



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 20, 2019

CBCA 6439-FEMA

In the Matter of DEWEES ISLAND PROPERTY OWNERS ASSOCIATION

Lori Sheridan Wilson, Environmental Program Director of Dewees Island Property Owners Association, Dewees Island, SC, appearing for Applicant.

Betsy Polk, Legal Counsel, South Carolina Emergency Management Division, West Columbia, SC, counsel for Grantee.

Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Frank Bruscato, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **HYATT**, **GOODMAN**, and **SULLIVAN**.

Dewees Island Property Owners Association (Dewees) appeals the denial by the Federal Emergency Management Agency (FEMA) of its request for public assistance funds for costs it incurred to repair damage to berms caused by Hurricane Irma. FEMA denied Dewees' request, finding that, because the primary purpose of the berms was to create and control water levels for the purposes of wildlife conservation, the berms were not an eligible facility for public assistance funds. However, the berms also create areas of deep water that are available for fire suppression. On this basis, we find that the berms are critical facilities eligible for public assistance funds.

The panel decides this matter pursuant to the authority set forth in The Federal Aviation Administration Reauthorization Act of 2018, Pub. L. No. 115-254, div. D, § 1219,

132 Stat. 3452 (to be codified at 42 U.S.C. § 5189a(d)). The panel conducted the arbitration in accordance with proposed Board rules that are now final. 84 Fed. Reg. 7861 (Mar. 3, 2019); 84 Fed. Reg. 29,085 (Jan. 21, 2019) (to be codified at 48 CFR pt. 6106).

Background

Dewees is a private non-profit organization responsible for the operations on Dewees Island, South Carolina. In the late 1970s, the South Carolina Wildlife and Marine Resources Department granted an easement for Dewees Island that permitted the construction of homes on the island but ensured that most of the island would remain available to support conservation efforts. As part of those conservation efforts, Dewees Island maintains water impoundment areas to create favorable conditions for several species of migratory birds, coastal flora and fauna, and recreation purposes.

To create these impoundment areas, several manmade berms were constructed on Dewees Island beginning in the 1970s. The water levels in the impoundment areas are raised or lowered depending upon the wildlife management goals. Three of the berms on Dewees Island were damaged or washed away during Hurricane Irma in September 2017. Without these berms in place, the water flowed out of the impoundment areas. In addition, utility lines buried in one of the berms were exposed and the island lost power for a period of time.

To restore the water levels and recover the utilities, Dewees repaired and rebuilt the three berms at a cost of \$473,577.77. After the work was completed, Dewees submitted a request for public assistance (RPA) that is the subject of this arbitration proceeding.

In its request, Dewees explained that the island and the impoundment areas serve an educational function similar to a museum or a zoo when school groups and other students travel to the island for study and research projects. FEMA denied Dewees' request, finding that, as Dewees stated in its request, the island was primarily for conservation purposes. FEMA denied Dewees' first appeal, again finding that the facility was for conservation purposes. FEMA also noted that Dewees had failed to apply for a disaster loan from the Small Business Administration (SBA) and Dewees Island was not open to the general public.

Dewees lodged a second appeal, asking FEMA to consider the berms as critical facilities for utility and fire suppression services. One of the berms contained utility lines for the island. The island lost power and other utility lines were exposed after the storm because of this broken berm. The deep water in the impoundment areas are available for fire suppression, if fire fighters exhaust the 100,000 gallon tank on the island. Dewees' witnesses testified at the hearing that, although the deep water has not been used to date, Dewees owns a fire truck with a special filter pump attachment that would enable the fire fighters to obtain

water from the impoundment areas without removing alligators and other wildlife. Dewees Island also has dry fire hydrants that are designed to carry water from the deep water areas of the impoundment areas to where it may be needed to fight a fire. Although the conservation easement prohibits activities “detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish or wildlife habitat preservation,” the Dewees Environmental Program Director explained that an out-of-control fire on the island would be highly detrimental to the conservation efforts. For this reason, use of the water would not violate the terms of the easement. Regarding the requirement to apply for an SBA loan, Dewees explained that it could not apply for an SBA loan because the on-line computer application system did not include Charleston County, South Carolina, as an eligible county.

Before FEMA could render a decision on the second appeal, Dewees withdrew its appeal and filed its request for arbitration with the Board.

Discussion

FEMA is authorized by statute to provide public assistance funds to private, non-profit (PNP) entities that have eligible facilities. 42 U.S.C. §§ 5172(a)(1)(B), (3) (2012). Eligible facilities are classified as either critical or non-critical. Critical facilities are those that serve a governmental purpose such as education, utilities, medical care, or custodial care. 44 CFR 206.221(e)(1–6) (2017). Non-critical facilities are “museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature.” *Id.* 206.221(e)(7). Non-critical facilities “must be open to the general public.” *Id.* Prior to obligating funds for a non-critical facility, FEMA requires a PNP to show that it applied for a disaster loan from the SBA. 42 U.S.C. § 5172(a)(3); 44 CFR 206.226(c)(2).

FEMA policy provides further guidance regarding which non-critical facilities are eligible for funding. Although museums and zoos are eligible facilities, “open natural areas/features or entities that promote the preservation/conservation of such areas are not eligible.” Public Assistance Program and Policy Guide (PAPPG) at 14 (Apr. 2017). This long-standing policy came about in 1999. FEMA Public Assistance Policy 9521.2—Private Nonprofit Museum Eligibility (1999). Pursuant to this policy, the impoundment areas on Dewees Island cannot be considered non-critical eligible facilities because these areas are open spaces created for the purpose of conservation.¹

¹ Because the berms are not part of a non-critical eligible facility, we need not reach the issues of whether Dewees could have applied for an SBA loan or whether the island

Turning to the claim that the berms are part of a critical, eligible facility, a critical utility facility is defined as “buildings, structures, or systems of energy, communication, water supply, sewage collection and treatment, or other similar public service facilities.” *Id.* 206.221(e)(2). FEMA policy requires that PNPs with facilities that have more than one use establish that at least fifty percent of the facility is used for an eligible purpose (primary use requirement). PAPPG at 17. Bodies of water that are drawn upon for fire suppression purposes are critical irrigation facilities. 44 CFR 206.221(e)(3). FEMA policy further provides that “[e]ligible PNP irrigation and eligible PNP public broadcasting facilities are exempt from primary use requirements.” PAPPG at 17.

The berms do not qualify as a utility facility because they do not meet the primary use requirement. Only one of the three damaged berms housed utility lines and, while burying the utility lines in this berm was for conservation purposes, the primary purpose of the berm is to contain water to create the impoundment areas.

The berms do qualify as a facility for the purposes of fire suppression. Per regulation policy, a water source for fire suppression qualifies as a critical irrigation facility. The berms create these deep water areas that are available for fire suppression. Although Dewees has never used the deep water, it has purchased equipment and hydrants to enable it to use the water in this manner. The conservation easement does not contain a prohibition on the use of the water for these purposes. And FEMA’s policy exempts irrigation facilities from the requirement to show that fire suppression is the primary use of the berms and the impoundment areas that they create. For these reasons, the berms are part of an eligible critical facility pursuant to FEMA regulation and policy.

In response to the panel’s request for briefing on the primary use requirement, FEMA explained that a PNP must show that the pre-disaster design and function of a facility was for fire suppression. This requirement, FEMA asserts, is different from the primary use requirement. Because the pre-existing design was as a bird sanctuary, Dewees cannot meet this requirement. However, the definition of “pre-existing design” and the discussion from the PAPPG that FEMA cites address the scope of work and cost of projects that FEMA will fund. PAPPG at 85–87. This limitation flows from the statutory requirement to “estimate the eligible cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility (i) on the base of the design of the facility as the facility existed immediately before the major disaster.” 42 U.S.C. § 5172(e)(1)(A); *see* 44 CFR 206.226. The determination of scope of work and estimated cost follows after the determination that a facility is eligible. We do not find any requirement to establish the pre-existing design and

is open to the general public.

function when determining whether a facility is eligible; that requirement must be established in determining the scope of work and estimated cost after a facility is determined to be eligible. 44 CFR 206.220–228. Moreover, FEMA’s argument taken to its conclusion would impose a primary use requirement on an irrigation facility. Because, in FEMA’s view, the berms and impoundment areas were designed for conservation purposes, they cannot be considered facilities for fire suppression despite their possible use for this purpose. However, as FEMA acknowledges in its brief, there is no primary use requirement for irrigation facilities that can be employed for fire suppression. FEMA Second Post-Hearing Brief at 4–5.

FEMA’s concern that every PNP with a man-made body of water will be able to claim public assistance funds is overstated. As noted, Dewees’ witnesses testified that Dewees made investments in equipment to enable it to use the water for fire suppression. Another PNP would have to make a similar showing; a PNP could not simply claim that any body of water might be used for fire suppression.

Decision

The application of Dewees is granted. We remand the matter to the agency for further evaluation.

Catherine B. Hyatt

CATHERINE B. HYATT
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge