



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 13, 2026

CBCA 8508-FEMA

In the Matter of BAY COUNTY, FLORIDA

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX; and Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Cassie Sykes, Recovery Appeals Officer, and Melody Cantrell, Recovery Legal Liaison, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee; and Kelly Ann Kennedy, Deputy General Counsel, and Caleb Keller, Senior Attorney, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee.

Alecia Frye and Rebecca J. Otey, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **RUSSELL**, **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge, writing for the Panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2024), Bay County, Florida (applicant or County) has asked to arbitrate the Federal Emergency Management Agency’s (FEMA) denial of its request for \$60,800,000 in public assistance (PA) for repairs to certain County roads. The County asserts that these roads were damaged in 2018 by Hurricane Michael and during the County’s response efforts to the hurricane. This panel is tasked with determining whether the County has demonstrated that the road segments at issue

were damaged as a result of Hurricane Michael and subsequent response activities. In its request for arbitration (RFA), the County alleges that the extent of debris left in Hurricane Michael's wake necessitated—to address the immediate threat to the public health and safety—repeated use of the County's roads by heavy debris removal trucks, power restoration vehicles, and other large and heavy emergency response vehicles and equipment. Applicant states that the County's road network was not designed to withstand such loading capacities and sustained unavoidable damage as a result of Hurricane Michael.

We conclude that the County is not eligible for the requested PA funding based on comparisons between the pre-hurricane and post-hurricane pavement condition index (PCI) scores.¹ The panel also determines, as a general matter, that the 406 roads at issue here are not eligible for PA. However, for 127 roads in section VI.A, sixty-seven roads in section VII.A, and twenty-seven roads in section VII.C, the panel carves out a limited exception for major road damage, specifically moderate to severe rutting and gouging (not asphalt cracking or other types of damage), that is directly supported by the joint site inspection reports in the record and caused by heavy emergency response vehicles and equipment. For these roads, the panel determines that this major damage, only as substantiated in the joint site inspection reports and as defined in this decision, is eligible for PA. The parties are to review the joint site inspection reports and determine reasonable repair costs for the specific areas with major damage, not to the road segment as a whole. Because applicant made no attempt to hold the contractor accountable for heavy machinery damage, the panel concludes that applicant is entitled to only half of the costs to repair such damage.

Background

The County's full road system includes approximately 510 miles of roads. In this matter, the County requests PA for 406 road segments, or roughly one-quarter of the road

¹ Under United States Department of Transportation Federal Highway Administration guidelines, "pavement condition" is defined as the "evaluation of the degree of deterioration and/or quality of service of an existing pavement section at a particular point in time," and a PCI is "a numerical rating resulting from a pavement condition survey that represents the severity of surface distresses." FEMA Exhibit 14 (Practical Guide for Quality Management of Pavement Condition Data Collection) at 87. The PCI provides "a numerical value between 0 and 100 that is calculated from a visual survey of pavement distress" with lower values indicating a poorer condition. *Id.* at 18. As discussed herein, the County incorrectly asserts that a reduction in a PCI score, when comparing PCI scores before and after the hurricane, demonstrates the damage was caused by the disaster.

system.² The County alleges that the road segments at issue worsened so significantly as to require a level and/or type of repair above and beyond that typically required after a hurricane. While the County asserts that FEMA initially approved work for the majority of the 430 road segments, FEMA disputes that work on these segments was actually approved. Instead, FEMA states that it dispatched representatives to complete multiple inspections, alongside County representatives, of each of the road segments and to assist the County in developing the project scope. After these events, FEMA obligated approximately \$27,000,000 for the necessary repair work. Later in the approval process, FEMA reviewed the 430 segments and approved just twenty-four segments, determining 406 segments ineligible for PA.

