



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 24, 2021

CBCA 7100-FEMA

In the Matter of MATTAMUSKEET ASSOCIATION

Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; and Wendy Huff Ellard and Parker Wiseman of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant.

Will Polk, Deputy General Counsel, and Kathryn Van Tol, Agency Legal Counsel, Division of Emergency Management, North Carolina Department of Public Safety, Raleigh, NC, counsel for Grantee.

Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, and Charles Schexnaildre, 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 **BEARDSLEY** (Chair), **KULLBERG**, and **ZISCHKAU**.

Applicant, Mattamuskeet Association (Mattamuskeet or the association), sought arbitration under 42 U.S.C. § 5189a(d) (2018) of the Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), claiming entitlement to \$3,561,249.84 in costs incurred to provide flood control services during Hurricane Matthew in 2016 and infrastructure repairs thereafter. The Federal Emergency Management Agency (FEMA) denied the applicant's request, determining that Mattamuskeet was not an eligible private non-profit (PNP) applicant for purposes of public assistance reimbursement, reversing an earlier FEMA determination of eligibility. Pursuant to Board Rule 19, the parties requested a ruling on the record. 48 CFR 6101.19 (2020). For the reasons set forth below, we find that Mattamuskeet is an eligible PNP and is entitled to full reimbursement of its costs.

Background

Formed in 1977, Mattamuskeet is a private, non-profit organization, located in Hyde County, North Carolina. Mattamuskeet's purpose is to provide "construction and maintenance of roads, canals, tidegates, water pumping stations, and related facilities" within the county. Mattamuskeet was also established to "own, acquire, build, operate, and maintain roadways, canals, easements, pumping stations, lands, and related things." Mattamuskeet is charged with providing all of the above stated services for forty-three structures and sixteen facilities, all located within 42,312 acres of land (66 square miles), known as the Mattamuskeet territory. The Mattamuskeet Association is made up of local businesses such as the Engelhard Sanitary District's wastewater treatment plant and the Hyde County Airport, as well as owners of agricultural land, commercial land, and undeveloped land and members of surrounding communities who work at the businesses located within the territory. The territory is also used by the U.S. Fish and Wildlife Service to protect and monitor a wildlife refuge in the area.

The Engelhard wastewater treatment facility is located on 302 acres of land in the territory. The wastewater treatment plant consists of a 40,000 gallon per day wastewater treatment and irrigation facility, as well as a lagoon, and sewage spray field. Because the Engelhard community is situated in a flood plain near the Pamlico Sound, the sanitary district is located nearby within the Mattamuskeet territory boundaries. The sanitary district facility is dependent on the Mattamuskeet Association for continued operation, as well as prevention of public and environmental harm due to wastewater backup, which could occur if the facility were to flood.

The territory is surrounded by multiple communities, including the North Lake Road, Greater Engelhard, and Fairfield communities. The Engelhard community is located to the southeast of the territory and consists of roughly 300 residences and businesses. Directly to the south of the territory, situated between the association's boundary line and Lake Mattamuskeet, are the neighborhoods making up the North Lake Road community. Fairfield is located to the southwest, adjacent to Lake Mattamuskeet, and contains homes and businesses as well. The location of the Engelhard, North Lake Road, and Fairfield communities make the areas particularly susceptible to flooding from the Alligator River, which is located on the north end of the territory. All three communities are wholly dependent on the association to maintain flood control throughout the area.

As part of its flood control services, Mattamuskeet directs water flow predominately from the Alligator River into a grid of underlying twenty-five-foot wide canals. Mattamuskeet uses eleven electric pumps and two diesel powered pumps to maintain a constant water level of three feet below sea level. The canals divert water from the river into the Pamlico Sound, the Intracoastal Waterway, and the Barge Canal, all surrounding the territory. If the association's levees are breached and the canals are topped with water, the pumping system works at a heightened rate to divert the water and to protect the improved

land within the territory and surrounding areas. Because there is no local government to provide flood control, the communities of the Mattamuskeet territory, North Lake Road, Greater Engelhard, and Fairfield are heavily dependent on the association to maintain adequate water levels and to prevent flooding. FEMA alleges that the Mattamuskeet Association provides land reclamation and flood control only for its private members. However, without Mattamuskeet's canal system, surrounding communities would be subject to flooding and could lose critical services, such as wastewater treatment, electrical power, and road access. Accordingly, we find that the Mattamuskeet Association's flood control facilities are providing an essential governmental-type service to the general public.

