take into consideration, the process and policy issues that exist in state budget determinations.

The budgetary process greatly impacts the ability to prepare for and mitigate against large disasters. Due to continued budgetary constraints such as revenue reductions, states struggle to bring in a balanced budget. As highlighted in [NCSL's State Budget Procedures website](#), 49 states must balance their budgets, with Vermont being the exception. Further constraining state

legislatures' spending abilities is the requirement for a super-majority vote to pass general appropriations bills; 10 states hold this requirement, and three, Arkansas, Nebraska and Rhode Island, require it without exception. Constitutional constraints in Arkansas requires legislators to obtain a three-fourths majority vote on appropriations for all purposes except education, highways and paying down the state debt. Illinois also has constitutional requirements on passing budgets at a super majority level after a certain date. The super majority exceptions vary by state, but trends toward limited spending and fiscal conservatism.

Within that framework, legislators must set a budget that effectively allocates resources and set policy priorities with an eye towards future planning and program review across all policy areas. NCSL's most recent [budget survey](#) found that in 2016, only 28 states expected to meet their revenue forecast, and half of those states later revised their original outlook downward. Among the many relevant factors that come into play in the state and local appropriations process is the condition of a state's or locality's economy.

States' fiscal conditions change throughout the fiscal year, and states are not always able to meet budget goals causing them to make difficult choices on how best to allocate limited funds. By imposing an arbitrary disaster deductible, that is to be met as a condition of the receipt of federal assistance from FEMA, would compel a state to over-prioritize the funding of those essential infrastructures solely to ensure that it remained eligible for federal funding. Because states are subject to periodic recession, the proposed changes could compel a state to commit the expenditure of funds that it may not have, thereby compounding the fiscal consequences of the disaster. In this framework, the disaster deductible model that FEMA proposes cannot work. It would either improperly compel FEMA to insert itself into state policy and budget decisions, or force states to favor meeting this deductible over other equally important infrastructure projects.

Intergovernmental Issues

The disaster deductible proposal raises a host of intergovernmental issues that would aggravate state-local relations. Local governments need reliable revenues to deliver services and plan for local infrastructure projects. State aid plays a vital role in those revenues. In the [State Aid to Local Government](#) article NCSL estimated that states transferred over \$475 billion to local governments within the last census – almost half of their own-source general revenues. State aid clearly constitutes a significant portion of local general revenues with the U.S. average being slightly less than one-third.

Because FEMA's proposal is aimed primarily at the state, it will reduce revenue for localities and will not incentivize individual localities to implement mitigation projects. There will be differences in efforts to increase resiliency between a state and the local governments within it, as well as among local governments within a state. There continues to be unanswered questions on how FEMA will take into account the relationships between state and local governments, how

to assure localities invest in the proper projects and ensure proactive localities are not punished by neighboring jurisdictions that do not invest in similar mitigation projects. For these reasons, a top-down approach that FEMA is suggesting is ill-advised as it does not consider state/local relationship, needs and abilities.

Mitigation Credits

FEMA does not clarify the term of years a given activity is eligible to be credited towards the states' deductible. Having credits eligible exclusively during one deductible cycle undermines the goals of incentivizing state risk reduction efforts and mitigating future disaster impacts. A better solution would be to allow credits to be spread out over the sustainable life of the Hazard Mitigation measure. Allowing the credit to exist beyond the initial deductible year would also incentivize states to proceed with projects initiated within that year but that will take several years to complete. Without the annualized credit deduction, there will be no incentive to complete long-term projects after the credit has been applied to a given year.

The proposal should also clarify that disaster mitigation projects will not always mitigate the hazard the state is experiencing. There is also the issue of the unpredictability of the types of disasters states face, especially in larger, ecologically diverse states. This fact makes mitigation of the resulting harm difficult. For example, California is prone to wildfires, earthquakes, floods and other natural disasters. Their infrastructure expenditures for earthquake preparedness do not mitigate the harm resulting in a year where 100-year flooding occurred. Similarly, while wildfires are more typical of the type of disasters California suffers from, spending on firefighting infrastructure does little to mitigate the damage caused by the random but devastating earthquake.

Federal Grant Subsidized Mitigation Projects

The proposal does not address whether FEMA would allow for credits towards federal grant mitigation projects implemented in the states. Forty-seven states received pre-disaster mitigation program grant funds in 2016. The grants are planned, implemented and coordinated within the state and follow federal guidelines which ensures mitigation projects are as effective as possible. Additionally, for states like Louisiana who have suffered from multiple large-scale disasters, the state and local governments are putting most of their time and resources on implementing mitigation projects which are federally funded. Requiring mitigation efforts that require only state resources to receive the credits would pit localities against the state. Localities are limited on how many projects can be undertaken successfully and often disasters cross jurisdictional boundaries who are subject to the same limited available funding. There will be differences in efforts to increase resiliency between a state and the local governments within it, as well as among local governments within a state. FEMA will need to take these differences into account when determining credits towards the deductible. How can FEMA assure that those jurisdictions that have taken positive steps will not be penalized when a disaster occurs because of the inaction of

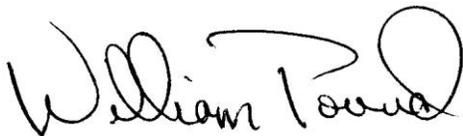
other jurisdictions within the state? State specific plans can mitigate the tensions between state-local relations.

Although NCSL does not favor FEMA's proposed approach of establishing a disaster deductible, if this proposal does go forward, states should be allowed to follow their own fiscal year calendars when applying for and taking advantage of annual disaster credits. This is particularly important when a state is significantly impacted by the timing of a disaster. Following a federal schedule would add an otherwise unnecessary complication to an already prescriptive and bureaucratic process. Additionally, the annual deductible should be a 12-month rolling calendar.

The proposal should clarify what criteria and guidelines for completion of mitigation projects states should follow. If only state funded projects may be considered for credits, states should have the flexibility to follow their own implementation time-line and procedures.

As it stands, FEMA's proposal may have adverse consequences on a state that finds itself in a disaster situation. NCSL posits that there must be more state discretion regarding how best to meet the stated goals of reducing federal spending and increasing state resiliency to disaster situations. NCSL urges FEMA to consider the issues outlined above, and to continue working directly with states and state emergency managers on the best ways to incentivize mitigation projects and state resiliency to disasters. NCSL staff is happy to work with FEMA staff to discuss state impact issues and provide research in this area. Please contact NCSL staff Susan Parnas Frederick (susan.frederick@ncsl.org) or Danielle Dean (danielle.dean@ncsl.org) in NCSL's Washington, DC office.

Sincerely,

A handwritten signature in black ink that reads "William T. Pound". The signature is written in a cursive style with a large, looping initial "W".

William T. Pound
Executive Director
National Conference of State Legislatures