FEMA argues that the 406 segments are not eligible for funding for several reasons. First, FEMA argues that applicant, in its RFA, primarily and incorrectly relies on the PCI as the indicator of disaster-caused damage and that this reliance is unsupported by FEMA regulation and policy. Second, twenty-eight roads are not eligible for PA funds as they fall under the authority of another federal agency, not FEMA. *See* 44 CFR 206.226(a)(1) (2018). Third, applicant failed to provide maintenance records relating to sixty-nine roads, preventing a determination of disaster-related damage as required by FEMA's inundated roads policy and Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018). *See* RFA Exhibit 11 (FEMA Inundated Roads Policy) at 6; PAPPG at 116. Fourth, fifteen roads showed post-hurricane improvement, whereby applicant failed to demonstrate disaster-related damage as required by FEMA policy. *See* RFA Exhibit 11 at 6-8. Fifth, 159 roads evince pre-existing damage, rather than damage incurred as a direct result of the disaster. *See* 44 CFR 206.223(a)(1). Sixth, applicant failed to provide sufficient documentation to demonstrate disaster-related damage for 135 roads. Seventh, applicant lacks legal responsibility, *see* 44 CFR 206.223(a)(3), to perform the requested repairs because a contractor is responsible for some of the damage incurred during debris removal.

After the President declared Hurricane Michael as a major disaster in the state of Florida (DR-4399-FL), FEMA obligated more than \$1,000,000,000 in PA funding to eligible applicants, providing critical aid to state, local, and tribal governments as well as to private nonprofit organizations. After the disaster, applicant initially sought PA funding in the amount of \$18,730,830.24 for asphalt reconstruction and asphalt resurfacing for the restoration of road segments allegedly damaged by applicant's post-disaster debris removal operations. Applicant asserts that its roads sustained visible and non-visible roadway damage. In support of its request for PA, applicant submitted Cartegraph Systems Inc.'s PCI

² The County's application for PA included 430 roads. FEMA found twenty-four of the road segments eligible for assistance. RFA at 31.

scores from 2017 (2017 PCI) and Stantec Consulting Service's 2019 PCI report (2019 PCI). PCI scores are designed to relay the overall condition of a roadway, facilitating establishment of maintenance priorities.

FEMA and the County conducted joint site inspections of the road segments during two time periods: October 22 to 23, 2019, and December 7, 2020, to January 18, 2021. The joint site inspection reports provide location and road damage information for certain roads purportedly damaged by heavy emergency vehicles and equipment. FEMA created a project worksheet (PW) to capture the damage under two damage inventories (DIs): DI 262729 and DI 262730. DI 262729 covered *asphalt reconstruction* for certain County roads, which included replacement of base and subbase material as well as resurfacing the road with one-and-a-half inches of asphalt concrete pavement. DI 262730 covered *asphalt resurfacing* for certain County roads, which included resurfacing of one-and-a-half inches of asphalt concrete pavement. On October 22, 2021, FEMA created PW 2095 (version 0), allowing \$18,730,830 in costs for asphalt reconstruction and asphalt resurfacing, with a federal cost share of \$14,048,122.68. Subsequently, applicant sought and received bids from contractors to complete the approved statement of work (SOW). The received bids demonstrated that the cost to complete the SOW would be more than the amount estimated in PW 2095 (version 0). In response, FEMA created PW (version 1), which analyzed the increased costs and supporting documentation.

On June 29, 2022, FEMA issued a request for information (RFI) to applicant seeking: (1) details on the County's \$57,400,000 backlog of road resurfacing projects; (2) all pavement preservation and resurfacing projects budgeted between 2017 and 2022, including the status of the projects; and (3) all resurfacing projects completed in 2017 and 2018, including those that were damaged during the disaster event and subsequent response activities and their dates of completion.

On July 27, 2023, FEMA obligated an additional \$6,363,071.07 federal share to complete the approved SOW for a total project cost of \$27,214,925 or a \$20,411,193.75 federal share at seventy-five percent. On October 3, 2023, FEMA sent a letter to the Florida Division of Emergency Management (FDEM or grantee), indicating that it would reanalyze the project because of potential eligibility issues. FEMA recommended that FDEM delay payment to the County until FEMA completed its analysis.

FEMA issued a determination memorandum (DM) on January 24, 2024, denying the entire, previously obligated, \$27,214,925 in project cost for road repairs. RFA Exhibit 2. FEMA subsequently created PW 2095 (version 2) to deobligate all project costs, finding that applicant failed to demonstrate that it was legally responsible for the damage to certain road segments or that the damage for the other road segments was a result of the declared incident.

FEMA also noted that PA funding could not be provided for roads without visible and quantifiable surface damage or for the projected loss of the useful life of roads due to long-term inundation.

On May 21, 2024, applicant filed its first appeal, requesting \$60,800,000 for resurfacing and reconstruction costs. Applicant referenced a change in the SOW and work code standards. Specifically, applicant asserted that damage occurred to the roads because of water infiltration and extensive traffic of heavy weight vehicles. Applicant refuted FEMA's determination that the contractor, and not the County, was responsible, arguing that its contractor could not be held responsible for road damage when weight limits were waived and the contract requested performance as quickly as possible to eliminate threats to health and safety. In addition, applicant requested that the Federal Highway Administration (FHWA) roads that were removed during project formulation be added to the project because emergency relief (ER) funding was denied by FHWA. Further, applicant asserted that raw PCI data could be compared to the existing visual condition and the actual method of repair then could be determined during the design phase based on confirmed conditions at the time. Lastly, applicant argued that the damage descriptions and SOW contained errors and omitted soft costs (e.g., planning and oversight costs) as well as costs required to comply with Florida Department of Transportation and local standards.

In response to applicant's SOW changes in its first appeal, FEMA issued a request for information (RFI) on October 1, 2024, seeking additional pre-disaster information, documentation identifying the heavy equipment used and the frequency of usage, an updated damage, description, and dimensions report, and FHWA's eligibility determination. On November 29, 2024, applicant responded to the RFI, supplying: a summary of estimated debris quantities from the disaster; a timeline of events; maintenance work orders; the 2019 PCI report and falling weight deflectometer tests identifying subsurface road damage; annual budgets regarding routine road maintenance from 2010 through 2024; and other relevant documents. Applicant did not provide any pre-disaster satellite imagery, videos, or photographs. Applicant stated that the road resurfacing backlog was due to budgetary constraints, caused, at least in part, by the increased code compliance costs, which exceeded prior estimates.

Following applicant's RFI response submission, FEMA partially approved applicant's appeal on the 430 road segments for which it sought PA. RFA Exhibit 1. Specifically, FEMA determined that twenty-four roads were eligible for PA funding, obligating \$787,784.72 for eight roads of the twenty-four; returning sixteen roads to FEMA Region 4 for cost estimation; and finding 406 roads ineligible due to lack of evidence of disaster-related damage or classification as a federal-aid highway. On July 21, 2025, the County submitted an RFA challenging FEMA's denial of PA funding for 406 roads.

Discussion

As a prerequisite to PA funding, FEMA policy requires that eligible work “[b]e required as a result of the declared incident.” PAPPG at 19. In addition, applicant bears the burden of demonstrating that damage was caused directly by the declared incident. 44 CFR 206.223(a)(1); PAPPG at 19. In the first two sections below, the panel addresses issues relating to the limits of using the PCI framework and the inadequacy of using comparisons between PCI scores before and after the disaster. As not all of the 406 roads at issue were surveyed in 2017 and/or 2019, the panel addresses additional issues relating to the absence of maintenance records or an adequate, implemented maintenance plan; post-hurricane improvements in the condition of certain roads; pre-existing damage for certain roads; and roads for which there is insufficient documentation on the cause of the damage. The panel finds that, for each category, applicant has not met its burden to establish that the disaster caused the damage for which it seeks PA. As addressed below, the panel carves out a specific type of damage as eligible for three specific groups of roads, for which FEMA and applicant are to determine costs.

I. Limits of the PCI Framework

As a general matter, the panel’s understanding is that the County roads at issue were divided into segments (for tracking purposes) and each segment was surveyed under the PCI framework for its condition as a whole. That is, the PCI survey method was not intended to identify discrete defects but to survey the health of the segment for maintenance purposes. In this regard, a PCI survey could designate a road segment as poor even if a severe defect was identified on only a limited portion while the remaining segment was without issue. For this reason, a PCI survey labeling a road segment as being in poor condition cannot justify the repair of a whole road segment when repairing a small portion would remedy the damage.

The United States Army Corps of Engineers (USACE), creators of the PCI framework, has never asserted that the PCI framework assessing overall road conditions can distinguish disaster-related damage from ordinary deterioration and pre-existing damage. Rather, the PCI framework is to be used for maintenance and rehabilitation planning needs from a budgetary standpoint. FEMA Exhibit 13 (Pavement Condition Index – There’s More and Less to the Score) at 2; RFA Exhibit 2 at 2. PCI is computed by converting the severity and extent of each distress into a deduct value, where different equations are used for varying distress types, and the cumulative deduct values are then added up and subtracted from 100, generating a PCI score. FEMA Exhibit 13 at 1. PCI is regarded as a “simple” tool that “when used alone . . . is insufficient for choosing the right strategy at the right time to maximize the cost effectiveness of pavement funding.” *Id.* PCI scores, on their own, fail to provide sufficient, objective detail for the actual distresses that may be present on a road

segment. *See id.* at 4-6. Thus, the panel concludes that PCI surveys—absent supporting visual evidence or other documentation showing the extent of damage—do not provide sufficient evidence for PA eligibility.

II. PCI 2017 and 2019 Score Comparisons Do Not Establish Disaster-Related Damage

The County relies on the comparison between PCI scores from 2017 (pre-hurricane) and 2019 (post-hurricane) as evidence of disaster-related damage. As noted above, PCI scores are a general measure of road health, not an inventory of specific disaster-related damage as required by FEMA policy for PA eligibility. Contrary to applicant's assertions, a reduction in a PCI score—when comparing scores before and after a disaster—cannot substantiate whether damage to a road segment was caused by the disaster. The comparison may show correlation, but not causation, and disregards the many reasons, other than a disaster, for a drop in PCI scores. For example, applicant's 2019 PCI inspection report references utility cut patch distresses more than 1550 times. Utility cut distresses occur when roads are cut to access underground utilities and then patched. When a utility cut is made, the material surrounding the perimeter of the trench weakens. After the trench is refilled, the area may not be fully restored, and a lower PCI score, unrelated to the disaster, may result.

Applicant also characterizes its road network “on average” as being in very good condition prior to the disaster, with a majority of roads having little or low distress severity. This “on average” generalization includes ineligible roads, such as those under the authority of FHWA (as discussed below), and ineligible distresses recorded by the PCI, such as potholes. The inclusion of FHWA roads skews the PCI scores with roads that may be in better condition due to FHWA maintenance. Conversely, the inclusion of roads with ineligible distresses improperly lowers the PCI average. The panel, thus, disregards applicant's “on average” arguments.

The panel also notes that applicant's 2017 and 2019 PCI report summaries were performed by two different companies using two different data collection methods. The 2017 survey gathered purely functional data while the 2019 survey and report included both functional and structural data. As there are substantial differences in how the 2017 and 2019 PCI surveys were conducted, the panel is unable to make reliable “apples-to-apples” comparisons of the data. Regardless, however, of the methodology used in the surveys, neither the 2019 PCI survey on its own nor any comparisons between the 2017 and 2019 surveys adequately tie the County's road damage to the disaster. Applicant cannot meet its burden to establish that the hurricane or subsequent response efforts caused the road damage for which applicant seeks PA through the use of PCI surveys. As such, applicant is not eligible for PA funding based on this documentation.

III. The County's Federal-Aid Routes Are Ineligible for PA Funding

The FHWA is authorized to distribute Emergency Relief (ER) funding to repair federal-aid routes damaged by a disaster. 23 U.S.C. § 125. Twenty-eight of the 406 road segments for which applicant seeks PA are designated as federal-aid routes. PA funding, however, is generally not “made available under the Stafford Act when another Federal agency has specific authority to restore facilities damaged or destroyed by an event which is declared a major disaster.” 44 CFR 206.226(a)(1). As the PAPPG explains:

Roads that are eligible for ER assistance are identified as Federal-aid routes, which include highways on the Federal-aid highway system and all other public roads not classified as local roads or rural minor collectors. The ER Program is activated separately from Presidential declarations under the Stafford Act and may not be activated for all incidents. Federal-aid routes are not eligible for Permanent Work even if the ER Program is not activated or if the program is activated but FHWA does not provide funding for the work.

