



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 2, 2019

CBCA 6604-FEMA

In the Matter of NEW YORK STATE OFFICE OF PARKS,
RECREATION AND HISTORIC PRESERVATION

Kathleen L. Martens, Supervising Attorney, and Christopher S. Holmes, Director of Emergency Management, New York State Office of Parks, Recreation and Historic Preservation, Albany, NY, counsel for and appearing for Applicant.

Elisha Tomko and Kristine Hoffman, Counsel, New York State Division of Homeland Security and Emergency Services, Albany, NY, counsel for Grantee.

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

Before the Arbitration Panel consisting of Board Judges **VERGILIO, SULLIVAN, and CHADWICK.**

Agencies of New York State sought arbitration under 42 U.S.C.A. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) over whether a dune system at Sandy Beach on Lake Ontario is a facility eligible for public disaster assistance. The panel held a hearing under Board Rule 611 (48 CFR 6106.611 (2019)) on November 25, 2019. This decision “is the final administrative action on the arbitrated dispute.” Rule 613. We write “primarily for the parties” and omit unnecessary background. *Id.*

We find the dune system to be an improved and maintained natural feature, and therefore, eligible for funding at the “Facility” stage of FEMA’s eligibility pyramid. FEMA considers a natural feature to be improved and maintained if there is evidence of “a designed and constructed improvement to its natural characteristics,” if the improvement “enhances

the function of the unimproved natural feature,” and if “[t]he applicant maintains the improvement on a regular schedule to ensure that the improvement performs as designed.”

The record shows that, prior to the disaster, the applicant improved the dune by, at a minimum, installing a fence across the crest of the dune and a scarp of cobble stones at the foot of the dune. The applicant also planted or encouraged grass in the dune. These items reinforced or enhanced the dune’s undisputed visual and protective functions by limiting erosion by wind, snow, and waves. Although there is no evidence of a written plan or design, FEMA does not suggest that the applicant installed these items haphazardly. The cobbles, in particular, were obviously placed with some design in mind, given the smooth and regular shape of the scarp.

Once installed, the fence, grass, and stone improvements were inspected and maintained by dune stewards on a periodic basis. The stamped statement of a licensed engineer supports the applicant’s representation that it engaged in regular maintenance before and after the disaster. We need not see detailed documentation of particular inspection or maintenance activities—such as might be necessary to prove reimbursable costs—to be persuaded that those activities occurred.

Decision

The approximately 400-foot portion of the dune system at issue here is an eligible public facility under FEMA regulations and policies.

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Kyle Chadwick

KYLE CHADWICK

Board Judge