



## FEMA LAW ASSOCIATES, PLLC Latest FEMA Law Developments At a Glance

FEMA Law Associates is a private law firm that specializes in Emergency Management and Homeland Security issues. For more information on our services please visit our website at [www.fema-law.com](http://www.fema-law.com).

### Message From the President of FEMA Law Associates

This newsletter provides commentary on recent arbitration decisions resolving disputes under FEMA's public assistance program. The decisions are issued by three judge panels of the United States Civilian Board of Contract Appeals acting under a memorandum of agreement with FEMA. Previous issues of our Newsletter can be obtained on the FEMA Law website, [www.fema-law.com](http://www.fema-law.com) (click on "e-Newsletters"). – *Ernie Abbott*

### Arbitration Decisions to Date

In our previous issue (August 2009), we reported on FEMA Arbitration developments made on prehearing procedural issues. Most important was the panel's determinations that arbitration hearings would allow witness testimony and that the arbitrators would resolve disputes regarding FEMA public assistance "*de novo*" – rather than merely review FEMA's decisions and overturn them only if those decisions were "arbitrary or capricious." Although only a half dozen decisions have now been released so far (they can be found at: <http://www.cbca.gsa.gov/>) it is already apparent that this process appears to work reasonably well and is significantly faster than the traditional dispute resolution system. Indeed, Congress should consider extending the arbitration option beyond Hurricanes Katrina and Rita. Review of the decisions issued to date demonstrates that:

1. The Arbitration panels have carefully applied FEMA regulations and public assistance policies to the factual disputes before them. They have not sought to develop new theories of eligibility.
2. The Arbitration panels have not "split the difference" in deciding cases. They have dismissed several applicants' arbitration requests on procedural grounds, and decisions on the merits have run the gamut: sometimes the applicant "won"; sometimes FEMA has "won" and in one case the panel concluded that 40% of damage was caused by the disaster and awarded 40% of the amount at issue.
3. The Arbitration panels have decided cases based on the strength and credibility of conflicting positions. A panel discounted the testimony of a FEMA expert witness who testified about the extent of damage to a roof – but had never been on the roof. Another panel discounted the testimony of an applicant's witness who testified from personal knowledge of pre-existing conditions – but whose testimony was contradicted by pre-disaster documentation. Licensed professional engineers specializing in particular types of systems are given more credence than unlicensed persons. In a recent C-SPAN interview, Administrator Fugate indicated that the arbitrators' weighting of the credibility of engineering testimony makes sense: "if a professional engineer is signing off on this, we [FEMA] ought to be looking at that with a heavier weight than trying to come back and say, 'well our folks said something different.' The professional engineer in this case was actually, I think, what the court recognized was a credible source of information."
4. The Arbitration panels clearly have understood the disputes at issue and have explained their decisions clearly and concisely. Reports from participants in the oral hearings have been generally favorable; participants clearly see that their position is heard and understood – even if it is ultimately rejected.
5. Very significantly – decisions are reached relatively quickly: final decisions generally issue less than 6 months from the filing. By contrast – it frequently takes a full two years to resolve a dispute using the two-level appeal process of the Public Assistance Program (counting for applicant's filing, state responses, and FEMA's decisions at first and second appeal).

**FEMA Law Associates, PLLC**  
**805 15<sup>th</sup> Street, Suite 1101, N.W.**  
**Washington, D.C. 20005**  
**Phone: 202.326.9319 Fax: 202.326-9323**  
**[info@fema-law.com](mailto:info@fema-law.com)**

# FLASH Newsletter



Volume 5  
Issue 14  
April 2010  
Page 2

FEMA LAW ASSOCIATES, PLLC  
Latest FEMA Law Developments At a Glance

The arbitration process is (at present) limited by statute to disputes arising from hurricane damage that occurred four and a half years ago – in August and September 2005 in the Gulf Coast Region. As a result, all disputes being arbitrated have a very long procedural history, with many extended discussions and negotiations between FEMA field staff and applicants. In many cases these disputes had already gone through most of the “regular” FEMA appeal process before arbitration was requested. Will the arbitration process – and its rapid fire 30 day deadlines for applicant and FEMA to file their “case” – work as well when a FEMA decision denying eligibility appears in a project worksheet issued with little advance warning – and perhaps with the agency’s rationale appearing only in terse “comments” on a project worksheet? How will the process work when it may not be possible to get supporting documentation of FEMA’s decision within a time frame that allows it to be used in framing an appeal? What rule modifications would be appropriate if the arbitration “option” were to be extended to all public assistance program disputes?

For convenience of those interested in the arbitration process we have summarized arbitration decisions that have issued to date and posted these summaries on the FEMA Law Associates web site, at <http://www.firmsitepublisher.com/fseditor/fs3/JSPeditPage.do?pagename=Summary-of-FEMA-Arbitration-Decisions>. When possible, we will supplement this summary as new decisions are issued.

---

## *Summary of FEMA Arbitration Decisions*

### *Jurisdictional Rulings: When is arbitration available?*

The statute that created the FEMA arbitration panels was quite specific that arbitration was to be available, under the Federal Emergency Management Agency public assistance program, to resolve “disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of the [Stafford Act] for a project the total amount of which is more than \$500,000. The panel has confirmed that the \$500,000 jurisdictional minimum is not the amount of assistance *which is in dispute*, but rather the full amount of the initial “project” in which the dispute over assistance arose. Indeed, there is jurisdiction to arbitrate even if the project ultimately cost less than \$500,000 – as long as initial cost estimates exceeded this amount. In *In the matter of Forrest County Board of Supervisors*, the project worksheet for the courthouse repair had been written for an estimated cost of over \$500,000 – satisfying the jurisdictional amount – even though the work ultimately cost only \$202,443. The panel concluded that only 40% of project cost was eligible for assistance.

### *Filing deadlines.*

The panel has denied several requests for arbitration because applicant had not appealed a FEMA decision within the statutory 60 day period (or had not timely requested any assistance at all). FEMA’s Arbitration rules make it quite clear that “arbitration is not available for determinations for which the applicant failed to file a timely appeal under the provisions of §206.206 prior to August 31, 2009.” In *In the matter of Sewerage & Water Board of New Orleans*, the Sewerage Board had received a First Appeal Decision in September 2007 – but never filed a second appeal. Applicant contended that its FEMA representative had advised against filing a second appeal so that the representative could continue to work out a resolution. But when these efforts failed and applicant appealed, FEMA rejected the appeal as untimely. The arbitration panel agreed that it did not have jurisdiction to hear the appeal, since the second appeal had

**FEMA Law Associates, PLLC**  
**805 15<sup>th</sup> Street, Suite 1101, N.W.**  
**Washington, D.C. 20005**  
**Phone: 202.326.9319 Fax: 202.326-9323**  
**[info@fema-law.com](mailto:info@fema-law.com)**

# FLASH Newsletter



Volume 5  
Issue 14  
April 2010  
Page 3

## FEMA LAW ASSOCIATES, PLLC Latest FEMA Law Developments At a Glance

been untimely filed. (The panel noted that the evidence in the record did not provide compelling evidence of the applicant's allegation that FEMA had misled the applicant or instructed the applicant to abandon or delay the appeal process.)

The applicant in *In the matter of Sabine Passport Authority* did not apply for any public assistance funding for more than two years after hurricane Katrina; when it finally did so in 2007, FEMA denied the application as untimely. A second appeal was pending when the FEMA arbitration statute was enacted, so the panel had jurisdiction when the applicant sought arbitration of the denial (in June, 2009) of applicant's Second Appeal. The panel agreed with FEMA and denied to consider the merits of the dispute: applicant's initial request for public assistance was "well beyond the date for a timely application" and "extenuating circumstances beyond the control of the applicant" did not exist.

*In the matter of Moss Point School District (MPSD)* provides an important insight into the way the panel interprets the "decision" that can be appealed. FEMA had made a determination – back in 2007 – that damage to the MPSD's Magnolia Junior High School had not been sufficient to justify *replacement*; FEMA approved funds only for *repair* of the school. MPSD unsuccessfully twice appealed this decision; FEMA denied the second appeal in July, 2008 – before any arbitration option existed. But when MPSD sought the building permit necessary for it to make the repairs FEMA had authorized, the permit was denied because as repaired, the building would be below FEMA's newly increased base flood elevation and so would not be in compliance with NFIP standards, with FEMA flood plain guidelines, and a new city flood plain damage prevention ordinance that took effect on February 17, 2009. (The city's ordinance requires critical facilities such as the junior high to be either floodproofed or heightened to four feet above BFE for new construction or substantially improved facilities.)

Both FEMA and MEMA technical team assessors agreed that "(1) elevating the existing facilities to the required elevation would not be feasible; and (2) dry floodproofing exterior walls with impermeable polymer coatings or by the construction of a free standing flood wall or levee similarly would be impracticable." Because repair was no longer "feasible" in light of its inability to secure a building permit, MPSD argued that they could no longer proceed with the authorized repair project for the school. In October 2009, MPSD sent FEMA a letter requesting FEMA reconsider MPSD's request to fund total replacement of the Magnolia Junior High School Facilities. In a letter dated October 23, 2009, FEMA refused (referring to earlier denials as being "final") and MPSD sought arbitration.

FEMA then argued in this case that since a second appeal decision had been made before February 17, 2009, the effective date of the ARRA, MPSD could not pursue arbitration before the panel as it had exhausted all administrative remedies. MPSD asserted that the matter before the panel was not the same as that decided by the FEMA Administrator, more particularly, when it sought a building permit in order to commence with the repair project, the permit was refused because the city's ordinance requires critical facilities such as the junior high to be either floodproofed or heightened to four feet above BFE for new construction or substantially improved facilities. The panel considered FEMA's October 23, 2009 response to be a FEMA determination that was subject to appeal, and therefore, under the jurisdiction of the arbitration panel.

### *Substantive Rulings.*

The most visible of these arbitration decisions overturned FEMA's refusal to find that damage caused by Hurricane Katrina to Charity Hospital in New Orleans was so great that the facility should be replaced. FEMA had concluded that eligible repair costs were \$126 million, and that replacement costs were over \$400 million. Applicant contended

**FEMA Law Associates, PLLC**  
**805 15<sup>th</sup> Street, Suite 1101, N.W.**  
**Washington, D.C. 20005**  
**Phone: 202.326.9319 Fax: 202.326-9323**  
**[info@fema-law.com](mailto:info@fema-law.com)**

# FLASH Newsletter



Volume 5  
Issue 14  
April 2010  
Page 4

## FEMA LAW ASSOCIATES, PLLC Latest FEMA Law Developments At a Glance

that eligible repair costs were well over \$250 million and triggered replacement under FEMA's 50% Repair/Replacement Rule. FEMA's low cost estimate was caused largely by its finding that much of the repair work needed in the hospital was not caused by Hurricane Katrina but by either deferred maintenance or by failure to protect the facility from further damage after Hurricane Katrina. In *In the matter of State of Louisiana, Facility Planning and Control (FP&C)* the panel disagreed with FEMA and awarded replacement cost of Charity Hospital to the applicant. While this decision was viewed as a major loss for FEMA, the arbitration panel was scrupulous in following not just the broad language of the Stafford Act and FEMA's regulations governing repair vs. replacement, but also FEMA's published policy guidance. FEMA's public assistance *policies* were thus not challenged by the panel – only the factual determinations made by FEMA in applying these policies.

The panel rested its decision on the credibility of the factual presentations and witnesses. The hospital had submitted three separate studies performed by highly experienced, licensed professionals who had examined the entire hospital; each of these studies found that the cost to repair Charity Hospital would exceed fifty percent of the cost of replacing it. By contrast – the arbitrators concluded that FEMA's cost estimates had been prepared largely by unlicensed professionals who had spent far less time in the building – and whom the arbitrators simply did not find as credible.

The panel was also called to apply FEMA's repair vs. replacement policy in *In the matter of Bay St. Louis-Waveland School District (BSWSD)*. The BSWSD sought replacement of roofs, siding, and windows of a high school, middle school and elementary school damaged by Hurricane Katrina. FEMA argued that there was no visible damage to roofs and contended that damaged siding could be repaired, not replaced. But the panel was not persuaded by FEMA's reports and witnesses – who were contradicted not just by applicant's expert witnesses, but by photographic evidence and other reports in the record. The panel appeared particularly concerned that FEMA's witnesses testifying on the absence of roof damage had never, in fact, been on the roofs at issue. The panel determined that BSWSD was entitled to receive \$6,988,360.59 for complete replacement of: 1) metal roofs at the BSWSD high school and middle school; 2) damaged windows at the middle and elementary school; and 3) damaged siding at the high school.

In several of its decisions, the panel has grappled with a standard conundrum of FEMA's public assistance program: deciding what to do when a facility is in much worse shape after the disaster than can fairly be attributed to the disaster event. Was the condition of the facility after the disaster caused by the disaster – or primarily the result of deferred maintenance? Did the owner of the building take adequate steps after the disaster to protect it from further damage? In *Charity Hospital*, FEMA staff had concluded that hospital management did not restore air conditioning quickly enough – and as a result mold from the flooded basement and first floor spread throughout the 20 story building. In *Forrest County Board of Supervisors (BOS)*, FEMA had claimed that the supervisors had not restored air conditioning fast enough in the Forrest County courthouse (a historic structure built in 1910) causing damage from mold growth fed by high interior temperatures and humidity during the nine-day loss of electrical power following Hurricane Katrina. FEMA also noted that there was evidence of mold in the courthouse prior to the Hurricane. Rather than finding no mold remediation costs eligible, however, the panel determined (based on the County's expert report) that forty percent of the mold damage was attributable to Hurricane Katrina. The panel also found that mold damage was not a result of negligence and that BOS took reasonable property saving measures using the personnel and equipment that were available in the midst of a major disaster. The amount awarded was forty percent of \$242,841, which equals \$97,136 minus \$25,000 from insurance proceeds, for a total awarded amount of \$72,136.

**FEMA Law Associates, PLLC**  
**805 15<sup>th</sup> Street, Suite 1101, N.W.**  
**Washington, D.C. 20005**  
**Phone: 202.326.9319 Fax: 202.326-9323**  
**[info@fema-law.com](mailto:info@fema-law.com)**

# FLASH Newsletter



Volume 5  
Issue 14  
April 2010  
Page 5

FEMA LAW ASSOCIATES, PLLC  
Latest FEMA Law Developments At a Glance

And in *In the matter of Sewerage and Water Board of New Orleans [Clarifiers]*, the panel weighed the applicant's evidence that corrosion to the steel in its clarifiers was caused by their immersion in salty floodwaters for some 45-75 days after Hurricane Katrina. But FEMA produced EPA reports prior to Katrina that noted corrosion of these clarifiers, records showing a lack of any corrosion control efforts during the 35 year life of the clarifiers, and an expert licensed professional engineer who testified that corrosion for only 45-75 days would stimulate a minimal amount of corrosion. Faced with FEMA's evidence, the panel concluded that the applicant's position (that there had been insignificant corrosion prior to Katrina) was simply not credible even though it was presented by the plant engineer who had actually seen the clarifiers prior to the storm. The panel rejected applicant's request for \$2.5 million to replace the steel in its clarifiers.

Finally, while deciding a the procedural question (discussed earlier) of its jurisdiction to arbitrate, the panel reached an important decision on whether FEMA public assistance program grants should fund upgrades to comply with federal flood plain management requirements. FEMA's regulations provide for funding upgrades to comply with a "legal Federal requirement" – but FEMA contended during arbitration that, because the city could have opted to withdraw from the National Flood Insurance Program (NFIP), the decision to enact the ordinance was strictly that of the local government and not a "federal requirement" under the public assistance program. FEMA cited *United States v. Parish of St. Bernard*, 756 F. 2d 1116 (5<sup>th</sup> Cir. 1985), in which the Fifth Circuit Court of Appeals refused to enjoin St. Bernard Parish to remedy violations of the floodplain management ordinances the Parish had adopted when joining the NFIP:

"Under the NFIP a community may withdraw, or it may be suspended by the agency, if it is not in compliance with the regulations governing flood plain construction and management... Deciding to join or remain under the program is a decision left solely by the statute to the local community...As a result, it is not a proper use of judicial power to force the parishes to do what they may decide to avoid doing simply by withdrawing from the program.

In other words, FEMA argued in the Moss Point arbitration proceeding that floodplain management requirements were not "legal federal requirements": the community was after all free to leave the NFIP. This argument was rejected by the arbitration panel, "a municipality already participating in the NFIP and wishing to continue to participate" is "subject to federal NFIP standards and related FEMA flood plain guidelines." The approach suggested in FEMA's brief was surprising given FEMA's mission to encourage compliance with the NFIP. Indeed – although not mentioned by either FEMA or the panel, FEMA's own regulations implementing Executive Order 11988 require that FEMA protect its federal investment, when funding reconstruction of facilities in floodplains, by compliance with federal flood risk mitigation requirements: the regulations applicable to construction of structures funded by FEMA grant funds state that either the lowest floor of the structure must be "at or above the level of the base flood" [or 500 year flood in the case of "critical facilities"], or the facility must be designed so that below the base or 500 year flood level (as applicable) "the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy." [44 CFR 9.11(d).] These regulations apply to "substantial improvements" – defined as any repair, reconstruction, or other improvement that costs more than 50% of replacement cost *or of market value of the structure prior to the damage.*" [44 CFR 9.4, Definitions, "Substantial Improvement."]

**FEMA Law Associates, PLLC**  
**805 15<sup>th</sup> Street, Suite 1101, N.W.**  
**Washington, D.C. 20005**  
**Phone: 202.326.9319 Fax: 202.326-9323**  
**[info@fema-law.com](mailto:info@fema-law.com)**

# FLASH Newsletter



Volume 5  
Issue 14  
April 2010  
Page 6

FEMA LAW ASSOCIATES, PLLC  
Latest FEMA Law Developments At a Glance

## *Miscellaneous Observations.*

The panel simply approved a settlement agreement in *University of Southern Mississippi* – but there are two aspects of this dispute that deserve mention. First – applicant had demonstrated in its arbitration papers that the FEMA staff computations of repair and replacement cost had not complied with FEMA’s policy: staff had used two different methodologies, one methodology for computing repair (via the 2006 RS Means Manual) while using a different methodology for computing replacement (via the applicant’s Capital Cost Study). The two computations were not compatible. Rather than asking the arbitrators to rule on this, FEMA arbitration staff simply agreed with applicant’s position and settled the matter.

Second – the procedural history of the *University of Southern Mississippi* dispute demonstrates the flexibility FEMA has in interpreting its 60 day appeal deadlines. FEMA staff had denied replacement of the facility at issue in version 0 of Project Worksheet 9230 in 2006. Applicant did not appeal. FEMA issued a version 1 of the project worksheet in 2007 (essentially changing the federal cost share to 100%). Applicant did not appeal. FEMA issued version 2 of PW 9230 to reflect various insurance adjustments in March 2008, again reiterating the previous finding that replacement was not warranted. Applicant did not appeal. In September, 2008, USM requested (through MEMA) a written response from FEMA for a 50% building replacement calculation on three facilities on USM's Long Beach Campus, including the Administration Building. MEMA made this request to FEMA on or about October 1, 2008. FEMA, in a letter dated November 6, 2008 stated that they had reviewed the PW's for each building and that 50% replacement calculations were not warranted. It was this letter from FEMA that the Applicant appealed. Since *this* appeal – from a letter that stated that replacement cost calculations were not warranted – was timely filed, the dispute was still pending when the Arbitration statute was enacted and the panel had jurisdiction.

## *Codes & Standards; Hazard Mitigation*

In yet another decision where the Panel has consistently applied FEMA’s regulations, the Applicant, East Bank Waste Water Treatment Plant (Plant) requested funds for the design, procurement, and installation of a generator as a permanent back-up source of power. Previously, the Plant had feeder lines from two substations, as its alternate power source. During Hurricane Katrina both lines were compromised causing the Plant to lose electrical power which, in turn, caused untreated sewerage to be discharged into the Mississippi River. FEMA authorized emergency funding for seven temporary generators until both feeder lines were restored and it resumed operations. In 2006, the EPA issued an order for the Plant to “provide adequate and stationary auxiliary power for the effluent pump, other critical units, and the treatment facilities so that said units and facilities will remain functional in weather events.” After additional outages which occurred in 2008, the Plant requested funds for a four-megawatt generator as a new back-up source. FEMA denied assistance on the basis that the Plant did not have a generator at the site prior to Katrina – a condition of eligibility that the applicant must meet in order to restore “such facility as it existed prior to the disaster,” and the applicant requested arbitration. In *In the Matter of Sewerage & Water Board of New Orleans [Generator]* the applicant put forward two theories for eligibility of funding for a new generator: 1) Codes and Standards, and 2) Hazard Mitigation, we shall review the panel’s analyses on both. First, the EPA’s order was not considered, by the panel, an upgrade required by a code or standard. While this order might have been considered a “Legal Federal Requirement” applicable to the type of restoration, the panel found “no compelling evidence that only a permanent back-up generator at the site would satisfy the requirements of this order.” Second, the panel rejected the applicant’s effort for funding of the generators as 406 Mitigation in that: “To be eligible for funding under the ‘hazard mitigation’ provisions, the [applicant] must show that the generator would eliminate or reduce the threat of future damage to the facility damaged.”

**FEMA Law Associates, PLLC**  
**805 15<sup>th</sup> Street, Suite 1101, N.W.**  
**Washington, D.C. 20005**  
**Phone: 202.326.9319 Fax: 202.326-9323**  
**info@fema-law.com**

