
Federal Emergency Management Agency
Public Assistance Division
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Washington, DC 20472-3100.

Submitted electronically to FEMA-Recovery-PA-Policy@fema.dhs.gov

RE: FEMA's Draft Policy "Stafford Act Section 705, Disaster Grant Closeout Procedures"

The National Rural Electric Cooperative Association ("NRECA") appreciates the opportunity to submit comments on FEMA's Proposed Policy titled "Stafford Act Section 705, Disaster Grant Closeout Procedures."

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 48 states. NRECA members serve 364 of the nation's 395 persistent poverty counties¹.

Every year, ice storms, tornadoes, floods, hurricanes and similar natural disasters destroy NRECA's member cooperatives' critical facilities and infrastructure (such as poles, lines, and transformers). If this damage is caused by a major disaster declared by the President of the United States, then many of the cooperatives' response and recovery costs are eligible for reimbursement through grants from the Federal Emergency Management Agency ("FEMA"). These grants, authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act and administered under FEMA's Public Assistance Program, can amount to tens of millions of dollars and are critical to the ability of cooperatives to recover from disasters. The grant program best serves its purpose when it is adequately funded by Congress and efficiently administered so that meritorious cost reimbursement grants are speedily disbursed and subject to minimal/no risk of deobligation. NRECA's member cooperatives and numerous other grant applicants are best positioned to support the communities they serve and help restore strong local economies when the grant program is administered efficiently and offers certainty. As such, FEMA's development and application of the closeout procedures policy is of great interest to NRECA.

NRECA has several concerns with the draft closeout policy, which are set forth below and in the attached comment matrix. It is disconcerting that we raised some of these same issues in our comments to FEMA's 2015 draft closeout policy, yet these concerns have been neither addressed nor explained by FEMA.

1. Applicability

At lines 13 and 14, the draft Policy states that section 705 does not apply to private non-profit subrecipients. While the statutory language of Section 1216c of the Disaster Recovery Reform Act

¹ Persistent poverty counties are defined by the U.S. Department of Agriculture's Economic Research Service as those counties where 20% or more of the population has lived in poverty for the last 30 years.

("Act") references State and local governments, we do not believe that Congress intended to exclude other entities eligible for Public Assistance from Section 1216c. The Policy should apply to sub-recipients. There is no reason private non-profit sub-recipients, like electric cooperatives, should be afforded less protection under the policy. This would be discriminatory and arbitrary – FEMA is reserving to itself the right to exceed a 3-year statute of limitations on deobligations involving private non-profit entities such as electric cooperatives while giving protection to state, tribal and local governments, the entities through private non-profits are sub-recipients.

With regard to lines 16 to 18, FEMA should not be allowed to limit the application of Section 705 to only projects that have not been through an appeal. Section 705 is a separate section of the statute and stands alone. FEMA does not have the authority to limit Congress's intent through the issuance of an agency policy.

2. Tolling the statute of limitations.

At lines 98 to 108 FEMA sets forth a process that is of concern to NRECA members. What FEMA proposes makes the 3-year time frame null and void as FEMA can extend the timeframe indefinitely simply by submitting Requests for Information ("RFI"). The lack of administrative finality prevents subrecipients from closing out a claim for an undetermined amount of time. Recipients/sub-recipients should be entitled to presume that FEMA has accepted closeout of a project. We recognize and support FEMA's responsibility to ensure that funds have been appropriately spent but we are concerned about the one-sided nature of this part of the policy. The administrative actions of FEMA outlined in this section are exactly the types of activities that Section 705(a) intends to limit to a 3-year period. Tolling the 3-year statute of limitations for FEMA's administrative activities simply subverts the intention of limiting the Agency's time for administrative actions.

To the extent FEMA believes that tolling or suspending the 3 year limit is necessary, once the recipient has provided its certification of project completion to FEMA, we recommend that if FEMA does not respond, or ask for additional information through an RFI, within 30 days, tolling should cease on the 31st day. We also recommend that if FEMA issues an RFI, once a response is submitted by the recipient/subrecipient, FEMA must determine if the response is adequate or not within 30 days.

In addition, currently subrecipients have no way to know if FEMA has issued a new RFI without endlessly monitoring the portal which is burdensome and time consuming especially when FEMA is under no time constraints to issue new RFIs. We recommend that the policy include a notice requirement in which FEMA must notify the recipient or subrecipient, via a separate email, that a new RFI has been generated and is waiting in the portal. This requirement should help to streamline the grant closeout process.

3. The Purpose of a Grant was Accomplished

At lines 185 to 199 FEMA sets forth the concept that FEMA can, after it has approved and closed out a project, re-open the project and potentially deobligate funds.

The policy should restrict FEMA's ability to challenge whether a project has met its stated purpose after FEMA has closed the project. The purpose of FEMA's closeout review is to confirm

reasonableness of the costs and that the scope and costs are eligible. Once FEMA has reviewed and closed a project, FEMA should not be allowed to later reopen the project to reverse these determinations to the detriment of a recipient or sub-recipient. Post-approval and close out challenges to procurement should not be allowed, as proper procurement supports reasonableness of the costs, and FEMA's closeout of a project includes confirmation that FEMA has determined a cost is reasonable – so procurement compliance at that point should be moot.

4. The Policy Should Be Adopted Through Formal Rulemaking Procedures.

Although Sec. 701. Rules and Regulations (42 U.S.C. 5201(a)), Rules and Regulations, merely authorizes and does not mandate that the Agency prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of the Stafford Act, the fact that Policy FP 205-081-2 is intended to have “binding effect” on the agency and regulated parties, FEMA should abide by the provisions of the Administrative Procedures Act in order to adopt it.

The court in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) provided a road map for determining when “guidance” or “policy” must be the product of notice and comment rulemaking via publication in the Federal Register. If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State authorities to believe that it will declare permits (applications for funding) invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes “binding” and must be adopted as a rule through formal rulemaking procedures.

Thank you for the opportunity to comment.

Respectfully submitted,

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