



# Stafford Act Section 705, *Disaster Grant Closeout Procedures* FEMA Recovery Policy FP 205-081-2 Version 2

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## BACKGROUND

This policy clarifies FEMA’s requirements under Section 705 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act<sup>1</sup> (Stafford Act), and establishes the guidelines to determine whether Section 705 applies, prohibiting FEMA from recovering payments made under the Public Assistance Program.<sup>2</sup> This policy applies to all potential recoveries of payments made to State, Indian tribal government, or local government recipients and subrecipients<sup>3</sup> for all Public Assistance funding<sup>4</sup> including funding approved under the Alternative Procedures Pilot Program.<sup>5</sup> Section 705 does not apply to private non-profit subrecipients.<sup>6</sup>

Section 705 does not apply in cases when FEMA or an arbitration panel has made a final administrative decision (i.e., the applicant has not submitted a timely appeal or arbitration request, or appeal or arbitration rights are exhausted).<sup>7</sup>

The Disaster Recovery Reform Act of 2018 (DRRA) provides that Section 705(a) applies to disaster or emergency assistance provided to a State or local government on or after January 1, 2004, except where administrative actions to recover payments of assistance were completed prior to the date of enactment of DRRA on October 5, 2018. Such completed actions are not invalidated or otherwise affected by DRRA. Administrative actions that were pending on October 5, 2018, including those where FEMA has provided notice of intent to recover funding but has not completed deobligation, will be evaluated for applicability of Section 705 in accordance with this policy.

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<sup>1</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended.

<sup>2</sup> 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.

<sup>3</sup> 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.”

<sup>4</sup> Public Assistance subawards are governed by 44 C.F.R. part 206, subparts G, H, I. Public Assistance funding is awarded using Project Worksheets (PWs).

<sup>5</sup> See <http://www.fema.gov/alternative-procedures> for applicable guidance regarding the Alternative Procedures Pilot Program.

<sup>6</sup> 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.

<sup>7</sup> Stafford Act sec. 423, 42 U.S.C. § 5189(a) and 44 C.F.R. § 206.206.



Section 705 does not apply to projects for which the recipient or subrecipient has requested a deobligation as a result of actual costs that are less than the amount approved in the Project Worksheet (PW), and the amount is not in dispute.

## 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.

## PRINCIPLES

- A. FEMA will responsibly implement this authority in a consistent manner through informed decision making and accountable documentation.
- B. FEMA will engage with recipients and subrecipients as appropriate to ensure fair and consistent application of this policy.

## REQUIREMENTS

### A. STATUTORY LANGUAGE AND APPLICATION

Outcome: To set forth the statutory requirements under Section 705 and establish the guidance for interpreting applicability to Public Assistance projects.

1. Statutory Language, Section 705(a) *Statute of Limitations*: “(1) In General – Notwithstanding section 3761(e) of title 31, United States Code, and except as provided in paragraph (2), no administrative action to recover any payment made to a State, [Indian tribal government,]<sup>8</sup> 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 project completion as certified by the grantee. (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 from the date that the recipient submits to FEMA the final expenditure report for project completion as certified by the recipient. The administrative action does not need to be completed within the 3-year time period (e.g., if FEMA has provided notice to an applicant within the 3-year time period but has not completed the deobligation of funding, the provision of notice is sufficient for purposes of Section 705(a)).
  - b. Identifying the 3-year time period: The recipient should submit its certification electronically to ensure that there is no discrepancy between the date of transmission and the date of receipt by FEMA. The 3-year time period is determined as follows:

<sup>8</sup> 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.



# FEMA

- i. For Small Projects: The 3-year period starts on the date upon which the recipient submits to FEMA the Project Completion and Certification Report (P.4) and a letter certifying that the subrecipient completed the approved scopes of work for all of its Small Projects in accordance with the FEMA-State/Tribe Agreement, and that it made all payments in accordance with the FEMA-State/Tribe Agreement.<sup>9</sup> For projects completed prior to the issuance of this policy, FEMA will accept a P.4 or letter containing the applicable certification for completion of all of an applicant's Small Projects.
  
- ii. For Large Projects: The 3-year period starts on the date upon which the recipient submits to FEMA the Final Inspection Report for a project and a letter certifying project completion, including certification that: all incurred costs are associated with the approved SOW; the subrecipient completed all work in compliance with the FEMA-State/Tribe Agreement; and it made all payments in accordance with 2 C.F.R. § 200.305. The recipient must also submit this certification for each of its own Large Projects. If a Large Project is completed prior to obligation, the applicant must still submit actual cost documentation and the recipient must submit its certification of project completion in accordance with applicable regulatory timelines.

For projects where the recipient has requested FEMA assistance with validating projects for closeout, once this process is completed, the recipient must submit a Final Inspection Report and letter certifying project completion. The 3-year period starts on the date of submission of this certification.

For projects completed prior to the issuance of this policy, FEMA will accept the Final Inspection Report or equivalent documentation that demonstrates the date upon which the recipient submitted its certification that the project was complete and request for project closeout.

- c. Tolling the 3-year statute of limitations: After the recipient has provided its certification of project completion to FEMA, FEMA reviews the project during the closeout process. During this review, FEMA may discover an issue that the recipient and/or subrecipient needs to address (e.g., lack of documentation). In such circumstances, FEMA will make a request for information (RFI) to the recipient. The RFI constitutes the beginning of an administrative action to potentially recover funds and will therefore toll the 3-year statute of limitations for purposes of Section 705(a) until the recipient and/or subrecipient provide the requested information and FEMA makes a determination on the substantive issue. This will pause the 3-year time period until FEMA notifies the recipient in writing that the issue is resolved and does not cause the 3-year time period to restart.

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<sup>9</sup> 44 C.F.R. § 206.205(a).



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- d. Administrative Offset: When Section 705(a) applies because FEMA did not provide notice of its intent to recover payments to a recipient or subrecipient within the applicable 3 year period, Section 705(a) also precludes FEMA from recovering such payments as an administrative offset (i.e. a reduction in future Federal payments otherwise due to the entity).
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 project completion as certified by the grantee, 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 project completion as certified by the recipient in accordance with Section A.1.b, 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],<sup>10</sup> 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 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 project 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 law, regulations, or FEMA policy. Section 705(c) does not apply if the recipient’s or subrecipient’s project 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 deobligate remaining obligated funds, to include instances where FEMA identifies errors in a previous eligibility determination.
  - b. 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, duplication of benefits (e.g., insurance proceeds), improperly duplicated costs documented on one or more PWs, math errors, scrivener’s errors, and accounting errors, as appropriate.

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<sup>10</sup> See 42 U.S.C. § 5123.



## B. EVALUATING SECTION 705(C) STATUTORY CRITERIA IN PROJECT DETERMINATIONS

Outcome: To clarify the application of the provisions of Section 705(c). Unless the 3-year statute of limitations per Section 705(a) applies, FEMA uses the following criteria to determine whether Section 705(c) prohibits FEMA from recovering payments for a project.

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 work<sup>11</sup> 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 the recipient has not drawn down. FEMA will take all appropriate actions to recover obligated funds that have not been drawn down, including the deobligation of such funds, for any appropriate reason, including a project eligibility error.
  - c. The “approved agreement specifying the costs” for a particular project consists of the obligated PW<sup>12</sup> together with the governing FEMA-State Agreement.<sup>13</sup> 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 law, regulation, or FEMA policy 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));<sup>14</sup> and

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<sup>11</sup> Payment methods are governed by 31 C.F.R. part 205, specifically §§ 205.11, 205.12, 205.33.

<sup>12</sup> 44 C.F.R. § 206.202(d), (e).

<sup>13</sup> 44 C.F.R. § 206.44.

<sup>14</sup> 44 C.F.R. § 206.202(e). Note that “approved agreement” also includes the governing FEMA-State Agreement (44 C.F.R. § 206.44).



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- ii. Demonstrates compliance with post-award terms and conditions of the Federal award,<sup>15</sup> as described in the obligated PW or 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 project closeout process.<sup>16</sup> 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 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 for each large project or following the completion of the last small project.<sup>17</sup>
- i. Small Projects: FEMA will accept the P.4 and a letter certifying completion of all of an applicant's Small Projects in accordance with applicable law and regulation or, for project completion certified prior to the issuance of this policy, a letter certifying work completion from the recipient for all of an applicant's Small Projects. When a recipient or subrecipient does not complete work on all Small Projects within the regulatory project completion timeframes, FEMA will accept the recipient's certification on those Small Projects that have been completed.
  - ii. Large Projects: Generally, FEMA reviews documentation submitted by the recipient as part of the final reconciliation report and request 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 to certify project completion, 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

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<sup>15</sup> See generally 2 C.F.R. part 200, subpart D, "Post Federal Award Requirements."

<sup>16</sup> 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.

<sup>17</sup> 2 C.F.R. § 200.343. FEMA allows 180 days based on the combined allowance of 90 days for the Subrecipient and 90 days for the Recipient. See also 44 C.F.R. § 206.205.



purpose of the grant was not accomplished and Section 705(c) does not prohibit FEMA from recovering payments as a remedy.<sup>18</sup>

- iv. Applicability of Duplication of Benefits Determinations: Section 312 of the Stafford Act:
    - 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., actual 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).<sup>19</sup> Based on information that FEMA identifies or the applicant provides, FEMA may adjust funding based on the amount of insurance proceeds or other duplication of benefits at any time post-award, unless FEMA indicated that its determination regarding the amount of available anticipated benefits was final or Section 705(a) prohibits FEMA from recovering funding.
  - 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 criterion of Section 705(c) is satisfied.
- a. If FEMA determines that the recipient or subrecipient incurred costs that were not reasonable 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 applicable costs associated with a project eligibility

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<sup>18</sup> 2 C.F.R. § 200.338.

<sup>19</sup> 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.



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## C. APPEALS, ARBITRATION, AND AUDITS

Outcome: To clarify the applicability of Section 705 to appeal, arbitration, and audit determinations.

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

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*Keith Turi*  
*Assistant Administrator, Recovery Directorate*

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Date





## ADDITIONAL INFORMATION

### REVIEW CYCLE

This version of the policy supersedes the version published on March 31, 2016. This policy will be reviewed within four years of the issue date. The Assistant Administrator of Recovery is responsible for authorizing any changes or updates.

### AUTHORITIES

Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended.

### QUESTIONS

Direct questions to [FEMA-PA-Executive-Office@fema.dhs.gov](mailto:FEMA-PA-Executive-Office@fema.dhs.gov).

DRAFT POLICY FOR PUBLIC COMMENT