



## Office of the County Attorney

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### MEMORANDUM

To: Boulder County Commissioners

From: Boulder County Attorney's Office

Date: October 5, 2023

Re: Discussion and determination on whether to file a lawsuit to recover damages related to the Marshall Fire

On July 28, 2023, FEMA Region 8 sent a letter to Colorado's Division of Homeland Security and Emergency Management (DHSEM) asking DHSEM to notify FEMA Public Assistance subrecipients for the Marshall Fire disaster, including Boulder County, the Town of Superior, and the City of Louisville, of their responsibilities under Section 312 of the Stafford Act prohibiting duplication of benefits. Under the Stafford Act, duplication of benefits includes funds "available to [the program applicant such as Boulder County] from a potentially liable third party." FEMA stated that it sent the letter "as a result of the recent release of Boulder County's fire investigative summary and review."

FEMA also stated in the letter that "those receiving federal assistance [must] take all actions necessary and reasonable" to recover costs from a "potentially liable third party."

Under the Stafford Act and relevant case law and as mentioned in FEMA's letter, if Boulder County does not pursue a claim it must provide FEMA with justification that such a pursuit is not commercially reasonable.

To date, more than ten cases have been filed against Xcel representing hundreds of fire survivor Plaintiffs and insurance companies. These cases have been and are being consolidated before one Judge. The applicable statute of limitations for the County filing a lawsuit likely runs on December 30, 2023. Plaintiff entities and individuals in these matters are generally represented on contingency fee, meaning generally no out-of-pocket cost to the County absent a settlement or judgment against the defendant.

In its letter to subrecipients, DHSEM stated that "it is the State's determination that it is not commercially reasonable to pursue a claim for recovery against a third-party [for damages resulting from the Marshall Fire disaster]." DHSEM then explained that each subrecipient would need to make its own determination regarding the commercially reasonable analysis and inform DHSEM whether it is in agreement with the State's determination or whether it will pursue a claim against a third party.

On Monday, October 2, 2023, Louisville's City Council took action indicating that it intends to pursue a lawsuit against Xcel Energy related to the Marshall Fire.

Because FEMA may attempt to recover funds from Boulder County if Boulder County does not pursue a claim, the County Attorney's Office requests authorization from the Board to take commercially reasonable steps including filing a lawsuit against Xcel Energy and any applicable related entities to recover for damages caused by the Marshall Fire.