Mattamuskeet maintains levees located on the northwest boundary line close to the Alligator River. The purpose of the levees is to prevent water from overflowing into the Mattamuskeet territory and the surrounding areas. The levees are of particular importance because the Alligator River poses a heightened threat of flooding to the territory, as well as to the North Lake Road, Greater Engelhard, and Fairfield communities outside of the association. The levees offer protection to many residents in the adjoining communities. This is especially true if the overflow of water is paired with an additional emergency, such as a power outage. Such circumstances could lead to large scale failure of the flood control system and severe flooding throughout the territory and adjacent communities. Because of the critical purpose served by the levees, as well as the danger posed to the North Lake Road, Greater Engelhard, and Fairfield communities were the levees to fail, we find that the association's maintaining of the levees provides an essential governmental-type service to the general public.

The Mattamuskeet Association's flood control facilities also support the provision of electric utility service in Hyde County and neighboring communities. It protects the wastewater treatment services, the Hyde County airport operation, and traffic flow on the public roads. Thus, these flood control activities clearly provide essential governmental-type services to the general public in and around Hyde County. Mattamuskeet also provides land and road access and protection for major utility lines owned by Tideland EMC, which run through the Mattamuskeet territory. Tideland EMC provides electrical distribution to residents throughout Hyde County. The electrical infrastructure maintained by Tideland also provides the electrical transmission feed to the Greater Engelhard and Fairfield communities, as well as portions of Dare county, adjacent to Hyde County. Tideland possesses multiple easements over land within the territory for the housing of and access to its electrical utility infrastructure. Because of its easements with Mattamuskeet, Tideland maintains constant access to all of its utility lines and substations within the territory's boundaries.

As a result of Mattamuskeet's support of the electrical power distribution lines, it is clear that the utilities, industrial facilities, businesses, and the more than 1,000 residents in Hyde County depend on the association's flood control services to maintain uninterrupted power, particularly following a natural disaster. Mattamuskeet's flood protection of utility lines allows Tideland to access the transmission lines and accompanying infrastructure in the

event of an emergency, preventing extended power outages. Because of the impact that the utility lines have on the residents, businesses, and local governments of Hyde County and surrounding areas, we find that the association's flood control and maintaining access to the utility lines within the territory is an essential governmental-type service provided to the general public.

Along with flood control and providing access to electrical utility lines, Mattamuskeet maintains, repairs, provides drainage use, and allows public access to over 146 miles of roads that traverse the Mattamuskeet territory. Although the roads are predominately used by members of the association, the roads provide connectivity to roadways located throughout Hyde County, including areas outside of the territory. The roadways support commerce and governmental activities throughout the territory and adjoining communities and counties, including public access to the Hyde County airport and the U.S. Fish and Wildlife Service's access to the Alligator River National Wildlife Refuge. Because of the use of the roads by the public at large, we find that Mattamuskeet's maintenance, repair, access, and flood control for the connecting roads is an essential governmental-type service provided to the general public.

Hurricane Matthew reached the North Carolina coast on October 9, 2016. The North Carolina Governor declared a state of emergency, and the President of the United States made a major disaster declaration the following day. The storm moved inland, dumping over ten inches of rain across eastern North Carolina, as well as registering the highest water levels on record for the area surrounding the Mattamuskeet territory. The storm disabled nine electric pumps and both diesel powered pumps used by Mattamuskeet to direct water throughout its canal system. Due to the flood control system failure, water from the Alligator River quickly topped the levees, flooding roadways and threatening to damage the infrastructure of the communities in and beyond Hyde County.

In response to its flood control system failure, Mattamuskeet contacted the North Carolina Department of Public Safety (NCDPS) to procure additional pumps for the canal system, along with fill material to reinforce roadways and dikes. However, due to the increased demand for emergency resources, NCDPS could not provide Mattamuskeet with the necessary equipment to support its facilities. As a result, Mattamuskeet procured thirty-three tractor driven pumps, three self-driven pumps, and fill materials from companies owned by organizational members, Mattamuskeet Management and Consulting LLC, Coastal Producers, and Alligator River Growers, who also serve as contractors to Hyde County. Mattamuskeet used the emergency pumps from October 9 through October 28, 2016, to minimize the impact of flooding throughout the region.

Following the storm, Mattamuskeet discovered damage to forty-five sections of roadways and dikes within the territory, including the loss of 53,615 cubic yards of fill material. The association suffered damage to its canal grid, pumps and buildings at multiple pump stations, and structures used to control water flow. Although flooding from the

Alligator River breached the Mattamuskeet territory, Mattamuskeet's flood control efforts allowed the Engelhard wastewater treatment plant and Hyde County airport to remain open for emergency response operations and to suffer only minimal damage to their facilities. Mattamuskeet's flood control efforts also allowed Tideland EMC to maintain access to its utility lines. Mattamuskeet further prevented more severe flooding to the Fairfield, Greater Engelhard, and North Lake Road communities.

On November 3, 2016, Mattamuskeet submitted a request seeking \$769,336.01 in public assistance reimbursement for work related to protective measures and emergency pumping (PW 1691), \$75,197.48 in costs associated with water control facilities (PW 1829), and \$1,669,064.88 in costs associated with road and culvert repair (PW 1863). Mattamuskeet supplemented its requests on July 16, 2019, increasing the total reimbursable costs in dispute to \$3,561,249.84, including an additional \$32,540.35 for PW 1829 and an additional amount for PW 1863. These additional amounts resulted from corrections to the calculation of the reimbursement amounts, not from additional work.

On May 31, 2017, FEMA's Office of Chief Counsel (OCC) determined that Mattamuskeet met the requirements for designation as an eligible PNP utility as an "other similar public services facility" under 44 CFR 206.221(e). In making its determination, FEMA cited the relationship between Mattamuskeet and Hyde County, the association's ownership and operation of water control and drainage systems, and the benefits provided to improved property both within and outside of the territory. FEMA further determined that the emergency work performed by the association would qualify for reimbursement under the Stafford Act, federal regulations, and FEMA's Public Assistance Program and Policy Guide (PAPPG).

FEMA issued two determination memoranda, one in late 2017 and another in early 2018, approving partial reimbursement in the amount of \$16,521.01 of \$769,336.01 requested for work related to emergency pumping operations and protective measures (PW 1691), as well as a total of \$1,587,968.94 of a requested \$1,669,064.88 for work related to road and culvert repair (PW 1863). The water control facilities request under PW 1829 was approved in the full amount of \$75,197.48. Mattamuskeet appealed the partial funding determinations on August 30, 2018. Two-and-a-half years later, on February 8, 2021, FEMA's Region IV Office issued a first appeal decision, denying all reimbursement to Mattamuskeet on the basis that Mattamuskeet was not an eligible PNP. In its decision, FEMA does not challenge the additional requested amounts for PW 1829 and PW 1863 on any grounds beyond its eligibility determination. In a reversal of the determination by FEMA's OCC, Region IV concluded that a PNP flood control or land reclamation facility is not an eligible applicant with an eligible facility for purposes of public assistance under the Stafford Act. Further, FEMA determined that allowing PNP flood control or land reclamation eligibility under the "other similar public service facilities" language included in 44 CFR 206.221(e) would circumvent congressional intent to narrowly construe eligible applicants. FEMA also cited its June 2020 version of the PAPPG as offering additional

“clarification” regarding the ineligibility of land reclamation facilities. FEMA ruled that even if Mattamuskeet were an eligible applicant, the agency did not view Mattamuskeet’s activities as being similar enough to those of a public utility to warrant eligibility.

Mattamuskeet Association filed a request for arbitration with the Board on April 9, 2021, which the Board docketed as CBCA 7100-FEMA. The parties held the initial conference hearing on April 21, 2021. At the prehearing conference on May 26, 2021, the parties agreed that a hearing was unnecessary and that the parties could submit final briefing in lieu of a hearing. On May 26, 2021, the parties also submitted joint stipulations to the Board. Although FEMA had cited procurement violations and cost apportionment issues in its first appeal decision, FEMA now agreed that if the arbitration panel were to find that Mattamuskeet is an eligible PNP, FEMA would authorize costs for the full scope of work and will not challenge reimbursement on these bases.

Discussion

We first address whether Mattamuskeet is an eligible PNP under the Stafford Act. FEMA states that Mattamuskeet is not an eligible PNP for receiving public assistance because the association only provides flood control, and FEMA argues that flood control, as a matter of law, does not make Mattamuskeet a utility under the Stafford Act or the regulations. In support of this contention, FEMA suggests that the enumerated list of eligible PNP facilities under the Stafford Act overlaps with many of the eligible public facilities listed in the regulations. FEMA claims that the inclusion of “flood control” facilities within the list of eligible publicly owned facilities, paired with the term’s absence from eligible PNP facilities, evidences a congressional intent to exclude flood control from the list of eligible PNP facilities. Additionally, FEMA alleges that the panel must find in favor of the agency because Mattamuskeet’s flood control facilities are not “similar to the list of public service utilities” set forth under 44 CFR 206.221(e)(2).

The Stafford Act authorizes public assistance to PNP facilities “damaged or destroyed by major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred” subject to conditions for assistance to PNP facilities specified in subsection 42 U.S.C. § 5172(a)(3). 42 U.S.C. § 5172(a)(1)(B). As relevant here, the PNP facility is considered to be a qualifying facility if it “provides critical services (as defined by the President) in the event of a major disaster” *Id.* § 5172(a)(3)(A)(i). The Act further defines the term “critical services” to include “power, water (including water provided by an irrigation organization or facility), sewer, wastewater treatment, communications (including broadcast and telecommunications), education, and emergency medical care.” *Id.* § 5172(a)(3)(B).

The Act also defines a public facility as one of several types owned by state or local governments:

- (A) Any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility.
- (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(10). Subsection 11 of section 5122 defines a private nonprofit facility as including a utility:

(A) In General – The term “private nonprofit facility” means private nonprofit educational (without regard to the religious character of the facility), center-based childcare, *utility*, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations, as defined by the President.

(B) Additional Facilities – In addition to the facilities described in subparagraph (A), the term “private nonprofit facility” includes any private nonprofit facility that provides essential social services to the general public (including museums, zoos, performing arts facilities, community arts centers, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, food banks, broadcasting facilities, houses of worship, and facilities that provide health and safety services of a governmental nature), as defined by the President. No house of worship may be excluded from this definition because leadership or membership in the organization operating the house of worship is limited to persons who share a religious faith or practice.

Id. § 5122(11) (emphasis added). Under 44 CFR 206.221(e), a private non-profit is defined as follows:

Private nonprofit facility means any private nonprofit educational, utility, emergency, medical, or custodial care facility, including a facility for the aged or disabled, and other facility providing essential governmental type services to the general public, and such facilities on Indian reservations.

Under 44 CFR 206.221(e)(2), a utility is further defined as “buildings, structures, or systems of energy, communication, water supply, sewage collection and treatment, or other similar public service facilities.”

In line with FEMA’s 2017 determination, we agree that Mattamuskeet qualifies as a PNP utility because its facilities provide essential governmental-type services to the general public. As such, Mattamuskeet operates in this capacity more like a public facility providing a governmental service to the general population, rather than a private facility. The record demonstrates that Mattamuskeet provides flood control, canals, levees, pumping and drainage systems, access to connecting roadways, protection for the airport, and protection for utility infrastructure including wastewater treatment and electrical power transmission on behalf of businesses and residents of communities located inside and outside of the association’s boundaries. In sum, these critical services provided by Mattamuskeet are essential governmental-type services for the general public as required to be a qualifying PNP for purposes of public assistance.

Mattamuskeet also argues that it qualifies under section 5122(11)(B) as it provides health and safety services of a governmental nature. Regardless of whether considered under section 5122(11)(A) or (B), the conclusion is inescapable that Mattamuskeet provides essential governmental-type services to the general public.

FEMA argues that our decision in *Ocean Hammock Property Owners Association, Inc.*, CBCA 6409-FEMA, et al., 19-1 BCA ¶ 37,360, supports FEMA’s position. In the *Ocean Hammock* decision, the applicants were PNP organizations seeking public assistance for damage to their dunes and berms. Following a hearing, the Board concluded that under the Stafford Act, regulations, and FEMA policy, the berms and dunes were not PNP facilities eligible for public assistance. Although FEMA attempts to liken the Mattamuskeet flood control activities to those addressed in *Ocean Hammock*, there was no finding in that decision that the dunes and berms provided an essential governmental-type service to the general public. Here, the flood control system in place is an expansive grid of canals, levees, pumps, controls, and dikes that clearly provides flood control as an essential governmental-type service for the general public, protecting critical facilities and services to the general public, including wastewater treatment, electrical power, road access, and airport operations.

FEMA also argues that we must find in favor of the agency because, under its 2020 PAPPG, FEMA does not include “flood control” in its examples of utilities it considers as an eligible PNP provider of critical services. FEMA alleges that the list included in the PAPPG is essentially the same as is provided in 44 CFR 206.221(e). However, FEMA’s 2020 guidance appears to be more restrictive than the listing provided in the regulation, as it fails to provide for “other similar public service facilities.” As such, FEMA’s interpretation of the guidelines contradicts the language of the Stafford Act, as well as the accompanying regulations. Thus, the interpretation offered by FEMA must be rejected.

FEMA does not contest public assistance for emergency pumping and protective measures and damage to Mattamuskeet's water control facilities under PW 1691 and PW 1829 if we find that Mattamuskeet is an eligible PNP. Therefore, Mattamuskeet is entitled to reimbursement of \$769,336.01 under PW 1691 and \$107,737.83 for PW 1829.

FEMA next asserts that even if the panel determines Mattamuskeet to be an eligible PNP, costs for road repair of "private roads" are not eligible under the PAPPG. FEMA characterizes the roads at issue as being the private property of Mattamuskeet Association and therefore ineligible for public assistance. In its sur-reply, FEMA adds that Mattamuskeet has not shown that the roads and culverts "are a part of an eligible facility." Alternatively, FEMA argues that Mattamuskeet members are charged assessments on behalf of the association to manage the roads, canals, and culverts. As such, FEMA claims that it is prohibited from reimbursing the association for repair work performed on the roads because it would violate dual funding provisions of the Stafford Act.

We cannot agree with FEMA's arguments. FEMA overlooks the fact that the roads are used by the public at large. Characterizing the roads as private to deny funding ignores the importance of the roads in allowing entities such as the Engelhard wastewater treatment plant and the Hyde County airport to respond to emergencies during natural disasters. The roads are generally available as connecting roadways to the public and are freely accessed by residents from several communities in Hyde County, as well as the U.S. Fish and Wildlife Service. Although Mattamuskeet owns and maintains the roadways, it does not appear that the roads are otherwise removed from public use and thus cannot be designated as "private" for the purpose of public assistance eligibility. The roads maintained by Mattamuskeet are also an integral part of its flood control system. The roads adjacent to the underlying canal grid act as berms and dikes, keeping water contained within the canals. Accordingly, the roads are accessible to the public, allow emergency response to equipment and services located within the territory on behalf of the public, and support the flood control system. We fail to see how FEMA's reimbursement of costs for repair to the roads and culverts would result in dual funding that is prohibited under the Stafford Act. Mattamuskeet collects assessments from members for the upkeep of its canals, culverts, and roadways. However, this differs from the funding provided here to repair damage resulting from a natural disaster.

Accordingly, we conclude that Mattamuskeet is entitled to reimbursement of \$3,561,249.84.

DECISION

Mattamuskeet Association is entitled to reimbursement of \$3,561,249.84.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge