

Disaster Recovery, Hazard Mitigation, And the Stafford Act

Background

Most emergencies are handled at the local level, without assistance from the state or federal government. However, major disasters or emergencies disrupt the normal functioning of governments and communities, and special federal measures are necessary and appropriate to expedite the rendering of aid, emergency services, and recovery. This public assistance is primarily provided and overseen by the Federal Emergency Management Agency (FEMA) under authorization of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (P.L. 93-288, as amended). The Stafford Act also authorizes FEMA to provide assistance in planning for disasters and emergencies and in disaster mitigation planning, design, and investments.

Categories of assistance that public power utilities generally receive include debris removal, emergency protective measures, and utility restoration and reconstruction. Public power utilities also receive assistance in planning and design for hazard mitigation and in making disaster mitigation investments. However, given the appropriate life-safety emphasis on getting power restored as quickly as possible, the ability to pause to consider how to rebuild systems with increased resiliency is often impaired.

In some instances, FEMA will decide that public assistance was not appropriate after payment has already been made. In those instances, it can seek to recover (or “deobligate”) such payments either directly or through an administrative offset of future federal payments. Deobligation can result because FEMA has discovered that the type of project is not appropriate, that the payment was duplicative, or quite often, because the recipient failed to follow federal procurement rules when making purchases with assistance funds. These rules can be found in the *Federal Acquisition Regulation* (FAR), a 1,917-page document that includes requirements related to: competition and acquisition planning; contracting methods and contracting types; socioeconomic programs; general contracting requirements; special

contracting categories; and contract management. Meeting these requirements is difficult in any instance, more so when normal governmental functions have been disrupted by a major disaster or emergency. Nonetheless, FEMA routinely seeks to deobligate funds given to states, tribal governments, and localities, including public power utilities, based upon failure to follow these rules, often years after the disaster. In fact, the Department of Homeland Security’s Office of Inspector General has said that if procurement requirements are not followed, FEMA can and should seek deobligation “even if costs were otherwise reasonable, and the grantee or subgrantee otherwise accomplished the purpose of the grant” (OIG-16-126-D, Sept. 2, 2016).

Congress sought to limit the time in which FEMA could deobligate funds in the Disaster Assistance Improvement Act of 2018 (P.L. 115-254). Under this new provision, which APPA strongly supported, FEMA may only seek to deobligate funds if it has notified the recipient of its intent to do so within three years of the transmission of the final expenditure report for the specific project. This statute of limitations does not apply to deobligations announced prior to the October 5, 2018, enactment of the new law. However, FEMA upended the intent of this three-year limit in a rule published on October 11, 2020, and reaffirmed on June 2, 2021 (See, “Stafford Act Section 705, Disaster Grant Closeout Procedures: FEMA Policy 205-081-2, Version 2”). Specifically, FEMA now allows itself to pause the new statute of limitations whenever it has additional questions about a project’s final report.

Finally, the Disaster Assistance Improvement Act also provided a permanent funding source for pre-disaster mitigation assistance, equal to six percent of disaster-related public assistance provided each year. This is a critical resource allowing for ongoing and reliable funding for pre-disaster mitigation projects.

FEMA and the Pandemic

All 50 states and four territories remain under a presidentially declared emergency and disaster (effective January 20, 2020) as a result of the COVID-19 coronavirus pandemic. Under this designation, public assistance grants are available to state and local governments for “Category B - Emergency Protective Measures.” According to FEMA, these expenses include spending on emergency health care aid, such as vaccinations, supplies, tests, and personal protective equipment (PPE).

In providing critical service to customers, the top priorities for public power utilities throughout the pandemic were securing the physical and logistical resources needed to operate while keeping workers and customers safe. Some of the out-of-the-ordinary steps public power utilities took in response to the pandemic include:

- Redesigning work procedures and work sites to meet Centers for Disease Control and Prevention recommendations;
- Acquiring resources—including testing, PPE, and other equipment;
- Building virus contact tracing programs and applications;
- Slowing and altering construction work, and work schedules, to minimize the possibility of infection spread;
- Quarantining and isolating workers in their homes or on site to ensure reliability; and
- Partnering with local organizations or setting up shops internally to create and manufacture PPE and sanitizer.

These steps kept the power on for critical infrastructure throughout public power communities, including hospitals, fire departments, and police stations. They also allowed residents to transition to remote working from home and therefore help stop the spread of the virus. FEMA defines qualifying emergency protective measures as those taken by the community “before, during, and after a disaster to save lives, protect public health and safety, and prevent damage to improved public and private property.”

However, on September 1, 2020, FEMA announced that state and local costs of responding to the pandemic would, as of September 15, be considered an ongoing operational cost and not eligible for public assistance.¹ FEMA reversed its decision in April 2021 in interim guidance that said that the costs of safely opening and operating during the pandemic would be 100 percent covered. These shifts in policy are having a huge effect on public power utilities, which for the most part have already made the investments needed to operate safely. It remains to be seen how these policies will be implemented. For example, some utilities have reported that regional FEMA officials continue to say that the costs of sequestering control room staff do not qualify for public assistance.

APPA believes that the additional steps taken in specific response to the COVID-19 pandemic by public power utilities to keep their workers and customers safe while keeping the lights on are absolutely the sort of expenditures Congress intended to be covered as an emergency protective measure for which reimbursement should be provided. FEMA must clarify its position and reimburse public power utilities for these legitimate expenses, and it must provide clear guidance to this effect to its case managers.

Congressional Action

In March 2021, the House Transportation & Infrastructure Committee approved by voice vote H.R. 1917, the Hazard Eligibility and Local Projects Act. Sponsored by Representatives Lizzie Fletcher (D-TX) and Michael McCaul (R-TX), and Resident Commissioner Jennifer Gonzalez-Colon (R-PR), the legislation would allow certain hazard mitigation projects that commence prior to FEMA approval to qualify for hazard mitigation funding. Only land acquisitions and projects that are “categorically exempt” under the National Environmental Policy Act would qualify for this exemption. In May 2021, Senator Thom Tillis (R-SC) introduced a companion bill (S. 1877) in the Senate.

In April 2021, Representatives Neal Dunn (R-FL) and Darren Soto (D-FL) introduced H.R. 2669, the FEMA Loan Interest Payment Relief Act, to assist public power utilities and rural electric cooperatives that take out loans to cover costs that

1. FEMA provided a narrow exception to this new rule for costs incurred by medical, emergency, and food emergency operations.

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will eventually be repaid by FEMA. Under the bill, public power utilities and rural electric cooperatives would be reimbursed for the interest expense of such loans. Reimbursement would be set at the lesser of either a) the actual interest paid, or b) the interest that would have been paid if the loan had been set at the prime rate. Senator Marco Rubio (R-FL) introduced a companion bill (S. 2212) in June 2021.

The text of H.R. 2669 was incorporated into H.R. 5689, the Resilient Assistance for Mitigation for Environmentally Resilient Infrastructure and Construction by Americans Act, which was approved by the House in April 2021. The legislation was referred to the Senate Homeland Security & Governmental Affairs Committee. No activity has occurred on the bill in committee thus far.

APPA Position

APPA would like to see improvements to the Stafford Act beyond those enacted in 2018. For example, the association proposes a safe harbor from FAR requirements for debris removal and emergency protective measures. Under this proposal, state, tribal, or local government compliance with state, tribal, or local government procurement requirements that promote full and open competition would constitute compliance with federal procurement requirements for purposes of the Stafford Act.

APPA strongly supports the Hazard Eligibility and Local Projects Act (H.R. 1917/S. 1877) and will work to see it enacted in the 117th Congress. Likewise, the association supports the FEMA Loan Interest Payment Relief Act (H.R. 2669/S. 2212) and will work for its advancement in the Senate.

APPA will also work to ensure that legitimate emergency protective measures taken by public power utilities in response to the COVID-19 pandemic are reimbursed by FEMA. That includes working with its members to help them better advocate for themselves before FEMA. The association will also make this case before the appropriate authorizing committees of Congress and before FEMA itself.

Finally, APPA strongly opposes FEMA's rule to allow itself to pause the three-year limit on attempts to "claw back" public assistance payments to public power utilities. The association will work with Congress to direct FEMA to follow the language and intent of the Disaster Assistance Improvement Act of 2018, which is inappropriately using the rulemaking process to not follow the law.

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The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 96,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.