PAPPG at 116. When another federal agency besides FEMA, such as the FHWA, has authority to provide assistance, applicants “should apply to the respective agency for assistance” receiving funding “under that agency’s authority.” *Id.* at 18.

While the County initiated an application with the FHWA for ER funding for repairs to the County’s federal-aid routes, it failed to respond to FHWA’s request for information and, as a result, received no ER funding. Whether FHWA, as the agency with authority over repairs for the routes, provided funding to the County has no bearing on applicant’s eligibility here for PA funding. The panel denies PA eligibility for the twenty-eight roads as they are not under FEMA’s authority to repair. *See* 44 CFR 206.226(a)(1); PAPPG at 116.

IV. Absence of Maintenance Records for Sixty-Nine Roads

Applicant is not eligible for PA funding for sixty-nine of the roads for which it seeks PA because it failed to provide maintenance records of the roads and lacked a regular maintenance program for the roads prior to the disaster. FEMA policy, including the Inundated Roads Policy, requires the review of applicant’s maintenance records or documentation to establish that applicant had a routine maintenance program for the road sections for which it is requesting PA funding. PAPPG at 116; RFA Exhibit 11 (Inundated Roads Policy) at 6. The declared incident may cause minor damage to roads that results 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. As a result, normal maintenance of roads is not eligible for PA by FEMA. PAPPG at 116. Applicant’s failure to provide maintenance records

prevents the panel from making a determination of what, if any, damage occurred directly as a result of the disaster or due to subsequent response activities.

Applicant has also failed to show that a regular maintenance program existed, or was implemented, for these road sections prior to the disaster. The record reveals a backlog of more than \$57,000,000 in overdue County general road maintenance. This backlog demonstrates that even if applicant had a plan for road maintenance, it failed to implement the plan as designed. The backlog of regular road maintenance, coupled with the absence of maintenance records, prevents this panel from comparing the pre-disaster condition of the roads with their post-disaster condition. This, in turn, prevents the panel from being able to determine what damage, if any, was directly caused by the disaster and subsequent response activities. For these sixty-nine roads, applicant fails to meet its burden of demonstrating disaster-related damage eligible for PA funding.³

V. Absence of Documentation Demonstrating Eligibility for Fifteen Roads

Applicant failed to demonstrate disaster-related damage to fifteen roads that showed improvement between 2017 and 2019 regarding the general condition of the roads. To be eligible for PA funding, the work must be required as a result of the declared incident. FEMA's regulations dictate that FEMA may only restore eligible facilities as they existed immediately prior to the disaster. 44 CFR 206.226. In accordance with FEMA's Inundated Roads Policy, applicants must demonstrate that surface damage to roadways was caused directly by the declared event. RFA Exhibit 11 at 6-7. At a minimum, FEMA requires "[p]re-event (if available) and post-event photos or videos of impacted sections of road, or other documentation to indicate pre- and post-event surface condition." *Id.* at 7.

For the fifteen roads, the only documentation that applicant provided was the 2017 and 2019 PCI surveys, which show improvements from 2017 to 2019, and some maintenance records. Applicant did not, as required by FEMA policy, provide photographs, videos, or other documentation showing the pre-disaster and post-disaster surface condition of the roads. Absent such documentation, the panel determines that applicant has not met its

³ The panel further notes that post-disaster photos of forty-seven of the sixty-nine road sections depict minimal visible damage to the road segments. As noted previously, minimal damage to roads can be caused by a disaster or other causes that occur naturally over time. Maintenance records can help establish whether the minor damage was the result of normal wear and tear on the roads or another cause. Here, since maintenance records were not provided for these roads, the panel is unable to determine whether the minor damage shown in the post-disaster photographs is directly related to the disaster.

burden to establish that the disaster caused damage to the roads and that the County is not eligible for PA for these roads.

VI. 159 Roads with Pre-Disaster Damage

Applicant is ineligible to receive PA funding for 159 road segments because the damage claimed was pre-existing and not directly the result of the disaster. To be eligible for PA funding repair work must “[b]e required as the result of the emergency or major disaster event.” 44 CFR 206.223(a)(1). FEMA does not provide PA funding for repair of damage caused by deterioration, deferred maintenance, applicant’s failure to take measures to protect a facility from further damage, or negligence. 44 CFR 206.223(e); PAPPG at 19-20. FEMA’s Inundated Roads Policy establishes that restoration work is not eligible for PA funding where surface damage is not “visible and quantifiable during inspection and directly attributed” to the disaster. RFA Exhibit 11 at 2. In addition, work to repair “potholes or fatigue cracking is generally ineligible . . . as this type of damage is rarely caused directly by one incident.” *Id.* at 2-3. Below the panel addresses two subsets of roads within this category.

A. 127 Roads with Visual Pre-Disaster Damage

For 127 of the 159 roads addressed in this section, it is evident from both pre- and post-disaster photographs that the roads were damaged pre-disaster. Thus, the damage was not directly caused by the disaster as is required under regulation and FEMA policy. The panel has reviewed the photographs of the roads and determines that the claimed damage to these roadways was, in fact, preexisting damage that is not eligible for PA funding. The panel, however, carves out an exception: where heavy emergency vehicles caused additional, major damage, as identified by joint site inspection reports and other evidence in the record, the repair costs are eligible for PA. The panel limits the eligible costs to fifty percent as a result of applicant’s failure to pursue contractor liability, as discussed below. In addition, the panel limits repair costs to those required to repair additional, major damage—specifically, moderate to high severity rutting or gouging (not asphalt cracking or other types of damage)—and only to repairs of these specific areas of damage, not the road segment as a whole.

B. The Remaining Roads with Age-Related Wear and Tear

The remaining roads in this section exhibit damage in post-disaster photographs that is consistent with age-related wear and tear rather than damage resulting from a single disaster incident. An example of this type of wear and tear is fatigue cracking, which can come in a variety of forms but which is not eligible for PA funding under FEMA policy. In

addition to applicant's post-disaster photographs, the 2019 PCI surveys note fatigue cracking throughout the reports for some of these roads. The panel weighs photographs showing post-disaster age-related wear and tear and PCI notes on fatigue cracking more heavily than raw PCI scores for the remaining roads and determines that these roads are ineligible for PA.

VII. Insufficient Documentation to Demonstrate Disaster-Related Damage for 135 Roads

Applicant's request for repavement of its roadway system is ineligible for PA funding for 135 of its roads that present minimal visible damage that is not clearly disaster-related. As roads naturally decline in health with age and usage, minimal visible damage does not equate automatically with disaster damage as opposed to normal wear and tear. Applicant bears the burden of demonstrating that the road work being requested is required to address damage caused by the disaster, and is not mere wear and tear. Of these 135 road segments: (1) sixty-seven roads had an insignificant drop in PCI ratings and/or remained in "good" condition according to the PCI rating scale after the disaster; (2) forty-one roads post-disaster photographs depicted minimal visible damage and did not support the 2019 PCI ratings; and (3) twenty-seven roads showed insufficient pre-disaster documentation.

A. Sixty-Seven Roads with an Insignificant Decrease in PCI ratings and/or Remained in "Good" Condition

Sixty-seven roads showed an insignificant decrease in their PCI ratings but, after the disaster, still maintained a PCI rating of eighty-five or above, which is the highest category available on the PCI rating scale. As noted earlier, the PCI rating system is designed to provide an assessment of the overall health of roads, rather than tying specific damage to any potential causes, and the panel does not rely on the PCI ratings, on their own, as reliable documentation to determine eligibility for PA funding. Applicant was given the opportunity to provide additional documentation to FEMA and later to the panel. For these sixty-seven roads, applicant failed to meet its burden to demonstrate through additional documentation that, despite an insignificant decrease in its PCI rating, these sixty-seven roads had "visible and quantifiable" damage "during inspection" that can be "directly attributed" to the disaster. RFA Exhibit 11 at 2. As a result, these sixty-seven roads are ineligible for PA, unless there is specific damage identified in the record related to gouges and rutting caused by a contractor's heavy machinery as articulated by the panel in section VI.A. The panel limits repair costs to those specific areas of damage, not the road segment as a whole.

B. Forty-One Roads with Minimal Visible Damage

In the case of forty-one of these 135 roads, the panel reviewed post-disaster photographs. After reviewing these photographs, the panel determines that the post-disaster

photographs show minimal visible damage to the forty-one road segments. As FEMA policy requires the damage to be “visible and quantifiable,” RFA Exhibit 11 at 2, the panel determines that these forty-one road segments are ineligible for PA funding.

C. Twenty-Seven Roads Lack Pre-Disaster Documentation

Finally, for twenty-seven of these 135 roads, applicant did not provide sufficient pre-disaster documentation to allow the panel to compare the condition of the roads before and after the disaster. For seven of the twenty-seven roads, applicant failed to provide pre-disaster photographs and requests that we rely on PCI score comparisons, which we decline to do, as discussed earlier. The record contains no documentation regarding the twenty remaining road segments to help the panel determine the pre-disaster condition of the roads. Applicant’s inability to demonstrate the pre-disaster condition of the road prevents us from being able to determine that the surface damage to the roads was directly caused by the disaster. Due to insufficient evidence of disaster-related damage, these twenty-seven roads are ineligible for PA, unless there is specific damage identified in the record related to gouges and rutting caused by a contractor’s heavy machinery as articulated by the panel in section VI.A. The panel limits repair costs to those specific areas of damage, not the road segment as a whole.

VIII. Applicant’s Eligibility for Fifty Percent of Certain Repair Costs

Under FEMA policy, applicant is not eligible for PA funds to repair roads that incurred damage by a contractor’s debris removal performance, as the terms of the contract between applicant and contractor typically assign legal responsibility to the contractor. *See* 44 CFR 206.223(a)(3). Therefore, for work to be eligible, the work must be the legal responsibility of applicant requesting assistance. To determine legal responsibility for a facility (here, roads), FEMA evaluates whether the applicant claiming the costs had legal responsibility for disaster-related restoration of the facility at the time of the incident based on ownership and the terms of any written agreements.

Applicant did not attempt to pursue a remedy with the debris removal contractor for the damage it caused. FEMA asserts that applicant’s failure to pursue recovery from the debris removal contractor renders applicant ineligible for PA funding. PAPPG at 83. FEMA acknowledges, however, that, under the PAPPG, damage resulting from debris removal operations is eligible for PA if the damage was due to severe conditions resulting from the incident, was unavoidable, and was not due to improper use. *Id.* FEMA’s Inundated Road Policy also provides that road surface damage caused by emergency vehicles performing eligible debris removal, or other emergency work required as a result of the declared event, is eligible for PA. RFA Exhibit 11 at 3-4.

In this matter, some of the damage observed appears to be the result of debris removal operations as evidenced by scarring and gouge marks on certain road segments. Applicant asserts that the gouges and scarring were a direct result of the disaster because the heavy emergency vehicles and equipment damaged the wet or inundated roads during emergency debris removal efforts. Applicant's assertion that the contractor was not responsible for repairing the damaged roads is somewhat supported by the record, including the state's emergency decision to waive weight limits on its roads for emergency removal of debris and utility repairs resulting from the declared event. As such, the panel concludes that applicant is eligible for one-half of the PA funding required to repair major damage caused by the heavy emergency debris removal vehicles and equipment where the damage to the segments is supported by the joint site inspection reports and other evidence in the record for the road areas identified in sections VI. A, VII.A, and VII.C and under the parameters established in those sections.

Decision

Applicant has not established eligibility for PA funding for the 406 County roads at issue in this matter with the exception of the specific road areas that may be eligible as identified by the parties according to sections VI.A, VII.A, and VII.C. FEMA and applicant are to review the road area site inspection reports, and other materials in the record, to identify which roads have areas of heavy machinery damage as defined in sections VI.A, VII.A, and VII.C and determine costs associated with those road areas.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge