

BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Planning For Coronavirus FEMA Public Assistance Program Arbitrations Before The Civilian Board Of Contract Appeals: Guidelines For Local Governments, Tribes, And Private Nonprofit Organizations

By Robert Nichols, Shiva Hamidinia, and Sam Van Kopp.*

The novel coronavirus pandemic represents the first time in history that the United States has declared a nationwide disaster in response to a public health threat. As of the date of this publication, there are more than 6.8 million confirmed COVID-19 cases in the United States.¹ Global deaths from the disease have exceeded 900,000 people.² More than 200,000 have died from the disease in the United States alone.³ Congress has authorized over \$3 trillion to multiple federal agencies to provide aid to local governments responding to the adverse impacts of the coronavirus pandemic.⁴

On March 13, 2020, President Donald J. Trump issued an unprecedented nationwide emergency declaration under the Stafford Act.⁵ Never before has a President issued 57 major disaster declarations simultaneously for all U.S. states, the District of Columbia, and U.S. territories.⁶ The President's emergency declaration, and state-specific major disaster declarations under the Stafford Act, makes the Federal Emergency Management Agency's (FEMA's) Public Assistance Program (PA) funding available to state, local, tribal, and territorial governments, as well as qualifying private nonprofit (PNP) organizations providing disaster relief aid in response to COVID-19.⁷ The FEMA Administrator, together with key officials from the Department of Health and Human Services (HHS), is responsible for managing the whole-of-nation COVID-19 pandemic response.⁸ FEMA's PA program grants funding for actions that lessen the immediate threat to public health and safety, like standing up emergency medical facilities; establishing COVID-19 testing sites; disinfecting public facilities; providing medical supplies and devices in high demand such as protective gear (face masks,

*Robert Nichols and Shiva Hamidinia are partners and Sam Van Kopp is an associate at Nichols Liu LLP, a specialized multidisciplinary Government contracts law firm in Washington, D.C.

IN THIS ISSUE:

I. Public Entity & Nonprofit Eligibility For Stafford Act Public Assistance Grants	2
1. Applicant Eligibility	3
2. Facility Eligibility	3
3. Work Eligibility	3
4. Cost Eligibility	4
5. COVID-19 Specific Stafford Act Eligibility Policies	5
II. Disputing A FEMA PA Award Determination	6
1. Step One: Appeal A PA Award Determination Within FEMA's Internal System	6
2. Step Two: Request Arbitration By The CBCA, Or Renew The Appeal Within FEMA	8
III. Arbitration Of PA Appeals Before The CBCA	8
1. § 601—The Board's Historical Stafford Act Arbitration Authority	8
2. § 1219—The CBCA's New Arbitration Authority	9
3. New Rules Of Procedure For Arbitrations Before The CBCA	9
IV. Notable FEMA Arbitrations Before The CBCA	10
1. The Extent Of Deference To FEMA Policy In CBCA Arbitration	10
2. Arbitration Decisions Departing From FEMA Policy	12
V. Guidelines	13



gloves, surgical gowns, and protective eyewear), ventilators, and medications; and providing food and nutrition assistance to those in need.⁹ FEMA's contract obligations in response to COVID-19 totaled about \$1.6 billion as of May 31, 2020, with obligations for goods such as surgical gowns and N95 masks accounting for \$1.4 billion, or 86% of that total.¹⁰

The extraordinary public health threat posed by COVID-19 will test the Stafford Act's capacity to quickly and appropriately marshal essential federal resources for local governments and PNPs. By coincidence, applicants seeking to dispute their eligibility for funding under FEMA's PA program have access to a new, independent tribunal designed to review FEMA's funding determinations and expeditiously process applicant's appeals.

On October 5, 2018, Congress passed the Disaster Recovery Reform Act as part of the FAA Reauthorization Act of 2018, amending the Stafford Act to provide a permanent right of arbitration for certain qualifying applicants: those who applied for Public Assistance pursuant to a disaster declared after January 1, 2016; those rural applicants whose dispute concerned more than \$100,000; and those urban applicants whose dispute concerned more than \$500,000.¹¹ The Act appointed the independent Civilian Board of Contract Appeals (CBCA) to act as permanent arbitrator for PA appeals under the program.¹² The CBCA promulgated rules of procedure for the new arbitration program on June 21, 2019, drawing from its experience arbitrating Stafford Act PA disputes arising from hurricanes Katrina, Rita, and Gustav.¹³

This BRIEFING PAPER provides an overview of the PA program appeals and arbitration process for public entities, local governments, territories, tribes, and qualifying

private nonprofits that are providing disaster aid relief in response to the coronavirus pandemic or any other federally declared disaster. The PAPER discusses (1) eligibility for FEMA PA grants to provide disaster aid and emergency relief, including COVID-19 specific authorizations; (2) the process for appealing and requesting arbitration of PA funding determinations; (3) the CBCA's rules of procedure for arbitrations; and (4) a summary of prior arbitration decisions that illustrate how the CBCA's arbitration process works within, and sometimes diverges from, FEMA precedent.

I. Public Entity & Nonprofit Eligibility For Stafford Act Public Assistance Grants

The Robert T. Stafford Disaster Relief and Emergency Assistance Act,¹⁴ as amended, authorizes the federal government to provide direct assistance to state, local, tribal, nonprofit and public entities¹⁵ responding to an emergency or disaster.¹⁶ FEMA operates the PA program to provide grants and direct assistance to states, local governments, public entities, and nonprofits.¹⁷ Historically, PA awards account for slightly less than half of all FEMA disaster relief funding.¹⁸ PA awards are, however, the single largest disaster response program by a significant margin.¹⁹

PA funding is limited according to four eligibility criteria: the *applicant* seeking aid;²⁰ the *facility* damaged in the disaster;²¹ the scope of the relief *work*;²² and the *costs* resulting from the work.²³ FEMA's Public Assistance Program and Policy Guide²⁴ (PAPPG) conceptualizes these four criteria as steps in an ascending pyramid, so that an application may satisfy some elements of eligibility but be denied funding for being ineligible under later criteria, such as cost.²⁵ As FEMA assesses the

Editor: Valerie L. Gross

©2020 Thomson Reuters. All rights reserved.

For authorization to photocopy, please contact the **Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400, <http://www.copyright.com> or **West's Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, copyright.west@thomsonreuters.com. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. Periodical Postage paid at St. Paul, MN. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

merit of appeals within the context of eligibility, this section of the PAPER briefly describes each eligibility criteria.

1. Applicant Eligibility

U.S. states, territories, public entities, and tribal entities are eligible applicants for PA funding.²⁶ Local governments include counties, municipal incorporations, intra- and interstate government entities, and instrumentalities of local governments.²⁷ Public assistance PNPs are also eligible to receive PA funding; however, their applications must be submitted by the state.²⁸ With few exceptions,²⁹ FEMA considers the state to be the legal recipient of PA funding, even if the actual application originates from a nonprofit, city, or county.³⁰ Though the state is considered the recipient, FEMA will only accept PA applications for work on a specific facility if filed by the entity with legal responsibility for the facility.³¹ As an illustrative example, when Hurricane Katrina damaged more than 400 school buildings in New Orleans, only the Orleans Parish School Board, and not the City of New Orleans or the Louisiana Department of Education, could apply for PA funding to repair the facilities.³²

2. Facility Eligibility

Unlike *applicant*, *work*, and *cost*, the concept of “facility” as an independent component of eligibility does not exist within the regulatory framework of the PA program.³³ FEMA characterizes a “facility” as the second step of its eligibility pyramid because other regulations³⁴ frame their concept of eligibility with regard to different categories of facilities. In FEMA’s conception, a facility is “any publicly or privately owned building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature.”³⁵ Eligible facilities are either public, in that they are owned or maintained by a government authority, or they are owned by a private nonprofit that provides “essential governmental type services to the general public.”³⁶

Both the eligibility of private nonprofit facilities and improved natural features are frequent subjects of appeals.³⁷ Private nonprofit facilities, such as places of worship or recreational centers, often serve both public and private uses. In such circumstances, a private nonprofit space qualifies as an eligible facility if (1) more than 50% of the physical space of the facility is dedicated

to public use, or (2) if the entire facility is set aside for public use for more than 50% of its operating hours.³⁸ Eligibility is discrete—either the entire facility is eligible, or none of it is,³⁹ though in a complex with multiple buildings, FEMA evaluates each building as a separate facility.⁴⁰

Natural features, most typically berms,⁴¹ barrier islands⁴² and erosion resistance features like dunes and terraced hillsides⁴³ are eligible facilities if the feature has been improved and regularly maintained.⁴⁴ Unlike a private nonprofit facility, which may be eligible in its entirety if 50% of it is dedicated to public use, only those portions of a natural feature that have actually been improved may qualify for PA funding.⁴⁵ Appellants frequently fail to qualify for funding by failing to prove that they regularly maintain natural features, which by their nature would not appear to need the sort of regular maintenance budgeted for man-made facilities.⁴⁶

3. Work Eligibility

As a matter of internal policy,⁴⁷ FEMA has divided the scope of eligible work into two broad classifications—emergency and permanent work—and seven smaller categories, each with its own criteria.⁴⁸ All classifications and categories of PA eligible work, however, must first meet three universal requirements. First, all work must be required as the result of an emergency or major disaster event,⁴⁹ which includes both work necessary to prepare for “an immediate threat” and work to recover from the consequences of an emergency.⁵⁰ Second, the work required must occur within the geographic area designated by the disaster declaration, unless the work concerns evacuation or sheltering of refugees.⁵¹ Third, the work must be the legal responsibility of the applicant requesting assistance, as discussed above.⁵² Of these criteria, the first is perhaps the most commonly disputed by applicants in arbitration, as FEMA requires proof that a given element of damage requiring work resulted from the specific named emergency at issue.⁵³

FEMA defines “emergency work” as “that which must be done immediately to save lives and protect improved property and public health and safety, or to avert or lessen the threat of a major disaster.”⁵⁴ FEMA recognizes two categories of emergency work: (1) debris removal⁵⁵ (Category A) and (2) emergency protective measures (Cate-

gory B).⁵⁶ Debris includes everything from mud and hazardous waste⁵⁷ to substantially damaged structures that have lost at least half of their market value.⁵⁸ Debris removal is primarily limited to improved public properties and rights-of-way,⁵⁹ though FEMA may approve removal of debris from private property where FEMA determines that the work is in the public interest.⁶⁰

Emergency protective measures (Category B) are those that “save lives, protect public health and safety, [and] protect improved property.”⁶¹ As the definition suggests, Category B covers a vast range of activities occurring immediately before, during, or after a named disaster,⁶² including fire-fighting; medical treatment; search and rescue; emergency construction and repair; child care; mass mortuary services; and mosquito abatement.⁶³ Like debris removal, Category B activities mostly occur on public property, but activities on private property may be eligible in the interest of public health and safety, providing that the property owner agrees to indemnify and hold harmless the federal government.⁶⁴ Similarly, though public entities are the primary recipients of PA funding for emergency protective measures, private nonprofit entities are eligible for funding where they perform emergency services at the request and certification of the legally responsible government entity.⁶⁵

FEMA Categories C through G concern different forms of “permanent work,” the “restorative work that must be performed through repairs or replacement, to restore an eligible facility on the basis of its pre-disaster design and current applicable standards.”⁶⁶ Similar to Category B’s emergency work, Category C permanent work is a general classification of activities subject to common standards. FEMA must first determine if the cost to repair a facility exceeds 50% of its replacement cost.⁶⁷ If repairable, PA funding will generally only be authorized in the amount necessary to restore the facility to its pre-disaster function.⁶⁸ An applicant may choose to apply these funds to improve or alter the design and function of the building, providing that the alteration is in the public interest,⁶⁹ but the level of PA assistance is capped at the value of damage sustained by the original building.⁷⁰ Should an applicant choose simply to return the facility to its pre-emergency state, FEMA will provide additional funding to bring the facility up to compliance with new facility codes and standards, providing that the new standards are reasonable, were enforced prior to the disaster,

and relate to the disaster damage.⁷¹ Thus, in a recent arbitration⁷² where an appellant sought to change the design and function of a convent so that it could operate as a homeless shelter, the cost of bringing the building’s HVAC system into code was not eligible for PA funding, for though the standards were reasonable and a homeless shelter met FEMA’s guidelines for alternative use, the existing HVAC system was not damaged in the hurricane.⁷³

4. Cost Eligibility

FEMA’s principles for allowable costs are derived from the Office of Management and Budget’s (OMB’s) uniform requirements for federal grants and awards.⁷⁴ These regulations require that all costs be “necessary and reasonable”;⁷⁵ “adequately documented”;⁷⁶ and reduced by all applicable credits, including insurance.⁷⁷ The OMB’s regulations discounting insurance mirror a Stafford Act prohibition against the payment of assistance to applicants who “received financial assistance under any other program or from insurance or any other source.”⁷⁸

The extent to which insurance and funding from “any other source” conditions eligibility for PA funding is often a source of dispute⁷⁹ and gives rise to FEMA’s characterization as the provider of last resort. A facility is only eligible for assistance if it is insured,⁸⁰ and FEMA will reduce its PA award not only by the amount of insurance or assistance that an applicant receives, but by the amount the applicant was theoretically eligible to receive.⁸¹ For example, a private nonprofit seeking permanent work must demonstrate that it applied for a Small Business Administration (SBA) loan before seeking PA funding.⁸² Even if an applicant cannot accept the terms of an SBA loan for reasons beyond its control—as when an applicant has insufficient collateral to secure a loan—FEMA will not provide PA assistance for work the loan would have covered.⁸³ Similarly, if the applicant’s parent entity receives alternative funding, FEMA will deny or de-obligate PA funding for its applicant, even if the applicant did not receive those funds from its parent.⁸⁴ FEMA’s statutory authority to de-obligate assistance later determined to be duplicative⁸⁵ applies even after the project is accomplished and the monies spent.⁸⁶

FEMA authorizes four categories of cost according to FEMA’s interpretation of the regulatory definition of

“necessary and reasonable” cost.⁸⁷ Whether a cost is reasonable depends on the market price for similar goods,⁸⁸ the prudence of the purchase given the circumstances,⁸⁹ the purchaser’s compliance with its own internal policies,⁹⁰ and whether the cost is “generally recognized as ordinary and necessary for . . . the proper and efficient performance of the Federal award.”⁹¹ Under this standard, FEMA reimburses applicant labor on a per-hour basis with adjustments for fringe benefits according to the employee’s pre-disaster contract.⁹² Different rates apply depending on the type of work⁹³ and the type of employee.⁹⁴ Applicant equipment is similarly reimbursed at an hourly rate depending on its type and pre-disaster operating cost in the disaster locale.⁹⁵ Leased equipment and purchased supplies are eligible to the extent that they comply with OMB guidance on reasonable cost,⁹⁶ federal procurement regulations,⁹⁷ and the applicant’s own procurement policy.⁹⁸ The remaining elements of eligible cost concern procurement and disposal of services and equipment,⁹⁹ which obligate applicants to abide by both their own and federal procurement laws¹⁰⁰ and result in a significant number of claim denials.¹⁰¹ Note that as cost eligibility is the penultimate step of FEMA’s conceptual pyramid of PA eligibility,¹⁰² FEMA has produced a large body of policy¹⁰³ that falls outside the scope of this PAPER.

5. COVID-19 Specific Stafford Act Eligibility Policies

Pursuant to President Trump’s disaster declaration of March 13, 2020, FEMA published two policies that expand PA eligibility to encompass new categories of eligible work, eligible facilities, and eligible cost. Applicants are still required to prove their eligibility according to the other elements of the PA application process.¹⁰⁴

FEMA issued FP 104-010-03 on April 11, 2020, which authorized “eligible work and costs for the purchase and distribution of food” in response to the COVID-19 emergency.¹⁰⁵ Qualifying work includes the “purchasing, packaging, and/or preparing [of] food, including food commodities, fresh foods, shelf-stable food products, and prepared meals,” in addition to delivering and distributing such food.¹⁰⁶ Work involving “leasing distribution and storage space, vehicles, and necessary equipment” is also eligible for PA funding under the agency’s new policy.¹⁰⁷ Note that this latter authority does not affect the scope of eligible “facility” within the PA classification

structure, as facilities are only those “publicly or privately owned” by the applicant.¹⁰⁸ FP 104-010-03 limits all eligibility under its authority to “an initial 30-day time period” with a possible 30-day extension.¹⁰⁹

FEMA issued FP 104-010-04 on May 9, 2020, to expand the definitions of “eligible facility,” “eligible work,” and “eligible costs” for the provision of medical care to combat COVID-19.¹¹⁰ The policy distinguishes between medical care provided at a “Primary Medical Care Facility,” which is owned by the applicant, and “Temporary and Expanded Medical Facilities,” which are “used to provide medical services when the primary care facility is overwhelmed.”¹¹¹ While both primary and temporary clinics are “eligible facilities,” “eligible work” at Primary Medical Care Facilities is limited to care provided for known or suspected COVID-19 patients, while treatment for both COVID-19 and non-COVID-19 patients constitutes “eligible work” at Temporary and Expanded Medical Facilities.¹¹² FEMA defines the scope of medical care broadly, classifying as eligible work the procurement of medical supplies, to include personal protective equipment; labor costs for most staff treating COVID-19 patients; accompanying medical services like transport, waste disposal, and pharmaceutical prescription; and the lease, construction and mobilization costs for building or expanding medical facilities.¹¹³ Unlike the FEMA’s policy on food aid, its authorization for medical expenses is not time limited.

Both COVID-19 policies expand the scope of eligible costs by authorizing repayment for noncompetitive contracts¹¹⁴ for “the duration of the Public Health Emergency, which began on January 27, 2020.”¹¹⁵ While applicants are always authorized to award sole-source contracts where the “public exigency or emergency for the requirement will not permit a delay,”¹¹⁶ FEMA has historically chosen to interpret this authorization in the narrowest terms possible,¹¹⁷ disallowing costs for a debris removal contract, for example, since the contract involved more than the clearance of a single road that might have been sufficient for the delivery of supplies.¹¹⁸ While neither COVID policy announces a change to FEMA’s calculus of exigency or emergency, both documents reference a departmental memorandum stating that the “declaration of a Public Health Emergency for COVID-19 establish[es] that exigent and emergency circumstances currently exist.”¹¹⁹ FEMA’s authorization does not supersede

an applicant's obligation to prove that its costs were "reasonable"¹²⁰ and in conformity with the procurement regulations of its state or locality.¹²¹

Applicants for PA funding should note that both policies include criteria for proving need. Need for food aid is demonstrated by "[r]educed mobility of people in need due to government-imposed restrictions, including 'stay-at-home' orders" or "[d]isruptions to the typical food supply chain within a given jurisdiction."¹²² Need for expanded medical aid is less specific, but must be "based on regular assessments" of "guidance from public health officials, caseload trends, and/or other predictive modeling or methodologies," and "the Applicant must document the review process to support its decision making."¹²³ FEMA's medical policy further limits eligible work to that "necessary as a direct result of the emergency or major disaster,"¹²⁴ which may require applicants to prove causation in complicated medical circumstances.

Though both policies expand eligible work in a critical way, FEMA remains the provider of last resort. Noting that food aid may also be provided by the Department of Agriculture, HHS, and the Department of Housing and Urban Development, policy FP 104-010-03 explicitly reiterated that "FEMA is prohibited from providing financial assistance where such assistance would duplicate funding available from another program, insurance, or any other source for the same costs."¹²⁵ In its policy for medical assistance, FEMA listed 10 different federal programs, mostly related to HHS, that provide duplicative benefits.¹²⁶ Because FEMA is required by statute to de-obligate duplicative funding,¹²⁷ even if the applicant fails to apply for other sources of aid, or if the applicant has already spent the money granted it by FEMA, applicants should be careful in applying for and spending PA funding under these authorizations.

II. Disputing A FEMA PA Award Determination

Applicants denied assistance under FEMA's PA program have the right to appeal the agency's decision on the grounds that the applicant was eligible for greater funding than it received.¹²⁸ FEMA operates its own internal mechanism for appeals, detailed below, and because disaster relief funding is a form of discretionary federal activity expressly immune from suit,¹²⁹ applicants

have very limited ability to challenge PA awards in court.¹³⁰ This section, and the attached schematic, describe how an applicant must first appeal a funding decision within FEMA before it can request arbitration by the CBCA.

1. Step One: Appeal A PA Award Determination Within FEMA's Internal System

Any applicant may challenge FEMA's eligibility determination, or the amount of aid FEMA chose to award the applicant, through FEMA's internal appeals process.¹³¹ Appeals typically assert that FEMA incorrectly, or arbitrarily, applied its own regulations to deny or limit the amount of PA assistance provided to the applicant, though neither statute nor regulation restrict an applicant to arguments concerning FEMA's regulations.¹³² Of the appeals that end in arbitration before the CBCA, the most common issues of dispute concern the eligibility of difficult-to-classify facilities¹³³ and the extent of damage sustained by a facility that is attributable to a specific disaster.¹³⁴

If the appealing party is a subrecipient, as would be the case for any public entity or PNP applying through a state's authority, the subrecipient must submit an appeal of FEMA's determination to the primary recipient—usually the state—within 60 days of receiving notice of FEMA's decision.¹³⁵ All applicants must ensure that their appeal does not request funding that is available to the contractor from another source; PNPs have the specific responsibility of applying for an SBA Disaster Loan prior to applying for, or appealing, FEMA aid.¹³⁶

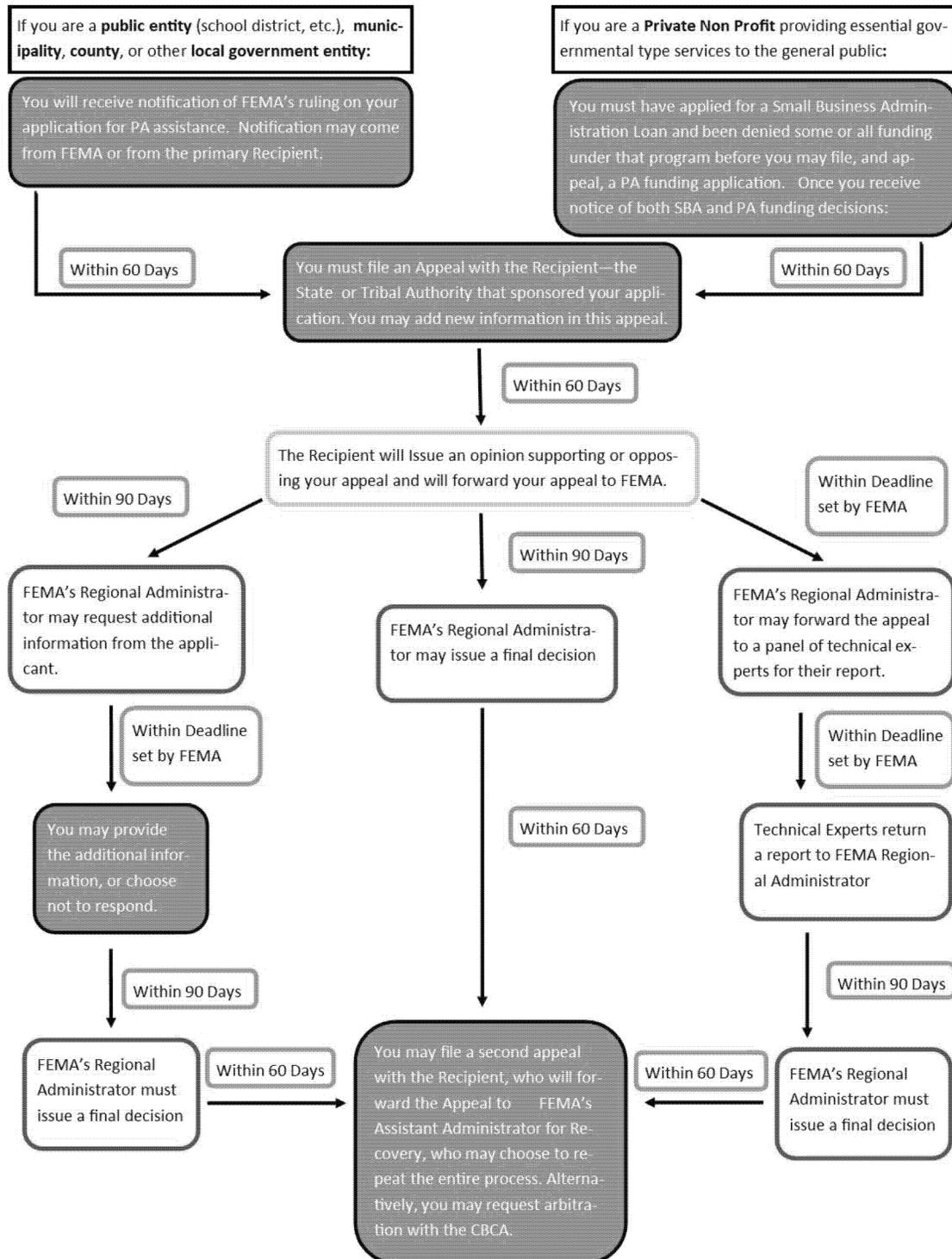
After receiving an applicant's appeal, the primary recipient (state) is responsible for reviewing and forwarding the subrecipient's claim, with a written recommendation, to FEMA's Regional Administrator within 60 days.¹³⁷ FEMA's Regional Administrator may request additional information from the recipient and establish a date by which such information must be received.¹³⁸ The Regional Administrator may also choose to submit the appeal to a panel for technical review of the issue, which may take an additional 90 days.¹³⁹

After receiving any necessary additional information, FEMA's Regional Administrator will rule on an appeal within 90 days.¹⁴⁰ Therefore, if both FEMA and the state primary recipient use the maximum time allotted for rul-

ing on an appeal, a subrecipient may have to wait 240 days to receive a first decision on its internal appeal with FEMA. A 2017 Government Accountability Office report

stated that from 2014 to July 2017, FEMA processed only 9% of first-level and 11% of second-level appeals within its 90-day limit.¹⁴¹

The First Step: Disputing a PA Determination within FEMA’s Mandatory Internal First Appeal Process



2. Step Two: Request Arbitration By The CBCA, Or Renew The Appeal Within FEMA

Before the passage of the American Recovery and Reinvestment Act of 2009 (ARRA),¹⁴² an applicant's only recourse to a decision from the Regional Administrator was to file a second appeal with the Assistant Administrator for the Disaster Assistance Directorate, who has another 90 days to respond to the appeal request and a further 90 days to decide the issue. The same regulation governing appeals by FEMA Regional Managers apply to appeals before the Assistant Administrator,¹⁴³ so that the Regional Administrator may also delay issuing a decision by requesting additional information from the applicant or referring the issue to a technical review panel. FEMA's Assistant Administrator does not have any regulatory or statutory authority to apply discretion or deviate from FEMA policy.¹⁴⁴ Of the 501 secondary appeals filed since 2014, the Assistant Administrator has granted, or partially granted, only 82 appeals as of the date of this publication.

Today, an applicant meeting certain criteria may request arbitration of its appeal by the CBCA, instead of requesting a secondary appeal from FEMA's Assistant Administrator.¹⁴⁵ The right of arbitration is limited to those applicants appealing a PA award relating to a disaster that occurred after January 1, 2016.¹⁴⁶ In addition, the dispute must seek at least \$100,000 in assistance or repayment for applicants in a rural area, and \$500,000 in assistance or repayment for applicants in an urban area, to be eligible for arbitration.¹⁴⁷ The meaning of a "rural area" is vaguely defined in statute,¹⁴⁸ and a recent CBCA arbitration discussed at length in Part IV of this PAPER suggests that almost any area that could be described as "outside an urbanized area" would qualify as "a rural area" for the purposes of arbitration eligibility.¹⁴⁹

An applicant meeting the criteria described above may request arbitration after either "the completion of the first appeal" or "180 days after the Administrator's receipt of the appeal if the Administrator has not provided the applicant with a final determination of the appeal."¹⁵⁰ If the applicant chooses arbitration after its appeal was denied by the FEMA Regional Administrator, it must submit its request to the CBCA within 60 days of its receipt of the FEMA Regional Administrator's decision.¹⁵¹ Applicants submit their requests for arbitration by e-filing their

request to the board's cbca.efile@cbca.gov address, attaching their application, denial, subsequent appeal, and its result in .pdf attachments within the board's 18 megabyte limit.¹⁵² Applicants should notify FEMA's Regional Administrator of their arbitration request¹⁵³ and must designate a primary representative for arbitration, who in turn will need to e-file a notice of appearance with the board.¹⁵⁴

The remaining sections of this PAPER concern arbitration decisions and arbitration procedures before the CBCA, beginning with the board's first arbitration authority in the wake of Hurricane Katrina. Understanding the board's processes and how it conceives of its authority is critical for practitioners seeking an expedited and independent means of challenging FEMA's PA determinations.

III. Arbitration Of PA Appeals Before The CBCA

1. § 601—The Board's Historical Stafford Act Arbitration Authority

The delays and concerns with the independence of the internal appeal system handled by FEMA led Congress to establish an arbitration process for the PA program.

In February 2009, in § 601 of the ARRA, Congress directed the President to establish "an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region."¹⁵⁵ The statute granted the panel "authority regarding the award or denial of disputed public assistance applications" for projects worth more than \$500,000.¹⁵⁶ The President delegated his authority under § 601 to the Secretary of Homeland Security,¹⁵⁷ who entered into a memorandum of understanding with the CBCA.¹⁵⁸ FEMA promulgated regulations governing CBCA arbitrations on August 31, 2009.¹⁵⁹

FEMA's regulatory framework¹⁶⁰ authorized applicants filing pursuant to certain named disaster declarations¹⁶¹ to request arbitration after filing a first or second appeal, providing that FEMA did not issue a final decision on a second appeal prior to February 17, 2009.¹⁶² Applicants could forward to the board a writing supporting their po-

sition and had to allow FEMA 30 days to file their own brief in opposition.¹⁶³ Either party could request an oral hearing to occur within 60 days of a preliminary conference¹⁶⁴ or choose to authorize the appeal according to the paper record.¹⁶⁵ In either event, the arbitration panel could ask parties to submit additional written information but was otherwise obligated to submit a final decision within 60 days of the close of the hearing.¹⁶⁶

The CBCA rejected FEMA's conception of its arbitration authority and established its own standard of review in its first published decision, *Bay St. Louis-Waveland School District*.¹⁶⁷ Citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁶⁸ FEMA asserted that pursuant to the Administrative Procedure Act (APA), the arbitration panel "must affirm FEMA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁶⁹ FEMA's position would have required the arbitrating panel to apply the same standard of judicial review as any court, a standard so deferential it has made PA determinations practically incontestable, absent constitutional violations.¹⁷⁰ Instead, the CBCA seized on what it characterized as Congress' conception of § 601 in the ARRA, that "arbitration before the CBCA may be pursued by grantees and applicants in lieu of the second level of administrative appeal within the agency . . . [and that] [t]he panel of CBCA Board Judge Arbiters should not be expected to defer to the decision making of lower level FEMA officials."¹⁷¹ Since "the statutory and regulatory scheme envisions independent fact finding by the arbitration panel," and as the Supreme Court characterized arbitrators as "hav[ing] completely free rein to decide the law as well as the facts and are not subject to appellate review,"¹⁷² the panel concluded that it would "consider the reasoning of FEMA officials" but assign their decisions no deference.

The board continues to arbitrate appeals filed pursuant to § 601,¹⁷³ but as the authorization is limited to Hurricanes Katrina and Rita, these appeals will eventually end. The statute's more enduring influence concerns its impact on the board's conceptualization of its new arbitration authority, which encompasses all declared disasters.

2. § 1219—The CBCA's New Arbitration Authority

To the board's surprise,¹⁷⁴ § 1219 of the FAA Reautho-

rization Act of 2018 amended § 423 of the Stafford Act to authorize applicants for disaster aid to request arbitration "for any disaster that occurred after January 1, 2016."¹⁷⁵ Critically, § 1219 did not expand the arbitration authorization granted under § 601 of the ARRA but founded an independent statutory authorization subject to enumerated rules, codified within the U.S. Code's subchapter for major disaster assistance programs.¹⁷⁶ Unlike the ARRA's prior authorization, § 1219 explicitly identified the CBCA as the arbitrating authority and specified that the board's decisions would be binding.¹⁷⁷ Section 1219 also instituted quantum limitations on arbitration eligibility, so that only those applicants whose claims exceeded \$500,000 in urban areas and \$100,000 in rural areas may request arbitration before the CBCA.¹⁷⁸ The statute retained a timing requirement from the enacting regulations of the ARRA's original authorization, obligating applicants to request arbitration only after completing an internal appeal within FEMA and before receiving a final agency determination from FEMA's Administrator.¹⁷⁹

On March 5, 2019, the CBCA published proposed rules of procedure pursuant to § 1219's new arbitration authorization.¹⁸⁰ Under the heading "Supplemental Information," the board characterized its understanding of its new arbitration authority. Because § 1219 established a "right of arbitration" and appointed the board to make binding decisions "without suggesting that the board should review, sustain, or reverse FEMA's first appeal decision," the board concluded that "arbitrators must find facts and interpret the law independently" without "judicial doctrines of deference."¹⁸¹ The board noted that its new rules included several mechanisms to expedite proceedings inspired by its experience arbitrating disputes pursuant to § 601 of the ARRA.¹⁸² The board's rules were subsequently published in Title 48, Part 6106 of the Code of Federal Regulations.¹⁸³

3. New Rules Of Procedure For Arbitrations Before The CBCA

The greatest differences between the CBCA's rules for 48 C.F.R. Part 6106 arbitrations and FEMA's rules for 44 C.F.R. Part 206 arbitrations concerns the board's flexibilities in evidence, filings, hearings, and motion practice.¹⁸⁴ Parties may, but need not, supplement the record by providing new evidence until the moment arbitra-

tion closes, though the board warns that the panel “may consider the timing or surprise nature of evidence” when assessing its probative value.¹⁸⁵ Expert testimony is not defined as evidence, but like written arguments and briefings it may be submitted as scheduled by the panel.¹⁸⁶ Motions practice is similarly limited; motions for summary judgment or to dismiss an arbitration request are prohibited, providing that the request was timely filed.¹⁸⁷ Parties may request a hearing, though hearing procedures are at the panel’s discretion and may not involve traditional witness examination or cross examination.¹⁸⁸

As mentioned in the board’s *Federal Register* notice,¹⁸⁹ the cumulative effect of the new rules of procedure is to expedite arbitration decisions. If parties request a hearing, it must begin within 60 calendar days after the parties’ initial conference with the board.¹⁹⁰ The rules explicitly discourage parties from submitting additional evidence if the existing record “adequately frames the dispute,”¹⁹¹ presenting live testimony if written testimony is available, or introducing forms of evidence other than documents.¹⁹² After arbitration closes, the parties will receive a final decision from the panel within 60 calendar days.¹⁹³ Parties may not appeal decisions for reconsideration, and decisions are only subject to judicial review on the grounds of corruption, fraud, misconduct, or such “imperfect[t] execut[ion] . . . that a mutual, final, and definite award upon the subject matter submitted was not made.”¹⁹⁴

IV. Notable FEMA Arbitrations Before The CBCA

Since the board’s new rules came into effect on July 22, 2019,¹⁹⁵ panels have issued a total of nine substantive decisions in § 1219 arbitrations, some of which have changed the practical operation of PA policy. While these decisions are nonprecedential, they illustrate the logic and perspective of the board’s arbitrators, who are always chosen from the same set of 14 CBCA judges, and who sometimes cite prior arbitrations in their decisions.¹⁹⁶ Decisions issued by one panel are therefore useful, though not dispositive, in predicting another panel’s probable interpretation of the same issue.

1. The Extent Of Deference To FEMA Policy In CBCA Arbitration

Though every panel has approached its arbitration

authority to “find facts and interpret the law”¹⁹⁷ with complete independence, panel decisions exhibit varying degrees of deference to FEMA policies. Three recent opinions¹⁹⁸ best illustrate the range of deference and departure in the board’s current arbitration practice.

In *Livingston Parish Government*,¹⁹⁹ a CBCA panel²⁰⁰ expressed “general principles . . . for future applicants and the agency (FEMA) to understand how the members of this panel, at least, presently intend to approach decisions under the board’s new Stafford Act arbitration authority and our arbitration rules.”²⁰¹ The panel noted that its obligation “to find facts” fell within the usual bounds of arbitration, but that its additional obligation “to interpret the law independently” raised a unique problem of review.²⁰² PA grants, unlike the government contracts typically reviewed by the board pursuant to the Contract Disputes Act, are discretionary awards issued in part according to extra-regulatory determinations of public policy.²⁰³ The panel recognized FEMA’s authority to condition discretionary awards on policy, but noted that FEMA policies are sometimes in tension with regulatory interpretation.

The *Livingston Parish* panel framed this tension with an example: FEMA’s persistent interpretation of eligibility under 44 C.F.R. § 206.223 as requiring an item of work to be required as a *direct* result of an emergency event.²⁰⁴ 44 C.F.R. § 206.223(a) actually only requires that “an item of work must: (a) [b]e required as the result of the emergency or major disaster event.” While an arbitration panel might correctly conclude that an item of work that is the result, but not the direct result, of an emergency is eligible according to 44 C.F.R. § 206.223, the panel suggested that it ought to give “weight” to FEMA’s determination that only *direct* harms should be eligible for funding as an exercise in agency discretion.²⁰⁵

The *Livingston Parish* panel concluded that its task as an arbitrator was to “try to make decisions that we believe FEMA itself would have made upon fairly and impartially applying applicable law and FEMA policies to the evidence in the arbitration record.”²⁰⁶ While the panel would not defer to FEMA’s conclusions, it also would not “re-open issues of statutory or regulatory interpretation that FEMA persuades us it has resolved on behalf of the Executive Branch, [or] second-guess facially rational policy judgments or broad factual inferences about what typi-

cally happens in disaster situations.”²⁰⁷ Following this principle, the panel applied a FEMA policy that interpreted 44 C.F.R. § 206.223’s requirement that road repairs be “required as a result of the emergency” to mean that the need for repair was “visible and quantifiable from a site inspection.”²⁰⁸ The panel described FEMA’s policy as “a rational basis for distributing money to fix roads after a disaster, even if it is not the only possible, or the most generous standard.”²⁰⁹

The *Livingston Parish* rationale represents both the most explicit and most deferential posture that CBCA arbitrators have chosen to adopt with regard to the treatment of FEMA policies. Its decision to apply a narrow FEMA policy conditioning eligibility, coupled with its dicta that arbitration should not “reopen issues of statutory or regulatory interpretation that FEMA persuades us it has resolved on behalf of the Executive Branch” comes close to advocating deference to FEMA interpretation of regulation. *Livingston Parish* should be contrasted with two decisions from panels whose reasoning suggests a more qualified conception of deference to FEMA policy determinations.

In *Municipality of Cabo Rojo*,²¹⁰ a CBCA panel²¹¹ chose not to apply a FEMA policy that it determined produced inconsistent outcomes. The arbitration addressed a question arising from FEMA’s classification of the appellant as an urban applicant. Under 42 U.S.C.A. § 5189a, an applicant from an urban area must have more than \$500,000 in dispute to qualify for arbitration; a rural applicant needs only \$100,000.01. FEMA policy as expressed in a Fact Sheet memorandum²¹² determined an applicant’s urban/rural identity according to an online program. Using the program, the panel found that some locations within Cabo Rojo were classified as urban, while other parts were rural.²¹³ Rather than conclude that the urban classification of portions of Cabo Rojo would render an application on behalf of the entire municipality to be urban, the panel decided that the tool did not designate either a rural or an urban classification for the municipality.²¹⁴ The panel also dismissed an alternative FEMA policy that assessed applicants according to the U.S. Census Bureau density-based methodology,²¹⁵ as the methodology could classify an high-density area with a population of less than 200,000 to be an urban area, in contradiction of 42 U.S.C.A. § 5189a(d)(4)’s explicit definition.²¹⁶

In *Deweese Island Property Owners Association*,²¹⁷ a CBCA panel²¹⁸ applied two FEMA policies to find an unlikely facility to be eligible for funding despite the general spirit of FEMA policy conditioning eligibility on pre-disaster function. The appeal concerned funding for a series of berms constructed to create containment ponds for a wildlife habitat.²¹⁹ Though the project’s conservationist objective did not qualify it as an eligible facility, the nonprofit applicant argued that the containment areas also provided an educational function similar to a museum or zoo and so should qualify as a noncritical facility “which provide[s] health and safety services of a governmental nature.”²²⁰ The panel cited a FEMA policy distinguishing between eligible zoos and noneligible “open natural areas/features or entities that promote the preservation/conservation of such areas” to reject the appellant’s argument.²²¹ However, the board noted that a second FEMA policy treated facilities with a fire suppression capability as eligible for funding even if fire suppression was not the primary purpose of the facility.²²² Finding that the applicant owned firefighting equipment that could draw upon the containment pond water in an emergency, and that this use would not violate the island’s conservation easement since an “out-of-control fire on the island would be highly detrimental to the conservation efforts,” the appellant found the applicant eligible.²²³

The *Deweese* panel’s conclusion required that they disregard FEMA’s characterization of a third policy interpreting the eligibility of work under 44 C.F.R. § 206.201(j).²²⁴ The PAPPG described permanent work as work “required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards.”²²⁵ FEMA drew from this definition to assert that as a matter of policy, a nonprofit entity “must show that the pre-disaster design and function of a facility was for fire suppression.”²²⁶ Though such a rule would fit *Livingston Parish*’s conception of “a rational basis for distributing money . . . even if it is not the only possible, or the most generous standard,” the panel disagreed that the PAPPG language FEMA quoted gave rise to the policy they asserted.²²⁷ The panel distinguished between permanent work eligibility, which it found only to effect the payment of certain costs, and facility eligibility, which would allow the facility to apply for permanent work funding in the first

instance.²²⁸ The panel concluded by finding the facility eligible for PA.²²⁹

Livingston Parish, Cabo Rojo, and Dewees jointly illustrate that the CBCA will interpret eligibility within the framework of published FEMA policies. At its most deferential, panels applying the *Livingston Parish* standard may choose to adopt FEMA's interpretations of regulations that deliberately limit the scope of eligibility, as with the *Livingston* panel's example of giving weight to FEMA's reading of 44 C.F.R. § 206.223(a) so that only work "required as the *direct* result of the emergency"²³⁰ is eligible for funding. At its least deferential, panels may choose, as in *Cabo Rojo*, to completely reject a FEMA policy that conditions eligibility, particularly if the panel believes that the policy is flawed. In the majority of arbitrations, as in *Dewees*, panels will apply FEMA policies to issues of eligibility if not regulatory interpretation, providing that the policy is published,²³¹ though those applications may result in outcomes that diverge from the spirit of FEMA policy. Even in the least deferential circumstances, however, CBCA panels will begin their analysis by assessing the issue through the lens of FEMA policy, rather than deriving eligibility from a fresh interpretation of FEMA's regulations.

2. Arbitration Decisions Departing From FEMA Policy

Cabo Rojo and *Dewees* describe the CBCA's conception of deference in FEMA arbitration, but in rejecting FEMA policy arguments they also redefined elements of eligibility. *Dewees* suggests that a facility's eligibility is not dependent on its pre-disaster use or purpose²³² despite FEMA policies that often characterize eligibility in terms of a facility's pre-disaster purpose.²³³ *Cabo Rojo* functionally discarded FEMA's classification system for rural applicants, and FEMA has since replaced its Fact Sheet specifying an applicant's rural or urban identity,²³⁴ so that now most any applicant who can claim to be located in "an area with a population of less than 200,000 outside an urbanized area"²³⁵ may appeal for arbitration with only \$100,000 of assistance at issue.

Three additional decisions illustrate how CBCA arbitrations have shifted elements of PA eligibility. In *Bossier Parish Police Jury*²³⁶ FEMA cited its policy prohibiting funding for "the projected loss of useful service life of a

facility"²³⁷ to assert that a roadway that had been submerged by stormwater but not rendered impassible after the disaster could not be eligible for PA assistance. The panel²³⁸ disagreed, defining "damage" as "injury or harm . . . resulting in a loss in soundness or value"²³⁹ and finding that the applicant proved that flooding had damaged the structural integrity of the road, rendering it eligible for PA assistance.²⁴⁰ Just two months prior to *Bossier Parish*, in *City of Liverpool*, a panel that included one of the same judges as arbitrated *Bossier Parish* came to the opposite conclusion, ruling that a submerged road in the city was ineligible for funding since the applicant's claim was one for "loss of useful life of its roads, which is ineligible for PA assistance."²⁴¹

The difference between the two cases involved the extent of evidence presented to the panels. In *Bossier Parish* the applicant presented pre- and post-disaster photographs, core samples, and expert testimony²⁴² to demonstrate the extent of damage to the road's structural integrity, whereas the applicant of *City of Liverpool* presented only expert testimony speaking to the general consequences of submerging pavement for prolonged periods of time.²⁴³ In both cases, however, the damage at issue did not result in the immediate failure of the facility, but rather raised the possibility of future failure that would require earlier than anticipated prophylactic repairs, and so could be conceived as damages that merely limited the useful service life of the facility. These two decisions, therefore, have functionally transformed FEMA's bar for "loss of useful service life of a facility" into an evidentiary hurdle, and by its meticulous recitation of evidence in *Bossier Parish*²⁴⁴ the CBCA has defined what those evidentiary requirements are.

Like *Bossier Parish*, *New York State Office of Parks, Recreation and Historic Preservation*²⁴⁵ functionally expanded the scope of eligibility for natural facilities. The panel²⁴⁶ found that a dune where an applicant "planted or encouraged grass" and installed "a fence across the crest . . . and a scarp of cobble stones at the foot" constituted an eligible facility.²⁴⁷ While FEMA policy had recognized that an "improvement [that] enhances the function of the unimproved natural feature"²⁴⁸ would qualify as an eligible facility under 44 C.F.R. § 206.201(c), the agency's guidance did not define the extent of improvement necessary for a natural feature to qualify as an eligible facility. The panel's decision sug-

gests that the improvement, if maintained,²⁴⁹ may be very slight.

With only nine substantive decisions²⁵⁰ issued pursuant to its § 1219 arbitration authority as of the date of this publication, the CBCA's arbitration experience is in its infancy. As the decisions discussed above have already shifted the practical meaning of PA eligibility, we should expect that the surge of arbitrations that must follow in the wake of COVID-19 will herald yet more changes that applicants will need to analyze before requesting arbitration.

V. Guidelines

These *Guidelines* offer a few suggestions for practitioners considering arbitration, whether the application at issue was filed pursuant to COVID-19 or any other named disaster. They are not, however, a substitute for professional representation in any specific situation.

1. Be mindful of deadlines. As discussed in part II, above, an applicant has a limited opportunity to file an appeal within FEMA and subsequently request arbitration before the CBCA. Applicants must appeal an agency decision to the primary recipient with 60 days of notice of FEMA's decision. After receiving notice from FEMA's Regional Administrator, an applicant must request arbitration before the CBCA within 60 days. FEMA's internal appeals process and the board's arbitration process may impose additional deadlines on the applicant. Neither FEMA, nor the board have any statutory authority to waive these deadlines as a matter of equity.

2. Include a complete record on appeal. Before appealing to FEMA or requesting arbitration, ascertain whether the PA application at issue meets the statutory requirements of the Stafford Act, FEMA policy guidance as expressed in the PAPPG, and the specific disaster declaration giving rise to the application. In an arbitration, FEMA may introduce new information and deny the application on different grounds. If there are other problems with an application, it may be more expeditious for an applicant to file a new, corrected application rather than appeal and arbitrate an original decision, even if the original reason for the application's denial was spurious. Commonly overlooked problems include the availability of alternative funding for the same relief effort; the applicant's legal responsibility for the facility or work in

question; and evidence of a causal relationship between the disaster event and the damage claimed.

3. Review Prior FEMA Determinations. Research FEMA's Public Assistance Appeals Database²⁵¹ to determine how FEMA's internal appeals process has responded to similar appeals. FEMA is not bound by its past decisions but contradictions between its current reasoning and past decision-making may indicate that the appeal would do well in arbitration.

4. Review published arbitrations by your assigned panel members. After filing a request for arbitration, determine whether the arbitrators assigned to your panel were party to decisions that follow the *Livingstone Parish*, *Cabo Rojo*, or *Deweese* theories of deference as it may affect your legal strategy with regard to FEMA policy. While every analysis must address the applicable FEMA policies at issue, the arbitrator's conception of deference to FEMA policy should condition legal arguments with regard to the application of those policies. The CBCA publishes all of its FEMA arbitration decisions at its website: <https://www.cbca.gov/decisions/index20191130.html>.

5. Follow the expeditious spirit, as well as the letter, of the CBCA's Rules of Procedure. In the course of arbitration, remember that the board has structured its rules pursuant to § 1219 to resolve arbitrations as expeditiously as possible, and that the judges who drafted these rules still preside with the board. A party representative should shape their entire strategy to avoid delay and treat the recommendations of Rule 612²⁵² as mandates: submit evidence to the panel as early as possible; submit written testimony before a hearing wherever possible; and limit oral testimony to those most important witnesses whose written testimony could not otherwise clearly convey their evidence.

6. Shape your arguments for arbitration, not litigation. In considering your arguments, remember that the absence of binding precedent in arbitration limits the persuasive power of citations. Though past arbitration decisions should guide your understanding of how the panel will probably approach a given PA regulation, the CBCA's itself rarely cites²⁵³ to prior arbitrations or federal court decisions in explaining its reasoning, even where the panel's logic mirror that of earlier arbitrations.

ENDNOTES:

¹See Johns Hopkins University & Medicine Coronavirus Resource Center, available at <https://coronavirus.jhu.edu/map.html>.

²Id.

³Id.

⁴FEMA Fact Sheet, Coronavirus Disease 2019 (COVID-19) Public Health Emergency: Coordinating Public Assistance and Other Sources of Federal Funding (June 2020), available at https://www.fema.gov/media-library-data/1593609857750-0a9c88370c27f1391b4c907818c1b3a2/FEMA-COVID-19_coordinating-public-assistance-and-other-sources-of-federal-funding_07-01-2020.pdf.

⁵Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>; see § 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. § 5191(b).

⁶See Gov't Accountability Office, GAO-20-685T, COVID-19: FEMA's Role in the Response and Related Challenges 2 n.6 (July 14, 2020), available at <https://www.gao.gov/assets/710/708097.pdf> ("Major disaster declarations include all 50 states, the District of Columbia, five territories, and the Seminole Tribe of Florida. In addition, 32 tribal entities are working directly with FEMA under the March 13, 2020, nationwide emergency declaration.").

⁷See FEMA Fact Sheet, Eligible Emergency Protective Measures (Sept. 7, 2020), <https://www.fema.gov/news-release/2020/03/19/coronavirus-covid-19-pandemic-eligible-emergency-protective-measures>.

⁸See Gov't Accountability Office, GAO-20-685T, COVID-19: FEMA's Role in the Response and Related Challenges (July 14, 2020), available at <https://www.gao.gov/assets/710/708097.pdf>.

⁹See FEMA Fact Sheet, Eligible Emergency Protective Measures (Sept. 7, 2020), <https://www.fema.gov/news-release/2020/03/19/coronavirus-covid-19-pandemic-eligible-emergency-protective-measures>.

¹⁰Gov't Accountability Office, GAO-20-685T, COVID-19: FEMA's Role in the Response and Related Challenges 6 (July 14, 2020), available at <https://www.gao.gov/assets/710/708097.pdf>.

¹¹See FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1219, 132 Stat. 3186, 3452 (Oct. 5, 2018) (adding 42 U.S.C.A. § 5189a(d)).

¹²42 U.S.C.A. § 5189a(d).

¹³Civilian Board of Contract Appeals; Rules of Procedure of the Civilian Board of Contract Appeals, 84 Fed. Reg. 29085 (June 21, 2019) (adding 48 C.F.R. pt. 6106)

(final rule effective July 22, 2019); see also 84 Fed. Reg. 7861 (Mar. 5, 2019) (proposed rule).

¹⁴Pub. L. No. 100-707, 102 Stat. 4689 (Nov. 23, 1988) (amending Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (May 22, 1974)) (codified as amended at 42 U.S.C.A. § 5121 et seq.).

¹⁵42 U.S.C.A. § 5121(b).

¹⁶42 U.S.C.A. § 5122(1), (2).

¹⁷44 C.F.R. §§ 206.1, 206.200.

¹⁸See Cong. Research Serv., R43990, FEMA's Public Assistance Grant Program: Background and Considerations for Congress 28–30 (Apr. 16, 2015), available at <https://crsreports.congress.gov/product/pdf/R/R43990>.

¹⁹Id.

²⁰44 C.F.R. § 206.222 (limiting eligible entities to states, local governments, and qualifying nonprofits).

²¹44 C.F.R. §§ 206.201(c), .221(e). Note that the "Facility" criteria is not identified as an independent criteria in 44 C.F.R. § 206.220, which does itemize "applicant," "work," and "cost." FEMA appears to have intuited the "Facility" category from the definitions of PA code sections.

²²44 C.F.R. § 206.223(a).

²³2 C.F.R. § 200.403.

²⁴Federal Emergency Management Agency, FP 104-009-2, Public Assistance and Policy Guide 1 (Version 4, June 1, 2020), available at <https://www.fema.gov/media-library/assets/documents/111781> [hereinafter PAPPG].

²⁵PAPPG, supra note 24, at 38.

²⁶42 U.S.C.A. §§ 5121, 5122; 44 C.F.R. § 206.222.

²⁷42 U.S.C.A. § 5122(8).

²⁸42 U.S.C.A. § 5122(11).

²⁹Primarily where the recipient is a tribal government or a different state providing assistance in its own right, as with the housing of refugees. See 44 C.F.R. § 206.202(f).

³⁰See 44 C.F.R. § 206.201(m).

³¹See 44 C.F.R. § 206.223(a)(3).

³²See Orleans Parish Sch. Bd. & La. Recovery Sch. Dist., CBCA 5457-FEMA, 18-1 BCA ¶ 36,929.

³³See 44 C.F.R. pt. 206, subpt. H.

³⁴See, e.g., 44 C.F.R. § 206.226; 44 C.F.R. § 206.223.

³⁵44 C.F.R. § 206.201(c).

³⁶44 C.F.R. § 206.221(e).

³⁷See, e.g., Union for Reform Judaism, CBCA 6457-FEMA, 19-1 BCA ¶ 37452; Ocean Hammock Prop. Owners Ass'n, Inc., CBCA 6409-FEMA, 19-1 BCA ¶ 37,360.

³⁸See PAPPG, supra note 24, at 56–57.

³⁹Id.

⁴⁰Id.

⁴¹See Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

⁴²La. Dep't of Natural Res., CBCA 5873-FEMA, 19-1 BCA ¶ 37,228.

⁴³Regarding dunes, see N.Y. State Office of Parks, Recreation & Historic Pres., CBCA 6604-FEMA, 19-1 BCA ¶ 37,477.

⁴⁴See PAPPG, supra note 24, at 55.

⁴⁵Id.

⁴⁶See St. Tammany Parish, CBCA 1778-FEMA, 10-1 BCA ¶ 34,457; La. Dep't of Natural Res., CBCA 5873-FEMA, 19-1 BCA ¶ 37,228.

⁴⁷Note that the regulations of 44 C.F.R. Part 206, Subpart H, that detail Public Assistance Eligibility, see 44 C.F.R. §§ 206.220–.228, list some specific forms of eligible work, such as debris removal, snow assistance, or the restoration of damaged facilities, but the regulations themselves do not articulate the same dual-classification and seven-category structure as defined in the PAPPG. See PAPPG, supra note 24, at 97–98, 140–1.

⁴⁸See generally PAPPG, supra note 24, at 97–179.

⁴⁹See 44 C.F.R. § 206.223(a)(1).

⁵⁰PAPPG, supra note 24, at 97.

⁵¹44 C.F.R. § 206.223(a)(2).

⁵²44 C.F.R. § 206.223(a)(3).

⁵³See, e.g., Noble Cty., Ohio, CBCA 6575-FEMA, 19-1 BCA ¶ 37,443 (finding, based on invoices for roadwork predating the disaster, that the roadway's instability resulted from failures of drainage and design that were not attributable to the emergency event); City of Liverpool, CBCA 6593-FEMA, 20-1 BCA ¶ 37,497 (finding testimony concerning the percentage of the municipality's budget dedicated to roadwork did not evidence a routine maintenance program without documentation of specific repairs and associated expenditure); St. Bernard Parish Gov't, CBCA 6114-FEMA, 19-1 BCA ¶ 37,276 (identifying the significant evidentiary hurdle involved in linking damage to the emergency response work of a disaster several years earlier); Plaquemines Parish Government, CBCA 6434-FEMA, 19-1 BCA ¶ 37,457 (rejecting eyewitness testimony as sufficient to differentiate damages sustained by fort resulting from one named disaster versus another).

⁵⁴44 C.F.R. § 206.201(b).

⁵⁵44 C.F.R. § 206.224.

⁵⁶44 C.F.R. § 206.225.

⁵⁷PAPPG, supra note 24, at 99. Note that version three of the PAPPG gave additional guidance for the disposal of hazardous waste as a component of debris removal. See Federal Emergency Management Agency, FP 104-009-2, Public Assistance Policy Guide 51 (Version 3.1, Apr. 2018), available at <https://www.fema.gov/media-library/assets/documents/111781>.

⁵⁸PAPPG, supra note 24, at 99–100.

⁵⁹44 C.F.R. § 206.224(a).

⁶⁰44 C.F.R. § 206.224(b).

⁶¹44 C.F.R. § 206.225(a)(1).

⁶²PAPPG, supra note 24, at 110.

⁶³PAPPG, supra note 24, at 111.

⁶⁴PAPPG, supra note 24, at 112.

⁶⁵PAPPG, supra note 24, at 112–13.

⁶⁶44 C.F.R. § 206.201.

⁶⁷See 44 C.F.R. § 206.226(f). For a discussion concerning the calculation of replacement cost, see Roman Catholic Church of the Archdiocese of New Orleans, CBCA 6469-FEMA, 20-1 BCA ¶ 37,582.

⁶⁸PAPPG, supra note 24, at 140.

⁶⁹44 C.F.R. § 206.203(d).

⁷⁰See PAPPG, supra note 24, at 141.

⁷¹44 C.F.R. § 206.226(d).

⁷²Archdiocese of New Orleans, CBCA 6469-FEMA, 20-1 BCA ¶ 37,582.

⁷³See Archdiocese of New Orleans, CBCA 6469-FEMA, 20-1 BCA ¶ 37,582.

⁷⁴See 2 C.F.R. pt. 200, subpt. E.

⁷⁵2 C.F.R. § 200.403(a).

⁷⁶2 C.F.R. § 200.403(g).

⁷⁷2 C.F.R. § 200.406(a).

⁷⁸See 42 U.S.C.A. § 5155(a).

⁷⁹The fullest discussion of the issue is perhaps contained in *State of Hawaii ex rel. Att'y Gen. v. Fed. Emergency Mgmt. Agency*, 294 F.3d 1152 (9th Cir. 2002) (finding that a state remained eligible for PA funding even if it settled with an insurer for an amount lower than theoretically possible under its policy).

⁸⁰44 C.F.R. § 206.253(b); 44 C.F.R. § 206.252.

⁸¹See 42 U.S.C.A. § 5155(c) (extending liability for repayment of PA funds “to the extent that such assistance duplicates benefits available to the person from the same purpose from another source”).

⁸²See PAPPG, supra note 24, at 57.

⁸³See PAPPG, supra note 24, at 58.

⁸⁴See Office of Facility Planning & Control, CBCA 5393-FEMA, 17-1 BCA ¶ 36,718.

⁸⁵See 42 U.S.C.A. § 5155(c).

⁸⁶Despite the wording of 42 U.S.C.A. § 5205(c). See Office of Facility Planning & Control, CBCA 5393-FEMA, 17-1 ¶ 36,718 (citing Baldwin Cty. Bd. of Supervisors, CBCA 2018-FEMA, 2010 WL 6233669 (Sept. 15, 2010)).

⁸⁷2 C.F.R. § 200.403(a).

⁸⁸2 C.F.R. § 200.404(c).

⁸⁹2 C.F.R. § 200.404(d).

⁹⁰2 C.F.R. § 200.404(e).

⁹¹2 C.F.R. § 200.404(a).

⁹²See PAPPG, *supra* note 24, at 69.

⁹³Emergency vs. permanent work. See 44 C.F.R. § 206.228(a)(2).

⁹⁴Temporary or permanent employees, employees whose job is disaster response, and those reassigned to such tasks. See PAPPG, *supra* note 24, at 70.

⁹⁵See 44 C.F.R. § 206.228(a)(1).

⁹⁶2 C.F.R. § 200.318(d).

⁹⁷2 C.F.R. § 200.317.

⁹⁸2 C.F.R. § 200.453(b).

⁹⁹PAPPG, *supra* note 24, at 75–85.

¹⁰⁰2 C.F.R. § 200.317.

¹⁰¹For a fuller description of the breadth of disputes typically arising concerning cost issues, see Erin J. Greten & Ernest B. Abbott, “Representing States, Tribes and Local Governments Before, During and After a Presidentially-Declared Disaster,” 48 *Urb. Law.* 489, 518 (2016).

¹⁰²PAPPG, *supra* note 24, at 38.

¹⁰³PAPPG, *supra* note 24, at 65–96.

¹⁰⁴Federal Emergency Management Agency, FEMA Policy FP 104-010-03 (Apr. 11, 2020), available at https://www.fema.gov/media-library-data/1586783951980-4adbdd3bad2955ca31966a9220058835/FP-104-010-03_COVID-19_Purchase_and_Distribution_of_Food_4-11-2020_508.pdf.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.*

¹⁰⁸See 44 C.F.R. § 206.201(c).

¹⁰⁹FP 104-010-03, *supra* note 104, at 5.

¹¹⁰Federal Emergency Management Agency, FEMA Policy FP 104-010-04, at 1 (May 9, 2020), available at https://www.fema.gov/media-library-data/1589208038530-19c77b9558076c303b4ebec5f0631697/PA_Medical_Care_Policy_for_COVID-19_508.pdf.

¹¹¹ *Id.* at 9.

¹¹² *Id.* at 2–4.

¹¹³ *Id.* at 4.

¹¹⁴ *Id.* at 7; FP-104-010-03, *supra* note 104, at 4.

¹¹⁵See Federal Emergency Management Agency, Memorandum on Procurement Under Grants Conducted Under Emergency or Exigent Circumstances for COVID-19, at 2 (Mar. 17, 2020), available at <https://www.fema.gov/media-library-data/1584457999950-7186ffa29ace3e6>

[faf2ca2f764357013/Procurement Under EE Circumstances Memo final 508AB.pdf](https://www.fema.gov/media-library-data/1584457999950-7186ffa29ace3e6).

¹¹⁶2 C.F.R. § 200.320(f)(2).

¹¹⁷See Ernest B. Abbott, “Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues,” 37 *Urb. Law.* 467, 484 (2005).

¹¹⁸ *Id.*

¹¹⁹Memorandum on Procurement Under Grants Conducted Under Emergency or Exigent Circumstances for COVID-19, *supra* note 115, at 2.

¹²⁰Defined in the policies as not “exceed[ing] that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost.” FP 104-010-03, *supra* note 104, at 4; FP 104-010-04, *supra* note 110, at 5.

¹²¹FP 104-010-03, *supra* note 104, at 4; FP 104-010-04, *supra* note 110, at 6.

¹²²FP 104-010-03, *supra* note 104, at 3.

¹²³FP 104-010-04, *supra* note 110, at 4–5.

¹²⁴ *Id.* at 2. Note that this policy makes explicit FEMA’s longstanding tendency to interpret 44 C.F.R. § 206.223(a)(1)’s provision that aid must be “required as the result of the emergency” to read instead that aid must be “required as a direct result of the emergency.”

¹²⁵FP 104-010-03, *supra* note 104, at 4 (citing 42 U.S.C.A. § 5155).

¹²⁶FP 104-010-04, *supra* note 110, at 7–8.

¹²⁷See 42 U.S.C.A. § 5155.

¹²⁸42 U.S.C.A. § 5189a.

¹²⁹42 U.S.C.A. § 5148 (“The Federal Government shall not be liable for any claim based upon the exercise or performance of, or the failure to exercise or perform, any discretionary function or duty. . .”).

¹³⁰For a discussion of the limited constitutional grounds that might sustain litigation concerning an award of PA funding, see *St. Tammany Parish ex rel. Davis v. FEMA*, 556 F.3d 307 (5th Cir. 2009).

¹³¹42 U.S.C.A. § 5189a(a).

¹³²FEMA archives internal appeals on an online database, available at <https://www.fema.gov/appeals>. Note, however, that there are no explicitly identified “grounds of appeal” enumerated in either statute or regulation. See 48 U.S.C.A. § 5189a(b); 44 C.F.R. § 206.206(a).

¹³³See, e.g., *Union for Reformed Judaism, CBCA 6457-FEMA*, 19-1 BCA ¶ 37,452; *Livingston Parish Gov’t, CBCA 6513-FEMA*, 19-1 BCA ¶ 37,436; *Dewees Island Prop. Owners Ass’n, CBCA 6439-FEMA*, 19-1 BCA ¶ 37,415.

¹³⁴See, e.g., *Plaquemines Parish Gov’t, CBCA 6434-FEMA*, 19-1 BCA ¶ 37,457; *St. Bernard Parish Gov’t, CBCA 6114-FEMA*, 19-1 BCA ¶ 37,276.

¹³⁵44 C.F.R. § 206.206(a), (c)(1).

¹³⁶44 C.F.R. § 206.226(c).

¹³⁷44 C.F.R. § 206.206(c)(2).

¹³⁸44 C.F.R. § 206.206(c)(3).

¹³⁹44 C.F.R. § 206.206(d).

¹⁴⁰42 U.S.C.A. § 5189a(b).

¹⁴¹Gov't Accountability Office, GAO-18-143, *Disaster Recovery: Additional Actions Would Improve Data Quality and Timeliness of FEMA's Public Assistance Appeals Processing* (Dec. 15, 2017).

¹⁴²See American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (Feb. 17, 2009).

¹⁴³See 44 C.F.R. § 206.206(c).

¹⁴⁴See 44 C.F.R. § 206.206(c); 42 U.S.C.A. § 5189a.

¹⁴⁵42 U.S.C.A. § 5189a.

¹⁴⁶42 U.S.C.A. § 5189a(d)(1).

¹⁴⁷42 U.S.C.A. § 5189a(d)(1), (3).

¹⁴⁸42 U.S.C.A. § 5189a(d)(4) (“For the purposes of this subsection, the term ‘rural area’ means an area with a population of less than 200,000 outside an urbanized area.”). Note that neither the term “outside” nor the term “urbanized area” are defined under this title.

¹⁴⁹See Municipality of Cabo Rojo, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517.

¹⁵⁰42 U.S.C.A. § 5189a(d)(5)(B).

¹⁵¹Note that the time limits for submitting a request for reconsideration are not clearly expressed in statute, FEMA, and CBCA regulation. While it may be possible to argue that an applicant may request arbitration after the 60-day window following receipt of FEMA's first appeal response, the use of the phrase “final determination” in statute suggests that FEMA's regulatory 60-day limit on appeals would dictate the timeline for requesting arbitration. See 42 U.S.C.A. § 5189a(d)(5)(B) (an applicant “may submit a request for arbitration after the completion of the first appeal under subsection (a) at any time before the Administrator of the Federal Emergency Management Agency has issued a final agency determination or 180 days after the Administrator's receipt of the appeal if the Administrator has not provided the applicant with a final determination on the appeal”); 44 C.F.R. § 206.206(c)(1) (“Appellants must file appeals within 60 days after receipt of a notice of the action that is being appealed.”); 48 C.F.R. § 6106.604(a) (“An applicant for public assistance may request arbitration by following applicable FEMA guidance implementing section 423 of the Stafford Act.”).

¹⁵²48 C.F.R. § 6106.604; 48 C.F.R. § 6101.1.

¹⁵³Per 44 C.F.R. § 206.206(a), it is to the FEMA Regional Administrator, via the recipient, that requests for appeals are filed.

¹⁵⁴48 C.F.R. § 6106.605; 48 C.F.R. § 6101.5.

¹⁵⁵American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (Feb. 17, 2009).

¹⁵⁶American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (Feb. 17, 2009).

¹⁵⁷Assignment of Function Under Section 601 of the American Recovery and Reinvestment Act of 2009, 74 Fed. Reg. 40055 (Aug. 6, 2009).

¹⁵⁸Bay St. Louis-Waveland Sch. Dist., CBCA 1739-FEMA, 2009 WL 6698610 (Dec. 8, 2009).

¹⁵⁹Arbitration for Public Assistance Determinations Related to Hurricanes Katrina and Rita (Disasters DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607), 74 Fed. Reg. 44761 (Aug. 31, 2009).

¹⁶⁰See 44 C.F.R. § 206.209.

¹⁶¹Corresponding to Hurricanes Katrina and Rita, R-1603, DR-1604, DR-1605, DR-1606, and DR-1607. See 44 C.F.R. § 206.209(a).

¹⁶²44 C.F.R. § 206.209(d)(2).

¹⁶³44 C.F.R. § 206.209(e)(3),(4).

¹⁶⁴44 C.F.R. § 206.209(h).

¹⁶⁵44 C.F.R. § 206.209(h)(4).

¹⁶⁶44 C.F.R. § 206.209(i)(2), (k)(1).

¹⁶⁷Bay St. Louis-Waveland Sch. Dist., CBCA 1739-FEMA, 2009 WL 6698610 (Dec. 8, 2009).

¹⁶⁸*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁶⁹Bay St. Louis-Waveland Sch. Dist., CBCA 1739-FEMA, 2009 WL 6698610 (Dec. 8, 2009).

¹⁷⁰Erin J. Greten & Ernest B. Abbott, “Representing States, Tribes and Local Governments Before, During and After a Presidentially-Declared Disaster,” 48 *Urb. Law.* 489, 558 (2016) (citing *St. Tammany Parish ex rel. Davis v. FEMA*, 556 F.3d 307 (5th Cir. 2009)).

¹⁷¹Bay St. Louis-Waveland Sch. Dist., CBCA 1739-FEMA, 2009 WL 6698610 (Dec. 8, 2009).

¹⁷²Bay St. Louis-Waveland Sch. Dist., CBCA 1739-FEMA, 2009 WL 6698610 (Dec. 8, 2009) (citing *Commonwealth Coatings Corp. v. Continental Cas. Co.* 393 U.S. 145, 149 (1968)).

¹⁷³The board's most recent decision was issued on April 8, 2020. See *Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 6469-FEMA, 20-1 BCA ¶ 37,582.

¹⁷⁴Judge Jeri Somers, Chair, informed members of the American Bar Association Public Contract Law Section during a public session in the fall of 2019 that the board was only informed of its new arbitration authority months after the FAA Reauthorization Act was signed

into law.

¹⁷⁵FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1219, 132 Stat. 3186, 3452 (Oct. 5, 2018) (adding 42 U.S.C.A. § 5189a(d)).

¹⁷⁶42 U.S.C.A. § 5189a.

¹⁷⁷Compare FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1219, 132 Stat. 3186, 3452 (Oct. 5, 2018) (adding 42 U.S.C.A. § 5189a(d)), with American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (Feb. 17, 2009).

¹⁷⁸FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1219, 132 Stat. 3186, 3452 (Oct. 5, 2018).

¹⁷⁹Compare FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1219, 132 Stat. 3186, 3452 (Oct. 5, 2018), with 44 C.F.R. § 206.209(b).

¹⁸⁰84 Fed. Reg. 7861 (Mar. 5, 2019).

¹⁸¹84 Fed. Reg. at 7862.

¹⁸²84 Fed. Reg. at 7862.

¹⁸³Civilian Board of Contract Appeals; Rules of Procedure of the Civilian Board of Contract Appeals, 84 Fed. Reg. 29085 (June 21, 2019) (adding 48 C.F.R. pt. 6106) (final rule effective July 22, 2019).

¹⁸⁴Compare 44 C.F.R. § 206.209 with 48 C.F.R. §§ 6106.608, .609, .610, .611.

¹⁸⁵48 C.F.R. § 6106.608.

¹⁸⁶48 C.F.R. § 6106.609.

¹⁸⁷48 C.F.R. § 6106.610.

¹⁸⁸48 C.F.R. § 6106.611.

¹⁸⁹See 84 Fed. Reg. at 7862.

¹⁹⁰48 C.F.R. § 6106.611.

¹⁹¹48 C.F.R. § 6106.612(a).

¹⁹²48 C.F.R. § 6106.612.

¹⁹³48 C.F.R. § 6106.613.

¹⁹⁴48 C.F.R. § 6106.613; 9 U.S.C.A. § 10.

¹⁹⁵See 48 C.F.R. § 6106.601.

¹⁹⁶Union for Reformed Judaism, CBCA 6457-FEMA, 19-1 BCA ¶ 37,452; Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

¹⁹⁷84 Fed. Reg. at 7862.

¹⁹⁸Municipality of Cabo Rojo, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517; Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436; Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

¹⁹⁹Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰⁰Consisting of Judge Chadwick, Vice Chair Judge Beardsley, and Judge O'Rourke.

²⁰¹Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰²Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰³Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436 (citing *City of San Bruno v. FEMA*, 181 F. Supp. 2d 101, 1014–15 (N.D. Cal. 2001)).

²⁰⁴Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰⁵Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰⁶Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰⁷Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰⁸Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²⁰⁹Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²¹⁰Municipality of Cabo Rojo, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517.

²¹¹Consisting of Chair Somers, Vice Chair Beardsley, and Judge Hyatt.

²¹²FEMA Fact-Sheet, Public Assistance Arbitration (Dec. 21, 2018), available at <https://www.fema.gov/medi-a-library/assets/documents/175821>.

²¹³Municipality of Cabo Rojo, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517.

²¹⁴Municipality of Cabo Rojo, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517.

²¹⁵By reference to Census publication “Defining Rural at the U.S. Census Bureau.” See U.S. Census Bureau, *Defining Rural at the U.S. Census Bureau 2* (2016).

²¹⁶Municipality of Cabo Rojo, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517 (citing 42 U.S.C.A. § 5189a(d)(4) “for the purposes of this subsection, the term ‘rural area’ means an area with a population of less than 200,000 outside an urbanized area”).

²¹⁷Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²¹⁸Consisting of Judge Sullivan, Judge Goodman, and Judge Hyatt.

²¹⁹Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²²⁰Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415 (citing 44 C.F.R. § 206.221(e)(7)).

²²¹Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415 (citing PAPPG at 14 (Version 2, Apr. 2017)).

²²²Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415 (citing PAPPG at 17 (Version 2, Apr. 2017)).

²²³Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²²⁴Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415 (citing PAPPG at 85–87 (Version 2, Apr. 2017)).

²²⁵PAPPG at 85–87 (Version 2, Apr. 2017).

²²⁶Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²²⁷Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²²⁸Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²²⁹Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²³⁰Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

²³¹Contrast Dewees consideration of a published FEMA policy concerning educational value of open air conservation sites, with its unpublished, asserted policy regarding prior designation of a facilities' purpose.

²³²Dewees Island Prop. Owners Ass'n, CBCA 6439-FEMA, 19-1 BCA ¶ 37,415.

²³³Consider FEMA's characterization of pre-disaster purpose for private nonprofit facilities, PAPPG, *supra* note 24, at 56, or for restorative, permanent work, PAPPG, *supra* note 24, at 140.

²³⁴See FEMA Fact Sheet, Public Assistance Appeals & Arbitration Under the Disaster Recovery Reform Act (Feb. 28, 2020), available at https://www.fema.gov/sites/default/files/2020-07/fema_DRRR-1219-public-assistance-arbitration-right-fact-sheet.pdf.

²³⁵42 U.S.C.A. § 5189a(d)(4).

²³⁶Bossier Parish Police Jury, CBCA 6651-FEMA, 20-1 BCA ¶ 37,557.

²³⁷See PAPPG, *supra* note 24, at 42.

²³⁸Judges Russell, Sullivan, and Somers (Chair).

²³⁹From the definition of "damage" in Webster's New World College Dictionary 373 (5th ed. 2016).

²⁴⁰Bossier Parish Police Jury, CBCA 6651-FEMA, 20-1 BCA ¶ 37,557.

²⁴¹City of Liverpool, CBCA 6953-FEMA, 20-1 BCA ¶ 37,497.

²⁴²Bossier Parish Police Jury, CBCA 6651-FEMA, 20-1 BCA ¶ 37,557.

²⁴³City of Liverpool, CBCA 6953-FEMA, 20-1 BCA ¶ 37,497.

²⁴⁴Note the descriptions, road per road, of damage and evidence in the decision. See Bossier Parish Police Jury, CBCA 6651-FEMA, 20-1 BCA ¶ 37,557.

²⁴⁵N.Y. State Office of Parks, Recreation & Historic Pres., CBCA 6604-FEMA, 19-1 BCA ¶ 37,477.

²⁴⁶Judges Sheridan, Zischkau, and O'Rourke.

²⁴⁷N.Y. State Office of Parks, Recreation & Historic Pres., CBCA 6604-FEMA, 19-1 BCA ¶ 37,477.

²⁴⁸PAPPG, *supra* note 24, at 15.

²⁴⁹In this case evidenced by an engineer's statement that it "engaged in regular maintenance before and after the disaster." N.Y. State Office of Parks, Recreation & Historic Pres., CBCA 6604-FEMA, 19-1 BCA ¶ 37,477.

²⁵⁰CBCA decisions are published on its website: <http://www.cbca.gov/decisions/fema.html>.

²⁵¹Found at <https://www.fema.gov/appeals>.

²⁵²48 C.F.R. § 6106.612.

²⁵³Of all the board's § 1219 arbitrations to date, only two decisions cite to other arbitrations or federal court decisions: Union for Reformed Judaism, CBCA 6457-FEMA, 19-1 BCA ¶ 37,452; Livingston Parish Gov't, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

BRIEFING PAPERS