Awaiting the Lame-Duck Session and Election Results

The Congress has been in recess since the beginning of October and is set to re-convene for a lame-duck session on November 15th. How much legislative business is conducted during the session and what kind of business is conducted will be largely shaped by the outcome of the November 2nd elections. Estimates of the length of the lame-duck session vary from less than one week to one month. Again, this will significantly relate to election results and associated political calculations.

The primary business of the session will be to deal with appropriations for the federal departments and agencies. Assumptions at present seem to be that if the majority party changes after the election in the House or Senate or both, there may be a push by current leadership to provide appropriations for all of FY 2011 through an omnibus appropriations bill in the lame-duck session. At the same time, Republicans may push to pass another Continuing Resolution until sometime in the spring when Republicans would be in the leadership positions. If there is no change in leadership, either another Continuing Resolution or an omnibus bill could be moved.

Additionally, if the majority party changes, there may be a push on the part of Democrats to act on many pieces of legislation that are near completion. Some of those are: Stafford Act Amendments (H.R. 3377), Liveable Communities Act (S. 1619 and H.R. 4690), reauthorization of Pre-Disaster Mitigation (H.R. 1746, H.R. 3377, S. 3249), Water Resources Development Act (reported out of House Transportation and Infrastructure Committee on July 29), Multi-Peril Insurance Act (H.R. 1264) and federal reinsurance backstop for state catastrophe funds (H.R. 2555).

For the most recent status of this legislation, please see the October issue of “News & Views” on the ASFPM website. For review of legislation, please go to: http://thomas.loc.gov, type in the bill number or name or go to the committee website.

Here’s Something You Might Find Interesting . . .

It’s always interesting to see how some federal programs reinforce each other. Yes, I know, there are plenty of examples that show the opposite, but I’m going to focus on one specific way that three of FEMA’s programs actually do reinforce each other in a good way.

The three programs are the National Flood Insurance Program, Mitigation Planning (Sec. 322), and Public Assistance (Sec. 406). The thread I’ll use to tie them together is buildings that are eligible for post-disaster assistance for repair, restoration and replacement. The Stafford Act includes a definition of “facilities,” a broad term that includes buildings and non-building structures. For the purpose of this article, I’m referring to buildings that are owned by a government (“public facilities”) or a nonprofit entity (“private nonprofit facilities”).

National Flood Insurance Program. Federal flood insurance policies can be written on any walled and roofed building that is located in a community that participates in the NFIP. The NFIP considers government-owned
buildings and private nonprofit buildings to be nonresidential buildings. This means that the maximum flood insurance coverage available is $500,000 for the structure and $500,000 for contents. These are important numbers to keep in mind as we look at how the other two FEMA programs treat these buildings.

**Mitigation Planning (Sec. 322).** This section of the Stafford Act outlines the mitigation planning requirement. Federal regulations at 44 CFR Part 201 expand considerably on what the law specifies for both state and local mitigation plans. States must have plans to receive Hazard Mitigation Grant Program funds, and local jurisdictions must have plans to be eligible for HMGP grants to undertake specific projects. Here’s how this program is part of what I’m tying together:

- **State Mitigation Plans** – 44 CFR 201.4(c)(2)(ii) requires, among other things, that “State owned or operated critical facilities located in the identified hazard areas shall also be addressed”. The state plans I’ve looked at have attempted to identify state-owned facilities that are located in special flood hazard areas. Of course, the quality of the identification depends on having digital flood maps and a good database of geocoding for the actual, physical location of individual buildings.

- **Local Mitigation Plans** – 44 CFR 201.6(c)(2)(ii)(A) specifies that local plans should describe vulnerability in terms of “The types and numbers of existing and future buildings, infrastructure, and critical facilities located in the identified hazard areas.” Again, the level of detail for this determination depends on the data, but the communities I’ve worked with to develop mitigation plans have all been able to do at least an SFHA “in/out” determination for their own buildings.

**Public Assistance (Sec. 406).** Here’s where things get interesting. First, it’s a given that post-disaster recovery funds are available for public facilities and private nonprofit facilities that are damaged by an event that is declared a major disaster. However, what’s less well-known is that – stay with me here – if those facilities are buildings, if they’re located in a mapped special flood hazard area, if they are damaged by flooding, and if those buildings are not insured for flood damage, then there’s a significant consequence. How significant is the consequence? I like to describe it as equivalent to having a $1 million deductible. This is because if one of these buildings is damaged by flooding, FEMA is required to reduce the amount of public assistance that would otherwise be available, by the amount of insurance that would have been payable if it was insured by the NFIP. And because the maximum amount of coverage is $500,000 structure/$500,000 contents, this means up to $1 million of public assistance could be withheld – per building! Below I’ve copied the specific provision, Sec. 406(d).

Isn’t it nice how these three programs tie together? First, we know that public buildings in SFHAs can be insured by the NFIP (some municipal insurance pools may also offer coverage). Second, as part of mitigation planning we should find out whether any public buildings are, in fact, in the SFHA. And third, although not phrased this way, I think we should interpret the Public Assistance provision as an encouragement to do a building-by-building risk assessment. But just because a building is “in” the SFHA isn’t sufficient basis for deciding that flood insurance should be purchased for a specific building.

I know that it’s easy to simply say that every flood-prone public building should have flood insurance. But especially in these days of tight budgets, it’s appropriate that communities first undertake a risk assessment. It is only with this added dimension that an informed decision can be made regarding whether insurance coverage for flood damage should be obtained.

This type of risk assessment is different than what is done for mitigation plans – it is done not by floodplain managers and community planners, although floodplain managers play a key role by providing information. It is done by people who pay attention to municipal insurance and liability. These are the people who decide whether a community’s insurance coverage is adequate given risks, and whether purchasing additional coverage is a worthwhile investment.

In this context, a risk assessment looks at the probability of occurrence and the consequences for specific buildings. Thus, once you know buildings are “in” the SFHA, the next step is to examine the situation more closely to estimate the potential damage and likely costs to repair. A building that may experience only a few inches of
water against its foundation during the base flood doesn’t have the same vulnerability as one that is exposed to frequent flooding because it is situated closer to the water and several feet below the base flood elevation. And, of course, we all know that buildings with basements are more vulnerable than those without below-grade areas – especially if there’s an easy path for the water to actually get inside.

What can floodplain managers do? First, if not already done for your mitigation plan (or if it needs to be refined), pull out your Flood Insurance Rate Maps, get a list of all public buildings, and make that in/out determination. Then, for the buildings that are in the SFHA, determine the Base Flood Elevation and while you’re at it, check to see if the Flood Insurance Study has information for the 500-year flood. Next, use the best available information to estimate the ground elevation, which, combined with the BFE gives you an estimate of the depth of water at each building’s location. Then go visit your community’s risk manager and offer to help with the rest of the risk assessment by estimating the consequences of flooding and the cost to repair if damage were to occur.

And for bonus points, keep in mind that FEMA’s mitigation grant program funds can be used to retrofit flood-proof at-risk public buildings. Learn more by calling your State Hazard Mitigation Officer.

Sec. 406 Repair, Restoration, and Replacement of Damaged Facilities (42 U.S.C. 5172)

(d) Flood insurance -

(1) Reduction of Federal assistance - If a public facility or private nonprofit facility located in a special flood hazard area identified for more than 1 year by the Director pursuant to the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.) is damaged or destroyed, after the 180th day following November 23, 1988, by flooding in a major disaster and such facility is not covered on the date of such flooding by flood insurance, the Federal assistance which would otherwise be available under this section with respect to repair, restoration, reconstruction, and replacement of such facility and associated expenses shall be reduced in accordance with paragraph (2).

(2) Amount of reduction - The amount of a reduction in Federal assistance under this section with respect to a facility shall be the lesser of -

(A) the value of such facility on the date of the flood damage or destruction, or

(B) the maximum amount of insurance proceeds which would have been payable with respect to such facility if such facility had been covered by flood insurance under the National Flood Insurance Act of 1968 on such date.

(3) Exception - Paragraphs (1) and (2) shall not apply to a private nonprofit facility which is not covered by flood insurance solely because of the local government's failure to participate in the flood insurance program established by the National Flood Insurance Act.

(4) Dissemination of information - The President shall disseminate information regarding the reduction in Federal assistance provided for by this subsection to State and local governments and the owners and operators of private nonprofit facilities who may be affected by such a reduction.

The complete Stafford Act is online at http://www.fema.gov/pdf/about/stafford_act.pdf.

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