



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 24, 2016

CBCA 4984-FEMA

In the Matter of LOUISIANA DEPARTMENT OF NATURAL RESOURCES,
through the COASTAL PROTECTION AND RESTORATION AUTHORITY

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Mark Riley, Deputy Director, William J. Patrigo, Appeals Specialist, and Carla Richard, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

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Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **POLLACK**, and **SULLIVAN**.

The Louisiana Department of Natural Resources (LDNR), through the Coastal Protection and Restoration Authority, asks the arbitration panel to direct the Federal Emergency Management Agency (FEMA) to provide a public assistance grant in the amount of \$586,112,000. The grant, LDNR says, "relates to the catastrophic damage to Louisiana's Coastal Barrier Resources System[] (CBRS)" which was caused by Hurricanes Katrina and Rita in 2005. The CBRS is characterized by the agency as "includ[ing] sixteen individual barrier shorelines," or islands, which constitute "the 'first line of defense' from a coastal

restoration and protection standpoint.” LDNR seeks the grant “to fund the restoration of Louisiana’s CBRS through the replacement of sand and the installation of sand fencing and vegetation necessary to retain and conserve the sediment introduced into the System.”

The case is before the panel under authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA), and section 206.209 of title 44 of the Code of Federal Regulations (CFR). Section 601 directs 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.” The President delegated this authority to the Secretary of Homeland Security, and the Secretary has designated the Civilian Board of Contract Appeals to have its judges constitute arbitration panels to consider these cases, pursuant to 44 CFR 206.209. The statute provides that “[t]he arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications.”

FEMA provides assistance, including public assistance grants, subsequent to major disasters, under authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 et seq. Assistance may be provided “to a State or local government for the repair, restoration, reconstruction, or replacement of a *public facility* damaged or destroyed by a major disaster and for associated expenses incurred by the government.” *Id.* § 5172(a)(1)(A)¹ (emphasis added).

FEMA has denied the grant LDNR has requested on the ground that the Louisiana barrier islands are not a “public facility” for the purpose of this Act. LDNR hotly contests this conclusion and asks the arbitration panel to hold that FEMA’s understanding of the term, which is expressed through regulations, is impermissible because it is inconsistent with Congress’ definition of the term in the Stafford Act.

The Act defines “public facility” to mean “the following facilities owned by a State or local government:

- (A) Any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility.

¹ We cite in this decision to the versions of the United States Code and Code of Federal Regulations which were in effect at the time of Hurricanes Katrina and Rita, in 2005. A single exception is to the regulations at 44 CFR 206.209, which were promulgated in 2009.

- (B) Any non-Federal-aid street, road, or highway.
- (C) Any other public building, structure, or system, including those used for educational, recreational, or cultural purposes.
- (D) Any park.”

42 U.S.C. § 5122(9).

FEMA has promulgated regulations regarding disaster assistance in chapter 1, subchapter D, of title 44 of the Code of Federal Regulations. In these regulations, FEMA has defined “public facility,” in subpart H, dealing with eligibility for public assistance, using words virtually identical to those of the Stafford Act. 44 CFR 206.221(h). FEMA has also defined the term “facility” in its regulations. In subpart J, dealing with the Coastal Barrier Resources Act, 16 U.S.C. §§ 3501 et seq. (CBRA), the regulations define “facility” to mean “‘public facility’ as defined in § 206.201.” *Id.* 206.342(e). Section 206.201 does not contain the term “public facility,” however. Instead, this section, which is part of subpart G, dealing with public assistance project administration, defines the term “facility.” It says that “*Facility* means any publicly or privately owned building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature. Land used for agricultural purposes is not a facility.” *Id.* 206.201(c).

According to LDNR, FEMA’s subpart G definition is inconsistent with the Stafford Act definition of “public facility” because it restricts “facilities” to structures or improvements which are man-made. This restriction, LDNR maintains, excludes from eligibility for public assistance “systems,” which are included in the Stafford Act definition of “public facilities.” A system may be defined as “a group of related natural objects or forces,” says LDNR, citing a definition in an online dictionary, Merriam-Webster.com. The Louisiana barrier islands are “a group of related natural objects or forces,” the reasoning goes – indeed, they are a “system,” as that term is defined in the CBRA – and as a “system,” this CBRS is eligible for assistance under the Stafford Act. LDNR asks the arbitration panel to “analyze and interpret pertinent statutory and agency rulemaking” by holding that “FEMA’s reliance on its own narrower definition in Subpart G is simply arbitrary, capricious, and otherwise unsupported by the plain text of FEMA’s rules and the statutory scheme read as a whole.” We should therefore, according to LDNR, invalidate the regulatory definition and hold, consistent with the Act, that the CBRS is eligible for assistance.

FEMA maintains, to the contrary, that the panel does not have jurisdiction under 44 CFR 206.209 to rule on whether the agency’s regulations comport with statute. FEMA contends that although federal courts may “review[] an agency’s construction of the statute

which it administers,” and determine “whether the agency’s answer is based on a permissible construction of the statute,” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Board does not have this authority. Indeed, says the agency, the Board has consistently, in exercising its power under section 601 of the ARRA, judged FEMA’s actions under the standards established in the regulations, rather than questioning the validity of those rules. FEMA notes that its interpretation that a public facility be man-made in order to qualify for a public assistance grant has been consistent for more than forty years and has not been challenged previously.

The arbitration panel agrees with FEMA that the panel does not have authority to rewrite or invalidate the agency’s regulations. Importantly, the panel is acting here not as a Board (and certainly not as a court), but rather, as an arbitral entity. An arbitrator has only those powers which are conferred on him or her by agreement of the parties. 9 U.S.C. § 10(a)(4). An arbitrator’s “proper task [is] to identify the rule of law that governs” a situation, not to make public policy. *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 672, 673, 675 (2010). An arbitrator acts improperly, the Supreme Court has held, when attempting to establish rules which will bind parties who are absent from the arbitration. *Id.* at 686-87. This is what the panel would be doing if it were to hold that FEMA’s regulations must be set aside. For this reason, an arbitration panel of this Board has held, since the very first case brought to us under section 601 of the ARRA, that the panel “does not sit as a court reviewing the validity of agency regulations, . . . nor does it engage in judicial review of a final agency action.” Instead, it “serves as the final . . . executive branch decision-maker” in cases brought before it. *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,577, 169,579 (2009). Thus, we apply FEMA’s regulations; we do not overturn them. *See, e.g., Livingston Parish*, CBCA 3608-FEMA, 14-1 BCA ¶ 35,645; *State of Louisiana, Facility Planning & Control*, CBCA 1741-FEMA, 10-1 BCA ¶ 34,441. None of the many cases cited by LDNR are to the contrary.

Although the interplay between the subpart G and subpart J definitions in FEMA’s regulations is not precise, as LDNR points out, we think the rules clearly provide that a “system” cannot qualify as a “public facility” unless it is “built or manufactured, or an improved and maintained natural feature.” The regulations amplify this definition by stating that for the Louisiana barrier islands, FEMA may spend money “to prevent the erosion of, or to otherwise stabilize, any inlet, shoreline, or inshore area,” 44 CFR 206.344, but only to the extent that the expenditures involve certain actions. None of these actions involves rebuilding natural features which are not improved and maintained. The only one of the specified actions which might pertain to this application is “[r]epair of nonstructural projects [sic] for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.” *Id.* 206.345(b)(6); *see also id.* 206.346(b) (limiting permanent restoration assistance to man-made facilities and parks), *id.* 206.347(c) (requiring that such

facilities be “roads, structures or facilities which are essential links in a larger network or system”; channel improvements; energy facilities; or special-purpose facilities).

The Louisiana barrier islands, as a system, cannot meet any of these requirements, for they are not “built or manufactured, or an improved and maintained natural feature.” Thus, the application as filed must be denied.

FEMA asserts that LDNR cannot receive any public assistance grants for any of the barrier islands because the applicant has not demonstrated that the requested work is required as the result of Hurricanes Katrina and Rita, would return the islands to their pre-disaster conditions, or involves man-made improvements which were actually maintained. FEMA notes that the islands have been eroding for many years, irrespective of the hurricanes; that some damage now alleged is greater than was estimated in earlier studies; and that some funding for portions of the proposed project have come from, or could more appropriately come from, other federal agencies and other sources. Further, says FEMA, LDNR did not provide information sufficient to validate the scope and cost of the work requested, and LDNR’s negligence over the ten years following the hurricanes should preclude provision of the requested assistance. LDNR responds that it “reserves all rights to its alternative argument that the System and/or the individual islands making up the System are ‘natural features’ that have been ‘improved and maintained’ as those terms are used in FEMA’s definition of ‘facility’ in Subpart G.”

Addressing the matters raised by FEMA would be premature at this time. Given our conclusion that the islands as a system cannot qualify for a public assistance grant, the prudent course of action is for LDNR to exercise its rights by making new, separate applications for grants for “public facilities” on each of the islands for which it believes natural features were improved and maintained, seeking grants from FEMA in response to each of these individual applications. We expect that LDNR will craft each of the applications with attention to the comments FEMA has made in its filings in this case, and that FEMA will evaluate each of the applications fairly, consistent with its regulations and other published guidance.

This decision brings this arbitration case to an end. If, in pursuing a future application for a public assistance grant for public facilities on any of the Louisiana barrier islands, LDNR wishes to seek arbitration under section 601 of the ARRA, it must file a new request for arbitration.

STEPHEN M. DANIELS
Board Judge

HOWARD A. POLLACK
Board Judge

MARIAN E. SULLIVAN
Board Judge