

March 6, 2020

Office of Response and Recovery
Federal Emergency Management Agency
500 C St. SW
Washington, DC 20472

Via email: FEMA-Recovery-PA-Policy@fema.dhs.gov

Re: Joint Comments in Response to FEMA’s Draft Policy to Implement DRRRA Section 1206

Our organizations support the Federal Emergency Management Agency’s (FEMA) emphasis on mitigation, through the adoption and enforcement of current building codes, as a critical component of our national resilience. The Agency’s proposed Draft Recovery Policy (Draft Policy) to implement Disaster Recovery Reform Act (DRRA) section 1206 does not adhere to that emphasis. For that reason, and although we appreciate the consideration FEMA has given to advancing this policy, we strongly urge FEMA to revise and strengthen its approach.

Section 1206 permits the Agency to, post-disaster, provide communities with assistance for building code adoption and updating, as well as for improved building code application communitywide. As proposed, the Draft Policy would prohibit these activities, which is inconsistent with FEMA’s current Strategic Plan, ongoing programmatic work, the National Mitigation Investment Strategy (NMIS), mitigation research, the DRRRA, and congressional intent.

I. FEMA, Congress, and Mitigation Research Support Improved Code Adoption and Enforcement Post-Disaster

The very first objective in the Agency’s current Strategic Plan describes FEMA’s priority to “Incentivize Investments that Reduce Risk, Including Pre-Disaster Mitigation, and Reduce Disaster Costs at All Levels.” That Objective continues by stating that “[d]isaster resilience starts with building codes, because they enhance public safety and property protection,” and, accordingly, commits the Agency to “advocate[ing] for the adoption and enforcement of modern building and property codes.”¹ FEMA’s Strategic Plan applies to each directorate within the Agency and, to be effective, should be advanced consistently across FEMA policy.

FEMA has deemed adherence to current model codes to be so important that it will not fund rebuilding of public facilities post-disaster under the public assistance (PA) program if that construction would otherwise be built to non-current standards.² The Agency’s position is intended to support the efficient use of federal dollars as “[r]ecipients and sub-recipients using nationally recognized voluntary consensus-based building codes and standards will decrease vulnerability [of] new construction and repaired and retrofitted structures, thus decreasing the need for future Federal disaster recovery grants

¹ FEMA’s 2018-2022 Strategic Plan (2018).

² FEMA Recovery Interim Policy FP-104-009-11 Version 2.1 (Dec. 2019); FEMA, *Public Assistance Program and Policy Guide*, FP 104-009-2 (2018).

and other assistance.”³ State and local adoption of up-to-date building codes is a budgetary performance metric for the Agency.⁴

Congress shares FEMA’s position. Twice in 2018 Congress passed, and President Trump signed into law, measures that incentivize the adoption and application of modern model building codes through enhanced federal cost shares for post-disaster rebuilding, new grants for states and localities both pre- and post-disaster, and by making pre-disaster mitigation grant applicants more competitive based on their adoption of up-to-date model codes.⁵

The efforts by Congress and FEMA are reflected in the Administration’s National Mitigation Investment Strategy, issued last summer by the Mitigation Framework Leadership Group (MitFLG)—chaired by FEMA and made up of 13 other federal agencies and departments as well as state, tribal, and local officials. The Strategy makes several recommendations concerning the use, enforcement, and adoption of building codes: “[a]rchitects, engineers, builders, and regulators should use the latest building codes for the most up-to-date requirements for structural integrity, mechanical integrity, fire prevention, and energy conservation;” “trained, certified professionals [should] handle building inspections and code administration;” and “[u]p-to-date building codes and standard criteria should be required in federal and state grants and programs.”⁶

The Administration and Congress’s emphasis on codes is well founded. Numerous studies confirm that the adoption and implementation of current model building codes is one of the nation’s best defenses against hurricanes, tornadoes, earthquakes, flooding, wildfires, and other natural disasters. For example:

- The National Institute of Building Sciences (NIBS) *Natural Hazard Mitigation Saves* study found that for every dollar invested, the 2018 International Building Code and International Residential Code provide \$11 in mitigation benefits against flood, hurricane, and earthquake risk and the 2015 International Wildland Urban Interface Code provides \$4 in mitigation benefits against wildfire risk.⁷
- The implementation of Florida’s statewide codes, which are based on the International Codes (I-Codes), reduced windstorm property damage 72 percent.⁸
- A FEMA analysis from 2014 estimated approximately \$500 million in annualized loss avoided in eight southeastern states due to do the adoption of modern building codes based on the I-Codes.⁹
- The 2019 Mitigation Assessment Team report following Hurricane Harvey found that National Flood Insurance Program (NFIP) regulations reduced average claim payments by almost half and following modern code requirements reduced the average claim payments by an additional 90%.¹⁰

³ FEMA Policy 204-078-2.

⁴ FEMA Budget Overview and Fiscal Year 2021 Congressional Justification.

⁵ See Pub. L. 115-123; Pub. L. 115-254.

⁶ Mitigation Framework Leadership Group, *National Mitigation Investment Strategy* (Aug. 2019).

⁷ NIBS, *Natural Hazard Mitigation Saves: 2018 Interim Report* (2019).

⁸ Simmons, K.M., et. al., *Economic Effectiveness of Implementing a Statewide Building Code: The Case of Florida* (2018).

⁹ FEMA, *Phase 3 National Methodology and Phase 2 Regional Study Losses Avoided as a Result of Adopting and Enforcing Hazard-Resistant Building Codes* (2014).

¹⁰ Mitigation Assessment Team Report Hurricane Harvey in Texas, FEMA P-2022 (Feb. 2019).

- Researchers found effective and well-enforced building codes in Missouri¹¹ reduced hail damage to homes by 10 to 20 percent on average.¹²
- Building envelope requirements within codes and standards maintain internal temperatures, permitting building occupants to shelter in place for periods without power during extreme weather. One study found that a typical low-rise building that met the 2009 edition of the International Energy Conservation Code (IECC) remained about 10°F warmer after a three-day blackout in winter than older buildings not in compliance with the 2009 code. Subsequent improvements in energy standards and codes would lead to even greater benefits to performance relative to the existing building stock, given the 2018 IECC is about 25% more efficient than the 2009 IECC studied, and the 2016 version of ASHRAE’s standard 90.1 is 35% more efficient than the 2004 standard.
- FEMA quantified the cost of Dade County’s inadequate code compliance as a quarter of the \$16 billion in insured losses from Hurricane Andrew.¹³ Researchers found similar results about 15 years later: that implementing building codes at the local level by ensuring codes are properly administered and applied provides an additional loss reduction value on the order of 15 to 25 percent.¹⁴

II. The Draft Policy Prohibits Support for Improved Code Adoption and Effective Enforcement Post-Disaster

DRRA Section 1206(a) amends section 402 of the Stafford Act (42 U.S.C. § 5170a) to permit the President in any major disaster to “provide assistance to State and local governments for building code and floodplain management ordinance administration and enforcement, including inspections for substantial damage compliance.” Separately, DRRA section 1206(b) amends section 406 of the Stafford Act (42 U.S.C. § 5172(a)(2)) to permit federal funding for the “base and overtime wages for extra hires to facilitate the implementation and enforcement of adopted building codes for a period of not more than 180 days after the major disaster is declared.”

The Agency’s Draft Policy would implement section 1206 entirely “through the Public Assistance (PA) Program.” In other words, the Agency has chosen through this Draft Policy to implement DRRA section 1206 entirely through section 1206(b)’s amendments to Stafford Act sec. 406, with no effect given to section 1206(a)’s amendments to Stafford Act sec. 402.¹⁵

We strongly urge the Agency to reconsider this choice. As currently proposed, FEMA’s Draft Policy will prohibit activities (1) associated with “non-disaster damaged buildings,” (2) related to “[a]dopting new

¹¹ Missouri’s cities and counties, which are the code adopters in this home rule state, adopt the I-Codes.

¹² Czajkowski, J. & Simmons, K., *Convective Storm Vulnerability: Quantifying the Role of Effective and Well-Enforced Building Codes in Minimizing Missouri Hail Property Damage* (2014).

¹³ Burby, R., *Hurricane Katrina and the paradoxes of government disaster policy: Bringing about wise governmental decisions for hazardous areas*, The ANNALS of the American Academy of Political and Social Science (2006) citing FEMA, *Building Performance Assessment Team, Preliminary Report in Response to Hurricane Andrew, Dade County, Florida* (1992).

¹⁴ Czajkowski, J. et. al., *Demonstrating the Intensive Benefit to the Local Implementation of a Statewide Building Code*, Risk Management and Insurance Review (2017).

¹⁵ See FEMA, *Public Assistance Program and Policy Guide*, FP 104-009-2 (2018) (listing “sections of the Stafford Act [that] specifically authorize the assistance FEMA provides under the PA Program,” and including section 406 but not section 402).

or updating current building codes or floodplain management ordinances,” and (3) that extend beyond “180 days after the date of the major disaster declaration.” The prohibition on activities associated with non-disaster damaged buildings and adopting new or updating current building codes or floodplain ordinances stem from the Agency’s decision to implement DRRRA section 1206 through section 1206(b)/Stafford Act section 406, which applies to damaged facilities. Section 1206(b) explicitly includes the 180-day limitation.

Excluding activities beyond disaster damaged buildings risks preventing communities from using DRRRA sec. 1206 funds from improving communitywide enforcement capacity in the aftermath of a disaster. Although reconstruction activity post-disaster will spike, permitting and efforts to ensure occupant health and life safety will continue for non-disaster damaged buildings. In some instances, these activities are statutory obligations with prescribed timetables. The goal of section 1206 enforcement support should be to address the increased permitting demand post-disaster in the most efficient means possible. That’s why surge capacity post-disaster should be flexible. To do otherwise would cordon off section 1206 funded assistance from the rest of a building department because only existing building department staff would be authorized to complete assignments pertaining to non-disaster damaged buildings—creating artificial and impractical regulatory silos where the full time staff with the greatest local knowledge could be diverted from disaster work or prevented from working alongside surge enforcement capacity.

Limiting assistance to disaster damaged buildings may also mean that support could be unavailable for efforts to improve enforcement processes communitywide by, for example, introducing or improving permitting software. Software tools can allow departments to do more with less. Section 1206 should be available to promote systemic and lasting productivity improvements at offices with vital public safety functions.

The Draft Policy’s limitation to disaster damaged buildings also prevents FEMA from utilizing it to support building code adoption or updating. That means that, per FEMA’s near contemporaneous implementation of DRRRA section 1235(b), only the buildings rebuilt with PA funds will necessarily receive FEMA assistance under the DRRRA to adhere to up-to-date codes.¹⁶

Finally, focusing exclusively on section 1206(b) would arbitrarily cut off resources, available under section 1206(a), to support improved enforcement capacity for an existing code after six months when post disaster reconstruction typically doesn’t begin until one to three months following the event, and can last for five or more years.¹⁷ Building officials have reported that permitting and staffing needs can increase more than 100 percent post disaster with those heightened resource requirements continuing for as long as five years after the event. These outcomes advance resilience and recovery piecemeal. An effective approach requires supporting code application communitywide and up-to-date codes that apply to all construction while ensuring these activities can be undertaken on a timeframe that maximizes efficacy.

In a footnote, the Draft Policy lists FEMA’s Hazard Mitigation Grant Program (HMGP) as an example of a program that “may be available to fund extraordinary post-disaster code enforcement costs not covered

¹⁶ FEMA Recovery Interim Policy FP-104-009-11 Version 2.1 (Dec. 2019).

¹⁷ Hidayat, B. and Egbu, C., *A Literature Review of the Role of Project Management in Post Disaster Reconstruction*, 26th Annual ARCOM Conference (Sept. 2010).

by this policy and activities to promote disaster-resistant codes.” The HMGP program’s track record raises concerns over whether it can be an effective alternative pathway to promote code activities. FEMA has operated HMGP for 30 years. Of the nearly 22,000 grants in FEMA’s HMGP database, as of February 2020, only 77 have been used for code adoption and enforcement activities (0.35 percent).

Building departments identify lack of resources (staff time and staffing as well as for training) and political opposition to new construction requirements as the top two impediments to adopting and implementing updated codes. Political considerations play out in grant applications. Programs like HMGP cap grant amounts, which forces jurisdictions to prioritize among eligible projects. Building officials have long reported that it is nearly impossible for code activities to compete for grants with other eligible activities, like infrastructure and redevelopment efforts, which have greater visibility and lack political opposition.

The historical timetable for HMGP awards for code activities has also not tracked the timetable necessary for code activities to have the greatest mitigation benefit during post-disaster rebuilding. Over the past ten years, the time from major disaster declaration to an HMGP award for code activities has averaged about two years. That’s 18 months after the cessation of enforcement assistance under the Draft Policy and roughly 21 months into the recovery phase post-disaster, during which time extensive rebuilding traditionally takes place.¹⁸ It is during that period when stronger codes can have the greatest effect and where knowledgeable and well-staffed permitting departments are critical to meeting permitting demand.

We appreciate the Agency’s work to encourage HMGP use for code activities through the Additional 5 Percent Initiative.¹⁹ However, to date, that incentive has not generated an appreciable increase in the rate of HGMP-funded code projects. We would welcome the opportunity to work with FEMA on changes to the HMGP program to permit it to more successfully advance code activities. But at the same time, we strongly urge FEMA to leverage DRR section 1206(a) to promote code mitigation activities post-disaster because Stafford section 402 does not face HMGP’s structural hurdles. It can be leveraged quickly. It does not provide applicants with a capped allocation, which would help ensure code activities would not be crowded out by other projects. Finally, it does not require HMGP’s 25 percent cost share.

III. The Draft Policy is Inconsistent with the DRR and Congressional Intent

Implementing DRR section 1206 exclusively through section 1206(b) ignores Congress’ decision to include section 1206(a), which runs counter to the statutory interpretation canon against surplusage. The sections say and do different things. Section 1206(a) applies to “building code and floodplain ordinance administration and enforcement,” while section 1206(b) applies to the “implementation and enforcement of adopted codes.” Section 1206(b) is limited to adopted codes, section 1206(a) is not. By amending Stafford Act section 406, section 1206(b) is limited to damaged buildings, while section 1206(a) amends Stafford Act section 402, which does not contain this limitation. Section 1206(b) is limited through its text to 180 days after the major disaster is declared. Section 1206(a) has no temporal limitation. A plain reading of section 1206(a) permits FEMA to support, through Stafford Act section 402, adoption of updated building codes and floodplain ordinances and improved code and ordinance application communitywide.

¹⁸ *Id.*

¹⁹ See FEMA, *Hazard Mitigation Assistance Guidance* (Feb. 2015).

This reading is consistent with the DRRRA's legislative history. The DRRRA originated from the House Transportation and Infrastructure Committee, where the Subcommittee on Economic Development, Public Buildings and Emergency Management (Emergency Management Subcommittee) had primary jurisdiction. The bill advanced initially as H.R. 4460 and later as a subtitle within H.R. 4. During H.R. 4's floor consideration, on April 26, 2018, Emergency Management Subcommittee Ranking Member Titus described the DRRRA, including now section 1206, as "require[ing] that communities build back to the latest model building codes." The DRRRA was subsequently packaged into H.R. 302. During final House consideration of that measure on September 26, 2018, Transportation and Infrastructure Committee Ranking Member DeFazio stated: "[w]e are going to require stronger building codes as we rebuild."

Permitting DRRRA sec. 1206 to support jurisdictions' adoption and enforcement of modern codes is consistent with Reps. DeFazio and Titus' statements. Courts accord bill sponsor floor statements²⁰ the second highest level of deference in legislative interpretation behind committee reports.²¹ Neither committee of cognizance filed a committee report prior to the legislation's enactment, so these statements are the most dispositive available.²²

IV. FEMA Should Utilize Section 1206 to Promote Improved Code Adoption and Enforcement Post-Disaster

Section 1206(a) permits FEMA to assist communities in adopting or updating building codes post disaster, in training code officials and builders on updated or existing building codes, and in boosting efforts to ensure rebuilding work communitywide is done to code. FEMA should implement this section accordingly. Where a community has not adopted modern building standards that incorporate model codes' hazard resistant design and life safety protections pre-disaster, post-disaster is the ideal time for that adoption or update. Post-disaster is also when permitting loads and training needs are at their greatest. Addressing these challenges through sec. 1206 will help ensure that rebuilding is done to modern standards so that impacted communities are better positioned to weather the next storm. Providing federal reimbursement for administering and enforcing older and less resilient codes risks perpetuating an unending cycle of damage and repair if those older codes are never updated.

Utilizing section 1206(a) to advance code activities is consistent with Congress's position as articulated during its May 22, 2019 hearing on DRRRA implementation: Chairman DeFazio ("DRRRA requires communities to rebuild to the latest consensus-based, design standards and in a more resilient manner, thereby ensuring stronger, smarter facilities going forward"); Ranking Member Graves ("It makes little sense for us to simply rebuild the same way over and over again. That is why it is important for the reforms we passed in the Disaster Recovery Reform Act to be implemented quickly"); Chairwoman Titus ("[DRRRA] also encourages communities to build back to the most recent, strongest consensus-based codes and standards"); and Ranking Member Meadows ("[DRRRA's] reforms are critical to ensuring all communities recover and rebuild faster, smarter and better"). The bipartisan Views and Estimates of the

²⁰ Both Ranking Members DeFazio and Titus are bill sponsors. The same day of Rep. DeFazio's remarks, in recognizing key members involved in the bill's drafting, Transportation and Infrastructure Chairman Shuster stated: "I especially want to thank Chairmen LoBiondo and Barletta, Ranking Members DeFazio, Larsen, and Titus, and Senators Thune and Nelson for their hard work on this bill."

²¹ See Costello, G., *Average Voting Members and Other "Benign Fictions" The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History* (1990).

²² See *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("post-enactment legislative history is not only oxymoronic but inherently entitled to little weight").

Committee on Transportation and Infrastructure Committee for FY2021 states that the DRRRA “requires stronger, more resilient rebuilding after disaster strikes.”

Despite the recommendations made by FEMA and Congress, only 16 communities have achieved a top Building Code Effectiveness Grading Schedule score, out of thousands of counties and cities nationwide.²³ According to FEMA, more than two-thirds of communities facing hazard risk have not adopted hazard resistant codes.²⁴ These figures make the case for a renewed emphasis on the Agency’s part to, across its policies, seek levers to increase support for the adoption of modern building standards, that incorporate model codes’ hazard resistant design and life safety protections, and investments in building and fire office staffing and training.

The Draft Policy states that it pertains to “implementation through the Public Assistance (PA) Program,” indicating that the Agency has left itself the option to implement section 1206(a) subsequently and, potentially, outside the PA program. Although we support this clarification in scope within the Draft Policy, we strongly urge FEMA to begin work now to implement the remainder of section 1206 consistent with the statute, congressional intent, the Agency’s policies and the Agency’s Strategic Plan, and the National Mitigation Investment Strategy. Given its work on improving codes and enforcement practices within the risk management directorate and support for code adoption and enforcement through FEMA’s suite of hazard mitigation assistance programs managed within its mitigation directorate, the Agency’s resilience directorate has the expertise and experience to ensure section 1206 is completely implemented.

Thank you for the opportunity to provide comment. If you have any questions concerning our comments please do not hesitate to contact us.

Sincerely,

AEC Science & Technology, LLC
Alliance for National and Community Resilience
Alliance to Save Energy
American Chemistry Council
American Property Casualty Insurance Association
American Public Works Association
American Society of Civil Engineers
American Society of Heating, Refrigerating and Air-Conditioning Engineers
American Society of Interior Designers
Association of State Floodplain Managers
Big City Emergency Managers
Concrete Reinforcing Steel Institute
Congressional Fire Services Institute
DuPont
Enterprise Community Partners

²³ ISO, *National Building Code Assessment Report* (2019).

²⁴ Mitigation Framework Leadership Group, *National Mitigation Investment Strategy* (Aug. 2019).

Environmental and Energy Study Institute
EPDM Roofing Association
Fair Share Housing Center of New Jersey
Fire Department Safety Officers Association
Flood Mitigation Industry Association
Insurance Institute for Business and Home Safety
International Association of Fire Chiefs
International City/County Management Association
International Code Council
Knauf Insulation
Mason Contractors Association of America
National Association of Regional Councils
National Association of State Energy Officials
National Council of Structural Engineers Associations
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National Fire Protection Association
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National Concrete Masonry Association
North American Insulation Manufacturers Association
Polyisocyanurate Insulation Manufacturers Association
Reinsurance Association of America
Sheet Metal and Air Conditioning Contractors' National Association
Simpson Strong-Tie Company, Inc.
Smart Vent
Texas Fire Marshal's Association
U.S. Green Building Council
U.S. Resiliency Council