



RECOVERY POLICY

- I. **TITLE:** *Stafford Act Section 705, Disaster Grant Closeout Procedures*
- II. **DATE OF ISSUANCE:** March 31, 2016
- III. **POLICY STATEMENT:** This policy clarifies FEMA's requirements under Section 705 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and establishes the guidelines to determine whether Section 705 applies, prohibiting FEMA from recovering payments made under the Public Assistance Program.¹
- IV. **PURPOSE:** The purpose of this policy is to explain how FEMA implements Section 705 in order to ensure consistent application to Public Assistance program funding.
- V. **SCOPE AND EXTERNAL AUDIENCE:** This policy applies to all potential recoveries of payments made to state, Indian tribal government, or local government recipients and subrecipients² for all Public Assistance funding³ including funding approved under the Alternative Procedures Pilot Program.⁴

Section 705 does not apply to private-non-profit subrecipients.⁵

¹ FEMA, consistent with applicable debt collection procedures, recovers payments by: reducing the amount of funds available for the award in the proper account (deobligation) and seeking recipient reimbursement by payment to the award account; by payment to the Agency; or through administrative offset.

² See "FEMA: Public Assistance Interim Program Guidance on 2 C.F.R. part 200" for all major disasters and emergencies declared on or after December 26, 2014. "Recipient" is a "state or Indian tribal government that receives a Federal award directly from FEMA to carry out an activity under the PA Program." "Subrecipient" is a "non-Federal entity that receives a subaward from a pass-through entity [e.g., a state or Indian tribal government that provides a subaward to a subrecipient to carry out an activity under the PA program] to carry out an activity under the PA program."

³ Public Assistance subawards are governed by 44 C.F.R. part 206, subparts G, H. Public Assistance funding is awarded using Project Worksheets (PWs).

⁴ See <http://www.fema.gov/alternative-procedures> for applicable guidance regarding the Alternative Procedures Pilot Program.

⁵ The language of Section 705, if applicable, only prohibits FEMA from recovering certain payments from state, Indian tribal governments, or local governments, and does not extend such protections to private-non-profits. See 42 U.S.C. § 5205.

With respect to application of Section 705(c), this policy does not apply to PWs where appeal,⁶ arbitration,⁷ or dispute resolution⁸ rights are exhausted and FEMA has made a final administrative decision (e.g., an adjudicated second appeal, final arbitration decision). Also, section 705(c) does not apply to PWs for which the recipient or subrecipient has requested a de-obligation as a result of actual costs that are less than the amount approved in the PW, and the amount is not in dispute.

VI. AUTHORITY: Section 705 *Disaster Grant Closeout Procedures*, The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5205.

VII. POLICY:

A. Statutory Language and Application.

1. **Statutory Language, Section 705(a) *Statute of Limitations*:** “(1) In General – Except as provided in paragraph (2), no administrative action to recover any payment made to a State, [Indian tribal government,]⁹ or local government for disaster or emergency assistance under this Act shall be initiated in any forum after the date that is 3 years after the date of transmission of the final expenditure report for the disaster or emergency. (2) Fraud Exception – The limitation under paragraph (1) shall apply unless there is evidence of civil or criminal fraud.”
 - a. **Application.** Section 705(a) effectively requires FEMA to provide notice to the recipient of its intent to recover payments made to recipients and subrecipients within 3 years after the date that the recipient submits to FEMA the final expenditure report for the recipient’s or subrecipient’s work for the disaster or emergency. The 3-year period is determined as follows:
 - i. For a *Recipient’s* expenditures under the program: The 3-year period begins when the recipient submits to FEMA its final Federal Financial Report (Standard Form 425) for the program for the disaster or emergency. This report is due within 90 days of the final payment made or after the end of the entire program period of performance, whichever occurs first; or
 - ii. For a *Subrecipient’s* expenditures under the program: The 3-year period begins when the recipient submits to FEMA the quarterly Federal Financial Report that represents the last expenditures of a subrecipient under the program for the disaster or emergency, as verified by the recipient’s submission of certifications and information in accordance with 44 C.F.R. § 206.205, as follows:

⁶ 44 C.F.R. § 206.206.

⁷ 44 C.F.R. § 206.209.

⁸ 44 C.F.R. § 206.210.

⁹ Stafford Act sec. 103 deems that any reference in the Act to “State, or local” government also refers to Indian tribal governments and officials. 42 U.S.C. § 5123.

After a recipient has submitted all closeout information as described in FEMA 9570.14 *Public Assistance Program Management and Grant Closeout Standard Operating Procedure* dated December 2013 for all of a subrecipient's projects under the disaster or emergency, it will notate the remarks section of its next quarterly Federal Financial Report to indicate it is the final expenditure report for the specified subrecipient for the disaster or emergency. The recipient will also indicate the date(s) it submitted to FEMA its request for subrecipient closure. Upon verifying this information, FEMA will notify the recipient that the request for subrecipient closure as documented in the quarterly Federal Financial Report constitutes the Final Expenditure Report for that subrecipient for the disaster or emergency and establishes the start of the 3-year period for FEMA to provide notice to the recipient of its intent to recover funds. The recipient will document this in Box 12 (Remarks) of the SF 425.

- b. When Section 705(a) applies because FEMA did not provide notice to the recipient of its intent to recover payments made to recipients and subrecipients within this 3 years period, 705(a) prohibits FEMA from directly recovering subject payments. FEMA will still pursue administrative offset (i.e. a reduction in future federal payments otherwise due to the entity), as appropriate pursuant to the Debt Collection Improvement Act of 1996, as amended¹⁰, unless Section 705(c) prohibits the recovery of funds.
2. **Statutory Language, Section 705(b) *Rebuttal of Presumption of Record Maintenance*:** “(1) In General – In any dispute arising under this section after the date that is 3 years after the date of the transmission of the final expenditure report for the disaster or emergency, there shall be a presumption that accounting records were maintained that adequately identify the source and application of funds provided for financially assisted activities. (2) Affirmative Evidence – The presumption described in paragraph (1) may be rebutted only on production of affirmative evidence described in that paragraph.”
- a. Application. For disputes that arise 3 years after the date the recipient submits to FEMA the final expenditure report for that recipient or subrecipient's completed work for the disaster or emergency in accordance with Section A. 1.a, the recipient or subrecipient is presumed to have maintained appropriate records, unless FEMA rebuts this presumption with affirmative evidence, such as documentation demonstrating that the recipient or subrecipient did not maintain the records in question.
3. **Statutory Language, Section 705(c) *Binding Nature of Grant Requirements*:** “A State, [Indian tribal government],¹¹ or local government shall not be liable for reimbursement or any other penalty for any payment made under this Act if – (1) the payment was

¹⁰ See 31 U.S.C. § 3701 *et seq.*

¹¹ See 42 U.S.C. § 5123.

authorized by an approved agreement specifying the costs; (2) the costs were reasonable; and (3) the purpose of the grant was accomplished.”

- a. Application. Section 705(c) prohibits FEMA from recovering payments for a PW if all three criteria of Section 705(c) are met. This prohibition applies even if FEMA later determines that it made an error in determining eligibility, regardless of whether the eligibility determination violated FEMA policy, regulations, or law.

With respect to application of Section 705(c), this policy does not apply to PWs where appeal, arbitration, or dispute resolution rights are exhausted and FEMA has made a final administrative decision (e.g., an adjudicated second appeal, final arbitration decision). Also, Section 705(c) does not apply to matters in which the recipient or subrecipient has requested a de-obligation as a result of actual costs which are less than the amount approved in the PW, and the amount is not in dispute.

Section 705(c) does not apply if the recipient’s or subrecipient’s PW does not satisfy all three statutory criteria. In circumstances where Section 705(c) does not apply, FEMA may take all appropriate actions to recover payments made and/or de-obligate remaining obligated funds, to include instances where FEMA identifies errors in a previous eligibility determination.

Project Cost Adjustments: Prior to determining whether Section 705(c) applies, FEMA will adjust and correct project funding based on properly supported actual costs for the approved and completed scope of work, duplications of benefits (e.g., insurance reductions), improperly duplicated costs documented on one or more PWs, math errors, scrivener’s errors, and accounting errors, as appropriate.

B. Evaluating Section 705(c) Statutory Criteria in Project Determinations.

FEMA uses the following criteria to determine whether Section 705(c) prohibits FEMA from recovering payments for a PW:

1. The payment was made under the Act, as authorized by an approved agreement specifying the costs. Section 705(c) applies to payments made, as authorized under the PA program and the approved agreement specifying the costs.
 - a. Payment has occurred when the recipient draws down funds obligated for the completion of the approved scope of work¹² through SmartLink, regardless of whether the recipient has disbursed funds to the subrecipient.
 - b. If Section 705(c) applies, FEMA is prohibited from recovering payments made, e.g. the amount of funds drawn down by the recipient in association with completion of the approved scope of work. Section 705(c) does not prohibit FEMA from deobligating funds that recipient has not drawn down. FEMA will take all

¹² Payment methods are governed by 31 C.F.R. part 205, specifically §§ 205.11, 205.12, 205.33.

- appropriate actions to recover obligated funds that have not been drawn down, including the de-obligation of such funds, for any appropriate reason (including a project eligibility error), as appropriate.
- c. The “approved agreement specifying the costs” for a particular project consists of the obligated PW¹³ together with the governing FEMA-State Agreement.¹⁴ Project eligibility decisions detailed in a PW obligated in accordance with standard procedures are authorized by an “approved agreement,” even if FEMA erred in applying FEMA policy, regulation, or statute to the eligibility decision and where Section 705(c) applies.
2. The purpose of the grant was accomplished. FEMA has identified the following factors for evaluating whether the purpose of the grant was accomplished.
- a. *Determination Factors:* The purpose of the grant is accomplished if the recipient or subrecipient, as appropriate:
 - i. Completes the scope of work as described in the obligated PW and supporting documentation (e.g., the “approved agreement” referenced in Section 705(c)(1))¹⁵; and
 - ii. Demonstrates compliance with post-award terms and conditions of the Federal award,¹⁶ as described in the obligated PW and the FEMA-State Agreement, including but not limited to applicable requirements: for federal procurement, to obtain and maintain insurance, and for Environmental Planning and Historic Preservation compliance.

If the recipient or subrecipient fails to comply with a post-award term or condition of the award Section 705(c) does not apply. Accordingly, FEMA may take all appropriate actions to recover payments for any appropriate purpose, including due to a project eligibility error.
 - b. *Closeout Procedures:* Typically, whether the purpose of the grant was accomplished will be determined during the PW closeout process.¹⁷ At closeout, FEMA will utilize the procedures described at 44 C.F.R. § 206.205 and in FEMA 9570.14 *Public Assistance Program Management and Grant Closeout Standard Operating Procedure* dated

¹³ 44 C.F.R. § 206.202(d), (e).

¹⁴ 44 C.F.R. § 206.44.

¹⁵ 44 C.F.R. § 206.202(e). Note that “approved agreement” also includes the governing FEMA-State Agreement (44 C.F.R. § 206.44).

¹⁶ See generally 2 C.F.R. part 200, subpart D, “Post Federal Award Requirements.”

¹⁷ See the definition of “closeout” in the Uniform Administrative Requirements, Cost principles, and Audit Requirements for Federal award: “Closeout means the process by which the Federal awarding agency or pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed.” 2 C.F.R. § 200.16.

December 2013 to verify that the purpose of the grant was accomplished. The recipient must submit documentation to FEMA demonstrating completion of the approved scope of work and compliance with post-award terms and conditions within 180 calendar days of completion of the approved scope of work.

- i. **Small Projects:** FEMA will accept the P-4 Project Completion and Certification Report or a letter certifying work completion from the recipient for all small projects. When a recipient or subrecipient does not complete work on all small projects within the regulatory project completion time frames, FEMA will accept the recipient's certification on those small projects that have been completed.
- ii. **Large Projects:** Generally, FEMA will review documentation submitted by the recipient as part of the final reconciliation report for project closeout, but FEMA may review certification and documentation consistent with 44 C.F.R. § 206.205(b)(1) submitted for a project prior to closeout to determine the applicability of Section 705(c), as appropriate.
- iii. **Non-compliance Remedies:** If, after the recipient has submitted the appropriate documentation, FEMA determines that the recipient or subrecipient failed to comply with a post-award term or condition of the award (such as federal requirements for procurement, environmental planning and historic preservation compliance, or obtaining and maintaining insurance), the purpose of the grant was not accomplished and FEMA is not prohibited by Section 705(c) from recovering payments as a remedy.¹⁸
- iv. **Applicability to Duplication of Benefits determinations:** Section 312 of the Stafford Act both:
 - 1) Prohibits FEMA from providing assistance when financial assistance has been provided for the same purpose from insurance, any other program, or any other source (e.g., realized insurance proceeds that duplicate FEMA assistance, other federal funding, donated resources); and
 - 2) Requires that FEMA reduce or recover funding by the amount of duplicative assistance available for the same purpose from another source (e.g., anticipated benefits that duplicate FEMA assistance).¹⁹ FEMA may adjust the amount of insurance benefits or other duplication of benefits recorded in the PW at any time post-award to ensure compliance with the terms of the award, based on information it identifies or the applicant provides, unless

¹⁸ 2 C.F.R. § 200.338.

¹⁹ For example, to expedite the delivery of Public Assistance when a recipient/subrecipient has insurance coverage, FEMA may assess the recipient/subrecipient's insurance coverage to record in the PW at the time of award a preliminary estimate of the amount of available anticipated benefits that would duplicate FEMA assistance (i.e., insurance reductions for anticipated insurance proceeds). The recipient/subrecipient remains, however, responsible to identify and seek all applicable insurance proceeds under its policy or policies as a post-award condition.

FEMA indicated that its determination regarding the amount of available anticipated benefits was final.

- v. Failure to provide information to FEMA: If the recipient or subrecipient fails to provide all necessary information to FEMA that materially impacts FEMA's determination regarding: 1) the eligibility of the project; 2) the cost of the approved scope of work described in the PW; or 3) compliance with terms and conditions of the award; then Section 705(c) does not apply and FEMA will take all appropriate actions to recover payments to remedy the state, Indian tribal government, or local government recipient's or subrecipient's failure to provide the subject information, as appropriate.
3. The costs were reasonable. As defined at 2 C.F.R. § 200.404 and OMB Circular A-87, "*A cost is reasonable if in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost.*" This definition and applicable FEMA policies and guidelines for determining reasonableness will be utilized to determine if this criteria of Section 705(c) is satisfied.
 - a. If FEMA determines that the recipient or subrecipient did not incur reasonable costs in performing the approved scope of work, Section 705(c) does not apply, and FEMA will take all appropriate actions to recover payments made for disallowed costs or overpayment, including if there was also a project eligibility error.

C. Appeals, Arbitration, and Audits

- a. This policy applies to state, Indian tribal government, or local government recipient and subrecipient PWs that are under appeal, arbitration, or where the Department of Homeland Security's Office of the Inspector General has made an audit recommendation to recover payments.
 - i. If the recipient or subrecipient disagrees with FEMA's decision to recover payments because they assert Section 705(c) applies, the recipient or subrecipient should submit appeals in accordance with 44 C.F.R. § 206.206, and FEMA will consider whether Section 705(c) prohibits FEMA from recovering payments.
 - ii. When responding to appeals, arbitration requests, and audits, FEMA will cite the Section 705(c) determination if FEMA is prohibited from recovering payments. FEMA will also note any Section 705(c) related determinations, including the rationale, in the PW comments and a determination memo, as appropriate.

VIII. **RESPONSIBLE OFFICE:** Recovery Directorate, Public Assistance Division.

IX. **REVIEW DATE:** It is FEMA policy to review policies and reissue, revise, or rescind the policy within three years of the date of issuance. This policy will be reviewed 3 years from the date of issuance in accordance with Directive 112-12.



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