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Florida Division of Emergency Management

# Update on Deobligations

## Recovery Subject #4

## October 7, 2015

# FLORIDA DEOBLIGATIONS

**Part I:** BACKGROUND ON PUBLIC ASSISTANCE PROGRAM

**Part II:** BACKGROUND ON DEOBLIGATION PROCESS

**Part III:** REPLENISHING THE BALANCE

**Part IV:** NEXT STEPS

# PART I

# BACKGROUND ON PUBLIC ASSISTANCE PROGRAM

# BASICS OF PUBLIC ASSISTANCE

- The State of Florida currently has debtor entities holding onto Public Assistance funds that have been deobligated by FEMA in the amount of:

$65,239,048.70

(as of 8/6/2015)

- While the focus of the presentation is on disasters since the 2004 hurricane season, note that the total above does include just under $2 million owed from pre-2004.

# DEFINITIONS

- **Public Assistance (PA)**: FEMA program, authorized under the Stafford Act, which funds reimbursement of eligible, disaster-caused, infrastructure and protective activities costs

- **Subgrantee**: Local government, state agency or Private Non-Profit entity that is claiming reimbursement under FEMA's Public Assistance program (also known as "subrecipient")

- **Grantee**: State that signs the FEMA-State agreement, accepting Stafford Act funding after a disaster (also known as "recipient")

- **Project Worksheet (PW)**: This is the form by which FEMA captures a proposed reimbursement for a given subgrantee in a given event

- **Smartlink**: The State's federal account into which FEMA deposits Stafford Act funds upon "obligation"

# DEFINITIONS

- **Obligation**: The act of FEMA approving a reimbursement claim (PW), and depositing money into the State's Smartlink account for a given disaster
- **Deobligation**: The act of FEMA approving a new version of a reimbursement claim (PW) that takes money out of the State's Smartlink account for a given disaster
- **Cost Share**: The federal-state breakdown (%) of how Stafford Act funding will be apportioned. In 2015 and beyond, nearly all cost shares under existing rules will be 75% federal – 25% non-federal

# THE FEDERAL-STATE AGREEMENT

- After a disaster declaration has been issued for Public Assistance by the President, FEMA and the impacted state will sign the “Federal-State Agreement.”
  - Establishes the federal-state cost share.
  - Establishes the conditions to which the grantee and subgrantees will be bound.
  - Establishes that the state is the true recipient of any grant funding, and will be held accountable for the distribution and accounting of funds.



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# FUNDING PUBLIC ASSISTANCE

- Florida's 2015 "Best Practices" Process for funding Public Assistance reimbursements under the Stafford Act:
  - The disaster occurs, and the subgrantee begins recovery process
  - The subgrantee signs a funding agreement with the state
  - The subgrantee completes repairs and then works with the state and federal staff to write PWs for reimbursement
  - FEMA obligates the agreed upon funds and places those funds into the state's Smartlink account
  - The state disburses the funds and begins the PW "closeout" process (PWs are paid when work is 100% complete)
  - FEMA closes out the PW, and the subgrantee retains records according to federal/state requirements

# PART II

# BACKGROUND ON DEOBLIGATION PROCESS

# THE 2004-05 STORM SEASON

- While not all current issues trace back to the 2004-05 storm seasons, it is a good place to start:
  - The 2004-2005 storm season saw unprecedented impacts to Florida communities
    - 7 hurricanes had major impacts to the state (Charley, Frances, Ivan, Jeanne, Dennis, Katrina, Wilma)
    - Roughly 35,000 PWs were written, with approximately **<u>$5 billion</u>** obligated by FEMA
  - Atmosphere at the time was to get money to communities as fast as possible to aid in recovery
    - PWs were written based on estimates, without work being 100% complete
    - FDEM won a Davis Productivity Award for “getting money on the street quickly”



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# THE 2004-05 STORM SEASON

- The mindset in 2004-05 was likely a factor that led to deobligations in later years.
  - Obligations / payments were issued based on estimates. The difference between the estimated costs and the actual costs were to be determined later.
    - Under payments resulted in additional obligations to subgrantees.
    - Overpayments resulted in deobligations from subgrantees.
  - The 2004-2005 mindset was to begin recovery of communities “before the next storm hit.”
    - Increased speed of recovery often led to inconsistencies in procurement. Florida procurement exemptions under a Governor’s Executive Order do not apply to federal procurement regulations.
    - In 2015 the DHS-OIG recognized procurement practices as the number one most cited target for deobligations nationwide.



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# REASONS FOR DEOBLIGATIONS

- The most common reasons seen in FL in recent years for deobligations include:
  - Ineligible work performed by the subgrantee
    - Work determined to be categorically ineligible after completion
    - Work outside the approved scope of work
    - Work later determined to be unauthorized improvements or alterations
  - Costs were deemed unreasonable
  - Improper procurement methods used by subgrantee

# WHEN DEOBLIGATIONS OCCUR

- A deobligation occurs when FEMA determines that a subgrantee has been overpaid at some point in the process:
  - The subgrantee was advanced funds but did not complete the project
  - FEMA makes a determination after initial obligation of funds that the project was entirely, or partially, ineligible
  - The DHS-OIG finds issues with procurement, or other issues of compliance with federal law/policy, etc…
- When this occurs, FEMA is required under the Stafford Act to reclaim the overpaid funds
  - This is done by writing a “Deobligation Version” PW
  - Affirmative Defenses do apply in certain circumstances (see Section 705 of the Stafford Act)

# DEOBLIGATION TIMING

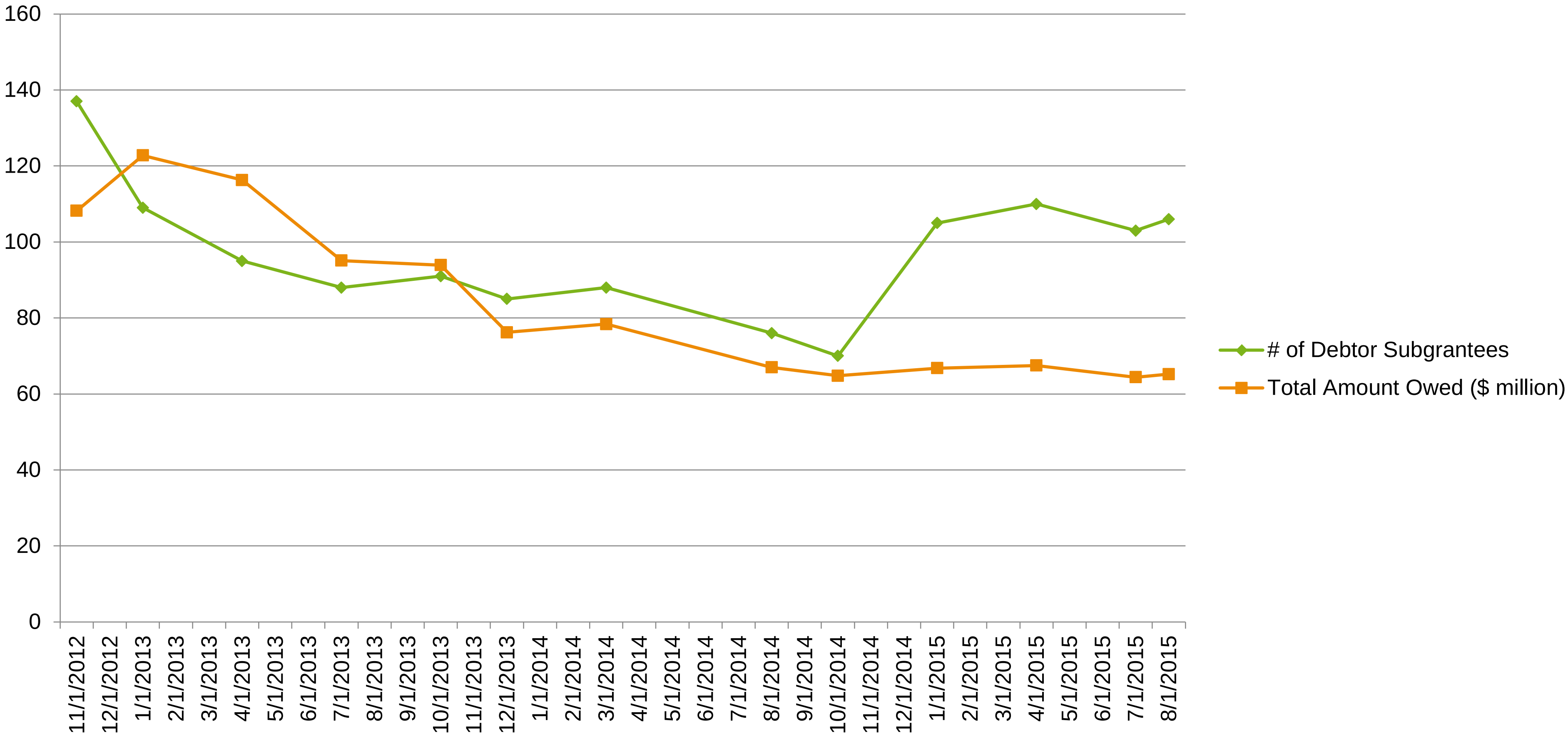
- A deobligation can occur at any time, even **years** after the final closure of the project
- FEMA has long held that PWs are in a state of "continual review" and that high-level officials can later overrule eligibility determinations made by mid-level staff who actually obligate funds. This process was argued during the SFWMD vs. FEMA court case in 2014
- Further, the DHS Office of Inspector General has repeatedly (in recent years) shown an interest in reopening closed PWs for audit

# THE DANGERS OF "HIGH RISK"

- When a deobligation occurs and causes a negative balance in the state's Smartlink account, the state can be classified as "High Risk" by the federal government.

- "High Risk" means the federal government can:
  - Withhold funding from other incoming federal sources to restore the Smartlink account to a positive balance (education or transportation funding)
  - Place restrictions on future PA programmatic funding, such as
    - Pay only on a strict reimbursement schedule (the state would reimburse subgrantees first, and the state would then seek reimbursement from FEMA)
    - Require additional and more detailed financial reports
    - Require additional project monitoring
    - Require the grantee/subgrantee to obtain technical and/or management assistance
    - Establish additional prior approvals for future funding actions

# DEOBLIGATIONS 2012-2015



# DEOBLIGATIONS 2012-2015

- From the high point in January of 2013, roughly $60 million has been removed from the net debt back to the state. The chart shows this net debt owed back to the state
  - But, between 2012-2015 additional deobligations have occurred in the approximate amount of $73 million.
    - Approximately $35 million was swept by FEMA as “unused funds” related to closed PWs for previous disasters. This amount is not considered debt to the state.
    - The other $38 million are funds that subgrantees were paid from Smartlink as reimbursement for work, which FEMA has deobligated for reasons already summarized. This amount is considered debt to the state.
  - So while the net debt has shrunk by approximately $60 million, FDEM has actually recouped approximately $98 million in total between 2012 – 2015.
    - $60 million + $38 million = $98 million

# WHY IS THIS A 2015 PROBLEM?

- FEMA's process of recouping funds that have been deobligated is creating financial strain on states.
- When a project is deobligated, FEMA removes the funds from the state's Smartlink account immediately, which leads to issues with paying outstanding PWs for the same disaster.
  - The subgrantees have spent the obligated money years earlier on approved projects. Subgrantees do not typically have funds to pay the deobligated balances back immediately into the state account.
  - Most subgrantees impacted by a deobligation have appeal rights remaining and do not feel that they should have to repay the deobligation until their appeals are settled.
  - The immediate impact of the deobligation falls on the state, not the subgrantees. Under the FEMA-State Agreement, it is the state's responsibility to keep the Smartlink balance positive.

# WHY IS THIS A 2015 PROBLEM?

- In 2015, Smartlink balances are low.
  - Most subgrantees took lump-sum payments soon after the disaster.
    - However, some subgrantees opted to take payments only after work was 100% complete on the project, and in other cases balances remained after project completion because the original estimates were higher than reality.
    - This left additional money remaining in the Smartlink accounts.
    - Smaller deobligations could be 'absorbed' by these remaining Smartlink balances. Smartlink cannot handle large deobligations without repayment by subgrantee. (example: 1% of $5 billion is $50 million), but this really 'robs Peter to pay Paul'
- The situation reached "critical mass" between 2012-2015, in that Smartlink can no longer stay positive after large deobligations
  - In 2013, FEMA swept unused balances that remained on projects that had been listed as 100% complete for years.

# SMARTLINK SITUATION

- A subgrantee who does not pay back deobligated funds, reduces the funds available in Smartlink for legitimate repayments still owed to other subgrantees in the same disaster.
  - In effect, that subgrantee is holding someone else's money by not repaying their debt.
  - In such cases, subgrantees requesting payment for completed projects that have been obligated must wait to be repaid, and this has happened within the past three years.

# PART III

## REPLENISHING THE BALANCE

# REPAYMENT STRATEGY

- Recouping funds from subgrantees has proven to be a difficult process over the last few years.
- Unrepaid deobligations amount to a debt owed to the State of Florida.
- Current strategy is to request in writing for subgrantees to submit deobligation payments to the Smartlink account.
  - Subgrantees are provided written requests at a minimum twice a year usually in the spring and fall.
- Goal is to minimizes political ill-will with subgrantees while strongly encouraging repayment.



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# REPAYMENT STRATEGY

- The State of Florida offers the following voluntary payment options
  - Repay by check
  - Repay by journal transfer
  - Repay through a repayment plan (standardized terms of 6 or 12 months to pay, depending on the amount owed)
- **<u>But the current strategy is not working!</u>**
  - Only successful when debtor agency agrees with deobligation and voluntarily repays balance.
  - Due to Smartlink balance situation, state can no longer wait on the subgrantee to agree to make payment.
  - Delays in repayment are negatively impacting communities that are eligible for payment on completed projects.

# COMPELLED REPAYMENT

- FDEM does have one allotted method by which we can compel repayment.
  - For subgrantees that owe funds in a past disaster, and who are eligible for reimbursement in a new disaster, the Division will enforce repayment by offsetting amounts owed against newly obligated funds in the new disaster.
  - For this to work, subgrantees must be in an area that receives a new disaster declaration, with eligible projects that will be owed reimbursement.
  - Offsetting through this process can cause financial strain on communities recovering from a new disaster.
  - It is important to manage the expectation and the reality of using this method in collecting outstanding debt.
  - Offsetting has been surprisingly effective.

# NEW REPAYMENT STRATEGIES

- Currently, the Division's only method to compel payment is through offsetting of current disaster payments.
- However, the state's funding agreement with the subgrantees includes additional provisions by which repayment could be compelled.
  - Funds could be diverted from other disaster grant programs.
  - Non-disaster state funds can be identified through the appropriation process.
  - Recoupment for state agencies could be included in annual appropriation request.
  - Least-preferred option is through legal action in the courts.

# PART IV

## NEXT STEPS

# SFWMD VS FEMA (2014)

- In 2014, SFWMD filed a successful federal lawsuit against FEMA in response to a $21 million deobligation from the 2004-05 storms.
  - The case focused on the affirmative defenses contained in the Stafford Act (Section 705), and the court's ruling "put teeth" back into those defenses.
- This means that many subgrantees will have a "second chance" at having their deobligation overturned
  - An injured party has a defined amount of time to file a federal lawsuit after an adverse decision. Many of the deobligations that were issued by FEMA could still be within the timeframe for legal action.
  - The strategy is to ask for administrative reconsideration on these cases, where this potentially avoids the need to take the case to court.

# SFWMD VS FEMA (2014)

- If one of these cases undergoing reconsideration is determined to fall into the SFWMD precedent, then FEMA will be compelled to replace deobligated funds back into the state's Smartlink account
  - The State would receive the money into Smartlink because FEMA has already been paid by taking the funds out of the state's account
  - The subgrantee's debt to the state would then be expunged
- A brief review identified approximately <u>$50 million</u> in recent deobligations in Florida that may have the same legal argument as the SFWMD case.
  - The amount is only an estimate after an brief initial review of files.
  - The Division will continue to research potential deobligations that may qualify for legal action.

# 2015 PUBLIC ASSISTANCE

- Deobligations from 2004-2005 have resulted in changes to the way Florida runs the State's Public Assistance program today.
  - Best Practices for dispersing funds have been established to help avoid future deobligations.
  - We all must recognize that the need to "get money on the street" following the storms of 2004-2005 was an integral piece of recovery, but that it led to issues.
- FDEM is working with state stakeholders to ensure that the deobligation issue is scrutinized by the emergency management community in Florida.
  - The Florida Association of Counties and the Florida League of Cities receive copies of the deobligation reports. Both organizations are working with their members to determine how to impact the process through federal legislation engagement.
  - The Division continues to offer training on the procurement process to local entities in order to reduce the likelihood of future deobligations.

# NATIONAL IMPLICATIONS

- Florida is driving the conversation on deobligations at both the state and national levels.
- As President of the National Emergency Management Association (NEMA), Director Koon is given a platform at the national level to discuss the impact of deobligations on local communities and the states.
- Using the power of many, NEMA is pushing FEMA and the DHS-OIG to review the process for deobligations and their impacts, as deobligations impact all states in the country.

(NEMA is a trade association representing state emergency management agencies)

# NATIONAL IMPLICATIONS

- Florida has engaged federal-level stakeholders to identify solutions.
  - FDEM staff continues to cultivate the relationship with FEMA Region IV staff so that both sides can better understand roles and positions on this issue.
  - FDEM staff are focused on building relationships with FEMA's recovery staff at FEMA headquarters to identify ways to work together to improve the overall Public Assistance program.
  - FEMA headquarters is "re-engineering" the Public Assistance program with the goal of establishing better processes on obligations, in order to avoid deobligations years after a disaster occurs.
  - The DHS Office of Inspector General has acknowledged that the deobligation process in the past was aggressive. DHS-OIG is providing better information on their audit priorities, particularly in the procurement process.

# NATIONAL IMPLICATIONS

- Florida Congressional Members are have proposed federal legislation that would streamline the Public Assistance Program with the hopes of reducing deobligations years after the disaster.
- Proposed legislation would
  - Raise the small project threshold from $121,500 to $1 million per project. This change will simplify the approval and closeout process for projects.
  - Amend the Stafford Act Section 705(a), which will strengthen the Affirmative Defenses available to subgrantees.
    - Statute of limitations on audits would start to run when the project is closed out.
    - The proposed change would be retroactive to 2004.

# FLORIDA RECOMMENDATIONS

- The Division is looking at ways that subgrantees can be required to maximize the time-saving provisions of the Sandy Recovery Improvement Act.
  - Encourage (or require) subgrantees to use the Public Assistance Alternative Procedures (PAAP) methodology whenever appropriate.
    - PAAP bundles large projects into one project, treating them more like small projects.
    - Projects are more closely scrutinized on the front end, rather than after closeout.
    - Concerns over procurement or project worksheets would be identified prior to work starting.
- Require subgrantees to maximize local recovery costs by tying the state waiver to areas such as use of the Public Assistance Alternative Procedures, volunteer service credit, etc.

# FLORIDA RECOMMENDATIONS

- FDEM will continue to use the current process to compel subgrantees to repay their debt through offsetting; however, FDEM will need EOG assistance for subgrantees who are unable to offset, and who still refuse to repay their debt.
- In the event the funds are not repaid, FDEM will be required to request additional appropriation from the state to fund the Smartlink accounts.
- Moving forward, the reality is that deobligations will not end, and we do not necessarily want them to end completely.
  - Audits are a necessary part of the system of checks and balances in every federal program.
  - Without audits, there is an increase potential for waste, fraud and abuse.
- Florida must identify a strategy to clear debts owed back to the state.

# QUESTIONS?


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