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Emergency Relief Program: Federal-Aid Highway Assistance for Disaster-Damaged Roads and Bridges

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Summary

The major highways and bridges recently damaged during Hurricanes Sandy and Irene are part of the federal-aid highway system and were therefore eligible for assistance under the Emergency Relief Program (ER) of the Federal Highway Administration (FHWA). Following a natural disaster or catastrophic failure (such as a bridge collapse), ER funds are made available for both emergency repairs and restoration of federal-aid highway facilities to pre-disaster conditions.

State departments of transportation typically have close ongoing relationships with FHWA's division offices in each state, which facilitate a quick, coordinated response to disasters. Although ER is a federal program, the decision to seek ER funding is made by the state, not by the federal government.

The program is funded by a permanent annual authorization of $100 million from the highway trust fund (HTF) along with general fund appropriations provided by Congress on a "such sums as necessary" basis. A number of issues have arisen in recent years:

- The scope of eligible activities funded by ER has grown via legislative or FHWA waivers of eligibility criteria or changes in definitions. As a result, in some cases the ER program has funded activities that have gone beyond repairing or restoring highways to pre-disaster condition.
- The $100 million annual authorization has been exceeded nearly every fiscal year, requiring appropriations that can lead to delay in funding permanent repairs.
- Congress has directed that in some cases ER fully fund projects, without the normal 10% or 20% state matching share, increasing the federal outlay for disaster highway assistance on these projects and constraining the funds available for other ER requests.

The 112th Congress authorized an emergency relief program for public transportation systems. However, this program does not have a permanent funding source, and funds are to be provided only by appropriation. No money has been appropriated to or expended under this program.

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Introduction

The major highways and bridges damaged during Hurricanes Sandy in 2012 and Irene in 2011 are examples of disaster damaged federal-aid highway infrastructure that is eligible for assistance from the Emergency Relief Program (ER) of the Federal Highway Administration (FHWA). ER assistance is restricted to roads and bridges on the federal-aid highway system, which essentially includes all public roads not functionally classified as either local or rural minor collectors. For disaster-damaged roads that are not federal-aid highways, states may request reimbursement for emergency road repairs from the Federal Emergency Management Agency (FEMA). FEMA may also allow limited funding under its Public Assistance Program for such things as snow removal and related operating costs during extreme snowfalls, which are not eligible for ER funds.[1]

This report describes FHWA assistance for the repair and reconstruction of highways and bridges damaged by disasters or catastrophic failures (such as a bridge collapse). It begins with a brief discussion of the legislative origins of federal assistance and describes the ER program in its current form. The report then discusses eligibility issues and program operation.

Background

For more than 70 years, federal aid has been available for the emergency repair and restoration of disaster-damaged roads. The first legislation authorizing such use of federal funds was the Hayden-Cartwright Act of 1934 (P.L. 73-393). This act, however, provided no separate funds, and states subject to disasters had to divert their regularly apportioned federal highway funds from other uses to disaster repairs.

The Federal-Aid Highway and Highway Revenue Act of 1956 (70 Stat. 374 and 70 Stat. 387) was the first act that authorized separate funds for the ER program (the program is codified at 23 U.S.C. 125). From the passage of the 1956 act through 1978, funding for the program was drawn 40% from the Treasury's general fund revenues and 60% from the highway trust fund (HTF). The HTF is supported by taxes paid by highway users, mainly on gasoline and diesel fuel. Starting in 1979, the Emergency Relief Program was funded 100% from the HTF. Late in 2005, Congress began appropriating funds from the general fund to supplement the $100 million permanent authorization from the HTF.[2] On July 6, 2012, the ER program was reauthorized through FY2014 by the Moving Ahead for Progress in the 21st Century Act (MAP-21; P.L. 112-141, §1107).[3]

[1] Federal Highway Administration, *Emergency Relief Manual (Federal-Aid Highways)*, Washington, DC, November 2009, p. 20, http://www.fhwa.dot.gov/reports/erm/er.pdf. See also MAP-21 Fact Sheet; Emergency Relief Program, 2012, http://www.fhwa.dot.gov/map21/er.cfm.

[2] Beginning with the December 30, 2005, enactment of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery (P.L. 109-148), ER supplemental appropriations have been drawn from the Treasury's general fund.

[3] CRS Report R42762, *Surface Transportation Funding and Programs Under MAP-21: Moving Ahead for Progress in the 21st Century Act (P.L. 112-141)*, coordinated by Robert S. Kirk.

FHWA's Emergency Relief (ER) Program

The ER program provides funds for the repair and reconstruction of roads on the federal-aid highway system that have suffered serious damage as a result of either (1) a natural disaster over a wide area, such as a flood, hurricane, tidal wave, earthquake, tornado, severe storm, or landslide; or (2) a catastrophic failure from any external cause (for example, the collapse of a bridge that is struck by a barge).[4] Historically, however, the vast majority of ER funds has gone for repair and reconstruction following natural disasters.

The Federal-State Relationship

As is true with other FHWA programs, the ER program is administered through the state departments of transportation in close coordination with FHWA's division offices in each state. Although ER is a federal program, the decision to seek financial assistance under the program is made by the state departments of transportation, not by the federal government. Local officials who wish to seek ER funding must do so through their state departments of transportation. They do not deal directly with the FHWA. As state departments of transportation normally deal with FHWA staff at the state level on many matters, they typically have working relationships that facilitate a quick coordinated response to disasters.

Funding

The ER program has a permanent annual authorization of $100 million in contract authority to be derived from the highway trust fund. These funds are not subject to the annual obligation limitation placed on most highway funding by appropriators, which means the entire $100 million is available each year. Because the costs of road repair and reconstruction following many disasters exceed the $100 million annual authorization, MAP-21 authorizes the appropriation of additional funds on a "such sums as may be necessary" basis, generally accomplished in either annual or emergency supplemental appropriations legislation.[5] For a listing of ER appropriations since 1998, see the **Appendix**.

As is true with other FHWA programs, ER is a reimbursable program. A state receives payment only after beginning repairs and submitting vouchers to FHWA for reimbursement of the federal share. However, once the state's eligibility for ER funds has been confirmed by FHWA, it can incur obligations knowing that it will receive reimbursement.

The Federal Share

Emergency repairs to restore essential travel, minimize the extent of damage, or protect remaining facilities, if accomplished within the first 180 days after the disaster, may be reimbursed with a

[4] Federal Highway Administration, *Emergency Relief Manual (Federal-Aid Highways)*, Washington, DC, November 2009, pp. 1-76, http://www.fhwa.dot.gov/reports/erm/er.pdf.

[5] The extensive damage caused by Hurricane Katrina in 2005 raised doubts whether emergency supplemental ER expenditures could be drawn from the highway account of the highway trust fund without constraining the ability of the HTF to fully fund other authorized surface transportation programs. For that reason, supplemental ER appropriations have come from the general fund since December 2005.

100% federal share. Permanent repair projects, such as rebuilding a bridge or a segment of damaged road, are reimbursed at the same federal share that would normally apply to the federal-aid highway facility. For Interstate System highways the federal share would be 90%, and for most other highways the share would be 80%. The requirement that the state provide a share of the funding for permanent repairs applies whether or not they are done during the first 180 days after the disaster. FHWA pays 100% of the cost of emergency or permanent repairs of roads on federal lands.

Congress has on occasion authorized FHWA to pay 100% of ER program expenses for repair and reconstruction projects related to particular disasters. Legislation for that purpose was enacted following the 2005 Gulf Coast hurricanes and the collapse of the I-35W Bridge in Minneapolis in 2007. MAP-21 also allowed for a 90% federal share for states whose total eligible expenses in a fiscal year exceed the state's apportionments from the large formula programs (under 23 U.S.C. 104) for the fiscal year in which the disaster occurred.

Eligibility and Program Operation

The ER program divides all repair work into two categories: emergency repairs and permanent repairs. Only repairs to roads and bridges on the federal-aid highway system that have suffered damage during a declared disaster or catastrophic failure are eligible for ER assistance.[6] The intent of ER assistance is to repair and restore highway facilities to pre-disaster conditions, not to increase capacity or fix non-disaster-related deficiencies. In regard to bridges, ER funds are not to be used if the construction phase of a replacement structure is already in the state's approved transportation improvement program at the time of the disaster or if the bridge has been permanently closed to vehicular traffic. In general, work funded by the ER program must occur within the federal-aid highway right-of-way. States must apply and provide a comprehensive list of all eligible project sites and repair costs within two years.

Contracts supported by ER funding must meet all contract provisions as required by 23 CFR Part 633A, which regulates highway contracts. All contractors receiving ER funds must pay prevailing wages as required under the Davis-Bacon Act.[7] ER-funded contracts must abide by Disadvantaged Business Enterprises (DBE) requirements, Americans With Disability Act (ADA) requirements, "buy America" regulations, and prohibitions against the use of convict labor (23 U.S.C. 114).[8]

Repair projects funded under the ER program are subject to the requirement of the National Environmental Policy Act (NEPA) of 1969. The impact, however, is generally limited since emergency repairs are normally classified as categorical exclusions under 23 CFR 771.117 (c)(9),

[6] A governor may issue a formal proclamation of the existence of a disaster. A presidential declaration or the governor's request for this declaration can serve the same purpose. The state files a letter of intent to apply for Emergency Relief program funding with the FHWA Division Office within the state. The FHWA division administrator may then concur that a disaster occurred and substantial damage has occurred to the federal-aid highway system roads over a wide area or that the criteria for a catastrophic failure were met and that the damage is eligible under 23 U.S.C. 125. When the President has issued a major disaster declaration, the division administrator's concurrence is not necessary. See, http://www.fhwa.dot.gov/reports/erm/ermchap3.cfm#a.

[7] The Davis-Bacon requirements can be suspended by executive order (ref. 40 U.S.C. 276a-5). President Bush did this in response to Katrina. He reimposed the requirements November 8, 2005.

[8] A state may request a waiver of the buy America requirements from FHWA based on a public interest rationale under 23 CFR 635.4109(c)(1)(i).

as are projects to permanently restore an existing facility "in-kind" to its pre-disaster condition. Betterments may, in some cases, require NEPA review.[9]

Emergency Repairs

These are repairs made immediately following a disaster to meet the program goals to "restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities."[10] State and local transportation agencies can begin emergency repairs immediately; prior approval from FHWA is not required. Once the FHWA division administrator finds that the disaster work is eligible, properly documented costs can be reimbursed retrospectively. To be eligible for a 100% federal share, emergency repair work must be completed within 180 days of the disaster, although FHWA may extend this time period if there is a delay in access to the damaged areas, for example due to flooding. Examples of emergency repairs are regrading roads, removal of landslides, construction of temporary road detours, erection of temporary detour bridges, and use of ferries as an interim substitute for highway or bridge service. Debris removal is generally the responsibility of FEMA.[11] The emergency repair part of the Emergency Relief Program is designed to permit work to start immediately, ahead of a finding of eligibility and programming of a project. In some instances, state departments of transportation have been able to let ER-funded debris removal and demolition contracts on the day of a disaster event.[12]

Permanent Repairs

Permanent repairs go beyond the restoration of essential traffic and are intended to restore damaged bridges and roads to pre-disaster conditions and capabilities.[13] Where the damaged parts of the road can be repaired to pre-disaster conditions, without replacement or reconstruction, this is done. Where a road needs to be replaced, ER funding is limited to the cost of building a roadway designed to current standards and of comparable capacity. MAP-21 defines a comparable facility as one that meets the current geometric and construction standards required for the types and volume of traffic that the facility will carry over its design life.

ER funds may be used for temporary or permanent repair of a repairable bridge or tunnel. However, ER funds may not be used to replace other federal funds that would have been used to construct a replacement bridge; if the construction phase of a replacement structure is already in the state's approved transportation improvement program at the time of the disaster, the project is not eligible for funding from the ER program. If a bridge is destroyed or repair is not feasible, then ER funds may participate in building a new comparable bridge to current design standards and to accommodate traffic volume projected over its design life. In some cases "betterments" (added protective features, added lanes, added access control, etc.) may be eligible, but they must

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[9] CRS Report RL33104, *NEPA and Hurricane Response, Recovery, and Rebuilding Efforts*, by Linda Luther.

[10] FHWA. *Emergency Relief Manual*. Available at http://www.fhwa.dot.gov/reports/erm/ermchap2.cfm#d1.

[11] MAP-21 restricted debris removal under ER to events not declared a major disaster by the President or declared a major disaster but where debris removal is not eligible under the Stafford Act.

