



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 7, 2022

CBCA 7329-FEMA

In the Matter of MONROE COUNTY ENGINEER

James L. Peters, Monroe County Prosecutor's Office, Woodsfield, OH, counsel for Applicant.

Anne Vitale, Ohio Emergency Management Agency, Ohio Department of Public Safety, Columbus, OH, counsel for Grantee.

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 **LESTER**, **RUSSELL**, and **VERGILIO**.

This arbitration matter, one of several that the Monroe County Engineer (the County) recently filed seeking public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) under the auspices of section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), highlights the difficulties in applying FEMA's PA funding rules to road failures, which often lack the type of immediate cause-and-effect result evident from damage caused by declared disasters to other types of facilities. FEMA's regulations and guidelines require that, to be eligible for PA funding, damage has to be the result of the major disaster at issue. Even if the February 2019 rainfall disaster at issue here contributed to or exacerbated erosion beneath the roadway for which the County seeks restoration costs in this matter, we find that the County has not established that the incident was the cause of the damage. Accordingly, we deny the County's request for PA funding.

Background

Mile 1.94 of County Road 22 (CR22-1.94) in Monroe County, also known as Barnes Run Road, is a two-lane asphalt-surface road with an uphill slope on one side and a fairly steep fifteen-degree downslope on the other. The County alleges that a February 2019 rainfall event, which the President declared a major disaster, 84 Fed. Reg. 19,793 (May 6, 2019), damaged the surface of the road and the supporting embankment at CR22-1.94. At some point in 2019, the County requested \$296,200 in PA funding for road repairs and embankment stabilization work.

During their subsequent inspection of CR22-1.94, FEMA inspectors identified fatigue cracking, chipped and broken roadway edges, and road settlement at the road surface, as well as erosion of the embankment supporting the road, but they could not tie these issues to the February 2019 rainfall event. In its eligibility determination memorandum dated November 6, 2020, FEMA denied the County's request for PA funding, finding that the County had not demonstrated that any identified damage was the result of the declared disaster. FEMA subsequently denied the County's first appeal by decision dated December 29, 2021, finding that alligator cracking in the road surface was caused by normal wear and tear, not by the February 2019 rainfall, and stating that it "was unable to verify any slope instability during the site inspections," much less instability attributable to the February 2019 rainfall. Applicant's Exhibit 4 at 7.

Subsequently, however, the embankment underlying a portion of the road at CR22-1.94 actually failed, causing a horseshoe- or U-shaped collapse of several feet of asphalt at the edge of one portion of the roadway. Although the specific date of the collapse is not in the record, the failure occurred sometime between early 2020 and early 2022. At its earliest, the failure happened more than a year after the February 2019 rainfall event.

Further investigation of the site showed that there were three separate "lifts" or layers of asphalt that had been poured over the course of time where the road collapsed, leaving an asphalt thickness of more than seven inches at the location of the roadway failure while other parts of the roadway had much thinner layers of asphalt. According to FEMA's expert witness, the differences in asphalt thickness indicate that the ground at the location of the CR22-1.94 pavement collapse had been eroding away and settling downward over the course of several years and that the County, instead of addressing the erosion issues, had repeatedly poured new pavement over the continually-sinking asphalt until, with the added weight from the increasing asphalt layers and continued erosion issues, the embankment ground eventually gave way or eroded away. FEMA's expert also opined that, given the steepness of the embankment and the fact that there is a creek at the base of the embankment sixty feet from the road surface (increasing the likelihood of erosion issues), site instability had long been a problem at this location that pre-dated the February 2019 rainfall disaster.

The County sought arbitration following FEMA's denial of the first appeal. The Board conducted an arbitration hearing that commenced on June 2 and, because of the original unavailability of a witness, was continued for a second day of testimony on August 1, 2022.

Discussion

Despite FEMA inspectors' initial inability to identify any slope instability at this location, it is clear, and FEMA has now acknowledged, that the slope at CR22-1.94 was at least somewhat unstable at the time of the February 2019 rainfall. A portion of the roadway there failed sometime within one to three years after the February 2019 rainfall, and the repeated pours of asphalt at the location of the road failure, which pre-dated February 2019, indicate that gradual erosion and instability at CR22-1.94 had begun before the February 2019 rainfall event.

On the record before us, we cannot specifically identify the extent, if any, to which the February 2019 rainfall disaster contributed to the instability at CR22-1.94. Even assuming that the heavy rainfall in February 2019 contributed, at least in some way, to the erosion at this location, there were numerous other heavy rainfall events in Monroe County in the months and years surrounding February 2019, some of which were much stronger than the February 2019 event, and it seems clear that those rainfall events contributed to erosion and collapse at this location. In its Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018), FEMA recognizes that repeated and separate rainfall events at a location may each cause minor damage to a particular roadway but that PA funding is available only if a particular disaster event is the specific cause of the damage for which funding is being sought:

The incident may cause minor damage to roads that result in damage similar to that which may occur over time from other causes, such as the age of the road, traffic flow, and frequent rain. Therefore, distinguishing between pre-existing damage and damage caused by the incident is often difficult. For the repair of this type of damage to be eligible, the Applicant must demonstrate that the damage was directly caused by the incident.

PAPPG at 116. Based on the evidence presented, and consistent with this panel's discussion in a prior arbitration decision, *Monroe County Engineer, CBCA 7251-FEMA, et al.*, 22-1 BCA ¶ 38,061, at 184,800, we find that the County has not demonstrated that the instability and collapse at CR22-1.94 were the result of the February 2019 disaster event, to the exclusion of other non-fundable causes such as deterioration. *See* 44 CFR 206.223(a)(1) (2021) (To be eligible for PA funding under FEMA's regulations, an item of work must "[b]e required as the result of the . . . major disaster event."); PAPPG at 19-20 (discussing "Result

of Declared Incident” element of “Minimum Work Eligibility Criteria” as excluding PA funding for deterioration).

To the extent that the County is asserting that fatigue or alligator cracking in the roadway at CR22-1.94 was caused by the February 2019 rainfall and that it is entitled to road repair costs at that location unrelated to damages associated with the section of roadway that actually collapsed, the County failed to prove that such cracking is tied to the February 2019 rainfall and is not normal wear and tear resulting from usage of the road.

Decision

For the foregoing reasons, we deny the County’s request for PA funding.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge