

**THIS DOCUMENT IS CONFIDENTIAL ATTORNEY WORK PRODUCT AND  
IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

**MEMORANDUM**

To: Ed Evans

From: Stephen Van Camp

Re: A Survey of Mechanisms Available to the Budget and Control Board to  
Fund the State's FEMA Match in Response to a Natural Disaster.

Date: September 4, 2008

When Hurricane Hugo hit in September 1989, the State of South Carolina was experiencing tight budgetary conditions due to the effects of a recession. There was little money on hand to pay the State's matching share for FEMA's emergency work in response to the storm.

Accordingly, in the next legislative session following Hurricane Hugo, the General Assembly authorized the Budget and Control Board to issue \$31.350 million of general obligation debt in the form of a promissory note. This note covered the State's match for FEMA assistance in response to Hugo.

Like 1989, the State is once again experiencing tight budgetary conditions. Furthermore, there are currently three named storms churning in the Atlantic Ocean with the potential for landfall in South Carolina as a major hurricane. Therefore, the Office of General Counsel, Internal Operations and the Budget Office have been considering what financial mechanisms are available for the State to pay its matching share for FEMA costs in the event one of these storms devastates portions of this State. We have identified the following programs as possible sources for the State's matching funds in the event of a significant natural disaster that results in a FEMA response:

**1. Proviso Regarding State Match of FEMA for Federally Declared Disasters,  
Proviso 89.80 of FY 2008-2009**

**Summary:**

Proviso 89.80 provides for the carryover of any appropriation designated as the state share for a federally declared disaster and that such funds may be used by the Emergency Management Division of the Adjutant General's office.

If state match funds are unavailable, the Budget and Control Board may borrow from any internal account or accounts necessary to maximize federal matching funds

through the Emergency Management Division. The General Assembly must replenish funds borrowed under this proviso.

Requirements of Proviso 89.80

(A) There must be a federally declared disaster in which FEMA is providing assistance.

(B) Appropriations for the state share of disaster costs may be carried forward. Unallocated funds from established state accounts may be used as the state share and may not be used for any other purpose.

(C) If there is a federally declared disaster and state match funds are not available, the B & C Board may borrow from "any internal account or accounts" necessary to maximize federal funding.

(D) Borrowing under Proviso 89.80 must be reported to the General Assembly within five days.

(E) The General Assembly must replenish funds borrowed from accounts as soon as practicable.

Comment:

Based on our review of state finances, the balance in the Disaster Trust Fund established in S.C. Code Ann. Section 11-5-230 is only \$27,479.42, which will quickly be exhausted in the event of a federally declared disaster. Moreover, the Contingent Reserve Fund has a balance of \$0. Thus, state match funds would not be available to cover a multimillion dollar state match requirement for a major disaster. (The state match for Hugo was over \$30 million in 1989 dollars.)

Therefore, under Proviso 89.80, the Board is authorized to borrow from internal state agency accounts to pay state match costs to maximize federal funding in response to a federally declared disaster in South Carolina.

Text of Proviso 89.80

**89.80.** (GP: FEMA Flexibility) Any appropriation designated as the state share for a federally declared disaster may be carried forward and used for the same purpose by the Emergency Management Division of the Adjutant General's Office in the event of additional federally declared disasters. Unallocated funds from established state accounts may be used as the state share in any federally declared disaster. Such funds may not be expended for any purpose other than for the state share for a federally declared disaster.

In the event there is a federally declared disaster and state match funds are unavailable, the State Budget and Control Board may borrow from any internal account

or accounts necessary to maximize federal matching funds through the Emergency Management Division. Any such borrowing must be reported to the General Assembly within 5 days. Funds borrowed from accounts shall be replenished by the General Assembly as soon as practicable.

**2. Account for Provision of Matching Disaster Assistance Funds, S.C. Code Ann. Section 11-5-230.**

**Summary:**

The State Treasurer maintains an account to be used to match disaster assistance funds when required by a federal entity providing the funds. The funds may be disbursed by the authorization of the Governor. The General Assembly intended for the Governor to look to the Disaster Trust Fund in response to a Presidentially-declared disaster. If the Governor determines the amount in the Disaster Trust Fund is insufficient to meet the demand of the disaster, the Governor may request that the Budget and Control Board transfer up to \$5 million in monies appropriated for other purposes to the Disaster Trust Fund.

**Requirements of Section 11-5-230.**

- (A) The President must declare a disaster.
- (B) The General Assembly makes appropriations to the Disaster Trust Fund.
- (C) The Governor authorizes expenditures from the Disaster Trust Fund.
- (D) The State Treasurer maintains the Disaster Trust fund as a separate account and credits the account with interest accruing on the fund.
- (E) If the demand upon the fund is unreasonably great and insufficient to meet immediate disaster needs AND the General Assembly is not in session, the Governor may request that the Budget and Control Board transfer up to \$5 million per fiscal year in monies appropriated for other purposes.

**Comment:**

Based on my conversation with the State Treasurer's Office, the balance in the Disaster Trust Fund is \$27,479.42. Obviously, this will fall far short of the disaster matching funds that will be required in the face of a significant natural disaster. The matching funds for Hurricane Hugo were over \$30 million in 1989. The Governor could bring to the B & C Board the issue of transfer of up to \$5 million from monies appropriated for other purposes to fund the Disaster Trust Fund.

Text of Section 11-5-230.

**§ 11-5-230. Account for provision of matching disaster assistance funds as required by federal agencies.**

There is established in the Office of the State Treasurer a continuing account to be used to match disaster assistance funds when required by the federal entity providing the funds. The fund must be established and maintained with appropriations as the General Assembly may authorize in the annual General Appropriations Act and as otherwise provided herein and shall continue from year to year. The State Treasurer shall hold the funds in a separate and distinct account and all interest and other income accruing on the funds must be retained in the account. The funds in the continuing account may be disbursed only upon the authorization of the Governor.

In a Presidentially-declared disaster it is the intent of the General Assembly that the Governor's recourse is to funds approved by the General Assembly into the Disaster Trust Fund. If the Governor finds that the demand upon this fund is unreasonably great and insufficient to meet immediate disaster needs (and the General Assembly is not in session), he may request through the Budget and Control Board a transfer into the Disaster Trust Fund monies appropriated for other purposes and in amounts not to exceed five million dollars in any fiscal year of the State.

**3. Emergency Loans to Counties and Municipalities and Reimbursement of State Agencies by the Budget and Control Board, S.C. Code Ann. Section 25-1-460.**

Summary

Pursuant to S.C. Code Ann. Section 25-1-460, the Budget and Control Board may authorize loans of up to \$1.5 million to counties and municipalities for emergency and recovery operations if the Governor has declared a state of emergency due to a disaster and the General Assembly is not in session. The Board may also reimburse state agencies for expenses unreimbursed by the federal government for an agency's participation in the disaster response in accordance with the South Carolina Comprehensive Emergency Preparedness Plan.

Requirements of Section 25-1-460

(A) The Governor must declare a State of Emergency due to damage or destruction caused by a disaster.

(B) The General Assembly cannot be in session.

122,7 m  
now

(C) For loans to counties and municipalities: (1) emergency funds must be required by counties and municipalities for emergency and recovery operations, (2) the total amount of the loan cannot exceed \$1.5 million, and (3) the loan must be secured by the full faith and credit of the borrowing county or municipality.

(D) Funds for loans under Section 25-1-460 are drawn from "reserve funds of the state treasury" that are "not appropriated for other purposes" on the warrant of the Budget and Control Board. The statute does not specify which "reserve fund" should be the source of the loans. Some possible "reserve funds" include the General Reserve Fund, the Contingency Reserve Fund and the Capital Reserve Fund. Article III, Section 36 of the South Carolina Constitution provides that the General Reserve fund may only be used to cover any year-end operating deficit and provides no authorization to utilize the General Reserve Fund for other purposes. Moreover, Article III, Section 36 provides that the Capital Reserve Fund must be used to cover any year-end deficit before drawing on the General Reserve Fund and that the General Assembly may appropriate monies in the Capital Reserve Fund for certain types of purposes. If the General Assembly does not appropriate funds in the Capital Reserve Fund in a fiscal year, such funds lapse and are credited to the General Reserve Fund. Thus, unless the General Assembly appropriated Capital Reserve Funds for emergency response, there would not be any funds available for a loan under Section 25-1-460 from the Capital Reserve Fund. Accordingly, it appears that the "reserve fund" referenced in Section 25-1-460 would be the Contingency Reserve Fund created in S.C. Code Ann. Section 11-11-220.

(E) Reimbursement of State Agencies. To obtain reimbursement under Section 25-1-460, the state agency must show: (1) that the agency has incurred emergency expenditures that have not been reimbursed by the federal government and (2) that the agency incurred the expenditures while carrying out its assigned responsibilities set out in the South Carolina Comprehensive Emergency Preparedness Plan. Section 25-1-460 does not set out a dollar cap for agency reimbursement and does not explicitly indicate the source of funds for reimbursements to state agencies. Given that the reimbursement provision is part of the same statute that sets out a loan program to counties and municipalities drawn from unappropriated reserve funds in the state treasury, one could argue that the "may also" language in the reimbursement of state agencies sentence would allow the Board to draw on the same reserve funds for reimbursements to state agencies.

#### Comment

It is my understanding that there is a balance of \$0 in the Contingency Reserve Fund, so there are no funds to implement this section.

Text of Section 25-1-460:

§ 25-1-460. Loans for emergency and recovery operations.

When the General Assembly is not in session and emergency funds are required by counties or municipalities, the State Budget and Control Board may authorize loans for emergency and recovery operations to counties and municipalities not to exceed one and one-half million dollars to any single county or municipality from the reserve fund of the state treasury paid from that fund from any monies in that fund not appropriated for other purposes. Any monies so used must be drawn from the fund on warrants of the board repayable by the borrowing county or municipality and secured by the full faith and credit of the county or municipality involved. These loans may be made only when damage or destruction results from a disaster declared as a state of emergency by the Governor. The board may also reimburse state agencies for unbudgeted expenditures or expenditures otherwise unreimbursed by the federal government for emergency expenditures resulting from their participation in the disaster based on their assigned responsibilities promulgated in the South Carolina Comprehensive Emergency Preparedness Plan.

4. Borrowing from Departments of State Government, S.C. Code Ann. Section 11-9-240

Summary.

Pursuant to S.C. Code Ann. Section 11-9-240, the Budget and Control Board has discretionary authority to borrow any surplus money on hand in the State Treasurer's office from any department of State government with the written consent of that department. The purpose of such borrowing must be to "facilitate the business of the State" and the borrowing must be "in the interest of economy". None of the operative terms set out in the statute are defined.

Requirements under Section 11-9-240

- (A) State agency must provide written consent to loan money.
- (B) An opinion from the Attorney General must be obtained holding that the revenues of the State, when collected, will be sufficient to repay the loan.
- (C) Accounts carried on the books and records of the Office of Comptroller General and State Treasurer may not be consolidated or confused and all expenditures must be charged against existing accounts in the Office of Comptroller General and State Treasurer.

(D) The Board may not borrow from any sinking funds under Section 11-9-240.

(E) A declaration of disaster is not required for loans under Section 11-9-240.

(F) Funds borrowed under Section 11-9-240 must be for the "use of the State." Presumably such uses could include matching funds for disaster relief.

Comment

Obviously, this is a tight budget year and agency budgets have already been cut 3% in response to revenue shortfalls. It is unclear what amount of "surplus money" is on hand in the State Treasurer's office to be borrowed under Section 11-9-240. Moreover, given the tight budget circumstances, agencies will likely be reluctant to agree to loan money to the Board.

Text of Section 11-9-240:

**§ 11-9-240. Budget and Control Board may borrow from departments of State government.**

For the purpose of facilitating the business of the State and in the interest of economy, the State Budget and Control Board may in its discretion borrow from any department of the State government, with the written consent of such department, for the use of the State any surplus which may be on hand in the office of the State Treasurer to the credit of any such department; provided, however:

(1) That no money shall be borrowed from any department of the State government for the general appropriation act without first obtaining from the Attorney General an opinion holding in effect that the revenues of the State when collected will be sufficient to repay such loan;

(2) That nothing herein shall be construed as authority to confuse or consolidate any of the accounts that are now carried on the books and records in the office of the Comptroller General and State Treasurer and all expenditures shall be charged against the separate accounts as now provided in the office of the Comptroller General and State Treasurer; and

(3) That the authorization contained in this section shall not apply to sinking funds.

**5. Budget and Control Board may borrow to pay operating expenses of the State.**  
**S.C. Code Ann. Section 11-9-280.**

**Summary:**

The Budget and Control Board has discretionary authority to borrow on the credit of the State to finance the "ordinary and current business of the State". Under Section 11-9-280, the board may borrow in anticipation of receipt of taxes and other income for any fiscal year, at a rate of interest not to exceed the legal rate, as much money as the Board deems necessary to fund "the ordinary and current business of the State" for a fiscal year or to repay money borrowed for such purposes. The total amount of indebtedness cannot exceed 75% of the State's estimated current income from receipt of taxes and other revenue applicable to the payment of the expenses of the ordinary and current business of the State for the fiscal year. No deficit may be created in the general funds of the State.

**Requirements of Section 11-9-280**

(A) The Board would be borrowing on the credit of the State, which would presumably count toward the State's debt ceiling limitations.

(B) The rate of interest cannot exceed the legal rate.

(C) The Board may borrow as much money as the Board deems necessary to fund the "ordinary and current business of the State", but the indebtedness cannot exceed 75% of the State's estimated current income from receipt of taxes and other revenue applicable to payment of the ordinary and current business of the State for the fiscal year.

(D) No deficit may be created in the General Funds of the State.

**Comment:**

By definition, a disaster is not an "ordinary" event, so it may be questionable whether Section 11-9-280 would authorize the Board to borrow to directly fund disaster relief efforts or to provide matching funds. On the other hand, when a disaster strikes, the funding of disaster relief becomes an immediate and urgent current business need for the State, so perhaps one could argue that disaster relief becomes part of the "ordinary and current business of the State" because the State must surely use its resources to protect its citizens and provide for the common good during an emergency. At minimum, the borrowing authority of Section 11-9-280 could provide funds to operate State government where other government funds have been properly diverted to disaster relief efforts. (See Section 11-9-240).



The State borrowed funds from commercial banking sources to pay over \$30 million in state matching funds required in response to Hurricane Hugo in 1989. But as noted above, the borrowing in 1989 was pursuant to direct General Assembly authority to borrow money and was not apparently borrowed under authority of Section 11-9-280.

Text of Section 11-9-280

§ 11-9-280. Borrowing to pay operating expenses of the State.

In anticipation of the receipt of the taxes and other income of the State for any fiscal year, applicable to the payment of the expenses of the ordinary and current business of the State, the State Budget and Control Board may borrow on the credit of the State, at a rate of interest not exceeding the legal rate, so much money as the Board deems necessary to finance the ordinary and current business of the State for such fiscal year or to repay any money borrowed for such purposes with interest thereon. The Board may issue and sell notes or other obligations of the State for the money hereby authorized to be borrowed. The total amount of indebtedness, at any one time outstanding, incurred to finance the ordinary and current business of the State for the then current fiscal year, shall not exceed seventy-five per cent of the State's estimated current income from the receipt of taxes and other revenue applicable to the payment of the expenses of the ordinary and current business of the State for such fiscal year and the amount of taxes and other revenue owing and due to the State but unpaid for the fiscal year next preceding. Out of the moneys borrowed under the provisions of this section the State Treasurer may pay any borrowings for or claims against the current and ordinary business of the State for the fiscal year next preceding to the end that no deficit may be ever created in the general funds of the State.