[12] A good example of this is the Northridge Earthquake. See *Effects of Catastrophic Events on Transportation System Management and Operations*, Washington, FHWA, 2004, pp. 37-45.

[13] Federal Highway Administration, *Emergency Relief Manual*, Washington, DC, November 2009, http://www.fhwa.dot.gov/reports/erm/ermchap2.cfm#d2.

be shown to be economically justified based on a cost/benefit analysis of the future savings in recurring repair costs.

Permanent repair and reconstruction contracts not classified as emergency repairs must meet competitive bidding requirements. A number of techniques are available to accelerate projects, including design-build contracting, abbreviated plans, shortened advertisement periods for bids, and cost-plus-time (A+B) bidding[14] that includes monetary incentive/disincentive clauses designed to encourage contractors to complete projects ahead of time. For example, the contract for repair of the I-10 Twin Spans Bridge between Slidell and New Orleans, LA, that was awarded September 9, 2005, less than two weeks after the bridge was damaged by Hurricane Katrina, included incentives for early completion. Two-way traffic on two lanes opened on October 14, 2005, 16 days ahead of schedule, and four-lane traffic opened January 6, 2006, 9 days ahead of schedule. The contract for the replacement of the collapsed I-35W bridge in Minneapolis also used incentives for early completion. The new bridge was built in 11 months and was completed 3 months ahead of schedule.[15]

ER Funding Sustainability

In February 2007, the Government Accountability Office released a report that expressed concerns about the budgetary implications of increased ER spending.[16] The report pointed out that because of the constrained outlook for the highway trust fund, the ER program was mostly funded with general fund revenues at a time when the

> nation faces a pending fiscal crisis, raising concerns about future use of the general fund and the financial sustainability of the ER program ... ER funds are not intended to replace other federal-aid, state, or local funds to increase capacity, correct nondisaster-related deficiencies, or make other improvements. However, contributing to future financial sustainability concerns is the fact that the scope of eligible activities funded by the ER program has expanded in recent years with congressional or FHWA waivers of eligibility criteria or changes in definitions. As a result, some projects have been funded that go beyond repairing or restoring highways to pre-disaster conditions ... [such as] projects that grew in scope and cost to address environmental and community concerns.... Congress has also directed that in some cases the program fully fund projects rather than requiring a state match.[17]

The report also noted that from 1990 through 2005, 86% of ER program funds were made available through supplemental appropriations. GAO said this situation led to project backlogs that forced states to delay reconstruction or use other highway dollars as they awaited congressional action on supplemental appropriations legislation.

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[14] Cost-plus-time bidding (A+B method) includes two components. The A component is the traditional bid for all work to be performed. The B component is a bid of the total number of calendar days required to complete the project. The contract includes a disincentive for overrunning the time bid and an incentive for earlier completion.

[15] Minnesota Department of Transportation, *Interstate 35W Bridge in Minneapolis*, Saint Paul, MN, http://www.dot.state.mn.us/i35wbridge/index.html.

[16] U.S. Government Accountability Office, *Highway Emergency Relief: Reexamination Needed to Address Fiscal Imbalance and Long-term Sustainability*, GAO-07-245, February 2007, pp. 1-60, http://www.gao.gov/new.items/d07245.pdf. See also GAO-12-45, http://www.gao.gov/products/GAO-12-45.

[17] Ibid., p. 2.

Recent "Quick Release" ER Allocations

The FHWA *Emergency Relief Manual* describes the "quick release" method for developing and processing a state request for ER funding as a method which "employs a process to immediately deliver ER assistance for large disasters very quickly. The quick release method should not be used as a matter of routine and is intended to provide a 'down payment' on overall ER needs immediately following a large scale disaster."[18] For example, on October 30, 2012, DOT Secretary LaHood announced $13 million in quick release Emergency Relief Program funds for Hurricane Sandy damage to highways and bridges in New York and Rhode Island.

FY2012 Nationwide ER Allocations

On January 9, 2012, FHWA allocated just under $1.6 billion of ER funds to the states for reimbursement for repairs to damaged roads and bridges.[19] Most of the funds were allocated to states for damage that occurred in 2011. Some funds were allocated for permanent repairs to earlier disasters. Additional allocations of $62 million and $20 million were announced on April 2, 2012, and May 7, 2012, respectively.

2005 Gulf Coast Hurricane ER Funding

As of January 2012, FHWA has received $2.967 billion in ER program funding requests, and has allocated an equal amount for the repair and reconstruction of the damage to federal-aid highways caused in 2005 by hurricanes Katrina, Rita, and Wilma. **Table 1** presents the allocations of ER funding.

Table 1. 2005 Gulf Coast Hurricane ER Fund Allocations

(through January 9, 2012)

State	Date Range	Amount Allocated ($)
Alabama	March 28, 2006-July 24, 2007	27,377,720
Florida	January 20, 2006-March 28, 2006	523,175,042
Louisiana	September 14, 2005-January 9, 2012	1,301,911,471
Mississippi	September 13, 2005-July 6, 2009	1,074,000,000
Texas	January 20, 2006-October 23, 2008	40,454,847
Total		2,966,919,080

Source: CRS calculations based on FHWA data.

[18] Federal Highway Administration. Office of Infrastructure, *Emergency Relief Manual*, Washington, DC, November 2009, p. 33, http://www.fhwa.dot.gov/reports/erm/ermchap3.cfm.

[19] Federal Highway Administration, "U.S. Secretary of Transportation Announces More Than $319 Million as Repayment for Repairs to Damaged Roads and Bridges," press release, March 31, 2011, http://www.fhwa.dot.gov/pressroom/dot11045.htm.

Public Transportation Emergency Relief Program

Section 5324 of MAP-21 created a new program for public transportation similar in intent to FHWA's ER program.[20] In the past, disaster funding for damage to public transportation facilities or operations has been funded through FEMA or through appropriations targeted to transit needs and administered by the Federal Transit Administration following a specific disaster. The fledgling program is to help states and transit agencies cover operating and capital costs incurred due to damage as a result of disasters and emergencies. Eligible projects and activities include

- capital projects and activities for protecting, repairing, and replacing public transportation equipment and facilities; and
- operating costs to cover evacuation activities, rescue operations, and temporary transit service, or the reestablishing, expanding, or relocating of transit route service, before, during, or after an emergency event.

The program does not have a permanent annual authorization. All funds are authorized on a "such sums as necessary" basis and require an appropriation to be made available. The Secretary of Transportation determines the terms and conditions for grants under the program. The federal share is 80%, although the Secretary may waive the local match.

Operating costs are eligible for reimbursement for one year beginning on the date a disaster is declared, although the Secretary may extend that period to two years after determining a compelling need. Grants may only be made for expenses that are not reimbursed by FEMA.

[20] Federal Transit Administration, *Fact Sheet: Public Transportation Emergency Relief Program*, Washington, DC, 2012, http://fta.dot.gov/map21/.

Appendix. ER Program Appropriations

Table A-1. Appropriated Funds for the ER Program: 1998-2011

(excludes annual $100 million permanent authorization)

Public Law	Date Enacted	Title of Appropriations Act	Highway Trust Fund	General Fund
P.L. 105-174	May 1, 1998	1998 Supplemental Appropriations and Rescissions Act	$259,000,000	
P.L. 106-346	Oct. 23, 2000	Dept. of Transportation and Related Agencies Appropriations, 2001	$720,000,000	
P.L. 107-117	Jan. 10, 2002	Dept. of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002	$175,000,000	
P.L. 107-206	Aug. 2, 2002	2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States	$265,000,000	
P.L. 108-324	Oct. 13, 2004	Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005	$1,202,000,000	
P.L. 108-447	Dec. 8, 2004	Consolidated Appropriations Act, 2005	$741,000,000	
P.L. 109-148	Dec. 30, 2005	Dept. of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006		$2,750,000,000
P.L. 109-234	June 15, 2006	Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006		$702,362,500
P.L. 110-28	May 25, 2007	U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007		$871,022,000
P.L. 110-161	Dec. 26, 2007	Consolidated Appropriations Act, 2008		$195,000,000
P.L. 110-329	Sept. 30,2008	Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009		$850,000,000
P.L. 112-55	Nov. 18, 2011	Consolidated and Further Continuing Appropriations Act, 2012		$1,622,000,000

Source: FHWA, Office of Program Administration, and Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55).

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