



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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November 26, 2018

CBCA 5873-FEMA, 5875-FEMA, 5876-FEMA, 5877-FEMA

In the Matter of LOUISIANA DEPARTMENT OF NATURAL RESOURCES, through  
the COASTAL PROTECTION AND RESTORATION AUTHORITY

John B. Dunlap III, Jennifer A. Fiore, and Hunter B. Bertrand of Dunlap Fiore, LLC, Baton Rouge, LA; and David Peterson and Richelle N. Moore of State of Louisiana, Coastal Protection and Restoration Authority, Baton Rouge, LA, counsel for Applicant.

Danielle Aymond, Executive Counsel, Jaron Herd, Appeals Manager, and Carla Richard, Executive Officer, Legal, of Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Charles F. Schexnaildre and John Dimos, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Ramoncito J. deBorja, 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 **SOMERS** (Chair), **GOODMAN**, and **RUSSELL**.

These matters involve disputes between the Louisiana Department of Natural Resources (LDNR), through the Coastal Protection and Restoration Authority (CPRA), and the Federal Emergency Management Agency (FEMA) concerning requests for public assistance related to the restoration of four barrier islands through the placement of sand, and the installation of sand fencing and vegetation. LDNR and the State of Louisiana, which supports LDNR's requests in these matters, contend that LDNR should receive public assistance for the restoration projects. FEMA contends that no public assistance is warranted.

### Background

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the legal authority for the President to make public assistance funding available to state and local governments for “the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government.” 42 U.S.C. § 5172(a)(1)(A) (2012). The President may designate a federal agency to exercise his authority provided by the Act and has done so through delegation to FEMA. *Id.* § 5164. In turn, FEMA has promulgated regulations and adopted guidelines under the Act establishing qualifications and procedures related to federal assistance for damage to public facilities.

Under FEMA’s implementing regulations, a natural feature, like the barrier islands at issue here, can be considered a “facility” for the purpose of public assistance if the natural feature has been both “improved and maintained.” 44 CFR 206.201(c) (2015). FEMA’s Public Assistance Guide, published in 1999, details additional standards that must be met for a natural feature to qualify as a “facility.” Specifically, the “improvement” to the natural feature “should be based on a documented design that changes and improves the natural characteristics of the feature.” Further, “[u]pon completion of an improvement, a subsequent measurable difference in the performance over the unimproved natural feature should be shown.” Additionally, “maintenance of [the] improvement must be done on a regular schedule and to standards to ensure that the improvement performs as designed.” Under FEMA’s standards, as set forth in its Public Assistance Guide, “[i]t is the improvement itself that must be maintained for the natural feature to be considered a facility.”

In 2015, LDNR sought public assistance for sixteen barrier islands, not individually but as a system (the Louisiana Coastal Barrier Resources System), to repair damage sustained on the system resulting from Hurricanes Katrina and Rita in 2005. *Louisiana Department of Natural Resources*, CBCA 4984-FEMA, 16-1 BCA ¶ 36,321, *motion for reconsideration denied*, 16-1 BCA ¶ 36,394. The arbitration panel in that matter dismissed LDNR’s request for public assistance, explaining that, under FEMA’s regulations, “a ‘system’ cannot qualify as a ‘public facility’ which is eligible for a public assistance grant unless it is ‘built or manufactured, or an improved and maintained natural feature.’” 16-1 BCA ¶ 36,394, at 177,431. The panel noted that the parties “made clear that a significant percentage of the funds sought [for this system were] for fill material, dune vegetation, and sand fencing to be added, not replaced, on a majority of the . . . barrier islands.” *Id.* The panel added that, “although there may be *some works* on *some of the islands* which were built, manufactured, or improved and maintained natural features before the disasters struck, the islands, as a system, cannot be so characterized.” *Id.* (emphasis added). However, as the panel conveyed, this resolution allowed LDNR to pursue arbitration on each island individually. *Id.*

### Discussion

In 2016, LDNR sought arbitrations concerning individual barrier islands, including the four which are the subject of these matters. As for these four islands, the parties do not dispute that the islands have been improved. The dispute lies in whether these improvements have been maintained on a “regular schedule and to standards to ensure that the improvement[s] perform[] as designed.” Both parties submitted evidence on this, as well as other issues related to public assistance eligibility, for the four barrier islands.

As part of its case, LDNR presented expert testimony from Michael T. Poff, a professional coastal engineer, who has worked with the state on barrier island projects since 2003. For the four arbitration matters at issue here, the state hired Mr. Poff to evaluate the impacts of Hurricanes Katrina and Rita on the barrier islands.

As part of its case, FEMA presented expert testimony from Dr. Larry Demich. Dr. Demich has over thirty years of experience in the civil, coastal, and wetland engineering areas. His coastal engineering experience includes working on projects involving ports, beaches, shoreline protection, and in-water structures, as well as analyses of river/estuarine/coastline processes. Dr. Demich has worked as a consultant to FEMA assisting with the response to Hurricanes Ike in Texas, Gustav and Katrina in Louisiana, and Sandy and Irene in New York. Most of his work on Gustav and Ike, and all of his work on Katrina, has been on barrier island projects. Dr. Demich was tasked with reviewing documentation submitted by LDNR in connection with the requests for FEMA funding for the barrier islands.

After reviewing the evidence presented by the parties, we find that LDNR has not met its burden of showing that the improvements made on the four islands were maintained consistent with FEMA’s standards for the purpose of showing an “improved and maintained” eligible facility. Thus, we do not consider the other arguments made by the parties on eligibility. As to our findings, we address each of the islands, followed by a discussion of evidence presented that is applicable to all four islands.

#### I. Evidence as Relates to Each of the Islands

##### Whiskey Barrier Island (CBCA 5873-FEMA)

LDNR has requested \$54.1 million in federal assistance to place 4,491,649 cubic yards of sand on and add sand fencing and vegetation to Whiskey Barrier Island.

LDNR identified a project authorized by the Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA) task force as the improvement that has been maintained for the purpose of establishing an eligible facility that qualifies for public assistance. CWPPRA is federal legislation enacted in 1990 to identify and fund construction of coastal wetlands projects in Louisiana. The task force is composed of the State of Louisiana and five federal agencies. The Army Corps of Engineers tracks the status of CWPPRA projects.

The improvement made to Whiskey Barrier Island, completed in 2000 and funded by the Environmental Protection Agency (EPA) for a total of approximately \$7 million, consisted of the installation of 657 acres of back barrier marsh platform and fill using sand dredged from the bay north of the island. The project also included the planting of vegetation and installation of sand fencing. However, as Dr. Demich testified and as the record indicates, LDNR has not produced evidence showing that these improvements actually existed just prior to Hurricanes Katrina or Rita, and that the improvements were subsequently damaged by either of these events.

Further, even assuming that the improvements did exist at the time of Katrina and Rita, the weight of the evidence shows that LDNR was not maintaining the improvements in a manner meeting FEMA's standards. The record reflects that there was considerable degradation to the improvements made on Whiskey Barrier Island over time, highlighting the lack of any recurring maintenance effort. Dr. Demich testified that, by 2004, the island's shoreline was actually halfway through the fill that had been placed. Essentially, half of the project was gone before Hurricane Katrina hit. Dr. Demich also testified that, although there was a subsequent project in 2009 involving dredging and placement of sand on the island, as well as the addition of vegetation, by 2011, there was open water where the filled embayment had been constructed. Dr. Demich testified that, by 2015, there was even further erosion to the project. This persistent and substantial erosion over an eleven-year period belies LDNR's argument that it had a maintenance effort in place meeting FEMA's requirements for public assistance.

Further, the state's own record evidences the lack of any maintenance effort in place, at least as of three years after Katrina, to preserve the improvements made to the island. Specifically, in a May 2008 Operation, Maintenance, and Monitoring (OM&M) report for Whiskey Barrier Island, issued nearly three years after Hurricane Katrina, CPRA, the entity responsible for developing and implementing efforts to achieve comprehensive coastal protection for Louisiana, states,

Allocation of funding for maintenance of barrier island restoration projects was not considered due to the expense involved with replenishment of dredged

material over the life expectancy of the project. Claims for FEMA assistance resulting from extensive or catastrophic damage to barrier islands from tropical storms and hurricanes are ineligible because there is no scheduled maintenance.

#### East Timbalier Island (CBCA 5875-FEMA)

LDNR has requested \$28.9 million in federal assistance to place 1,265,285 cubic yards of sand on East Timbalier Island, and to add vegetation to support and maintain the deposited sand. LDNR identifies two CWPPRA projects funded by the National Fisheries Service and totaling approximately \$11 million as evidence of an improvement that has been made to the island for the purpose of establishing an eligible facility that qualifies for public assistance. The projects, completed in 2001, involved the dredging of 2.8 million yards of sediment to establish a dune and a marsh along the length of the island, the installation of sand fences, and the addition of vegetation along the island's dunes.

We find that the evidence supports FEMA's contention that LDNR did not have a maintenance effort to adequately protect the improvements made to the island. As relates to the creation of the dune and marsh, a CPRA OM&M report for East Timbalier Island published by LDNR about two months prior to Katrina states: "Funding for maintenance of barrier island restoration projects was not considered due to the expense involved with replenishment of dredge material over the life expectancy of the project." Additionally, the record reflects and Dr. Demich provided testimony that, over time, the improvements made to the island degraded. By 2015, not only were the improvements almost completely gone, but the island itself was almost completely submerged under open water. Thus, we agree with FEMA that, because the improvements to the island were not maintained as required by FEMA's standards, they are ineligible for public assistance.

Further, consistent with its regulations, FEMA does not provide public assistance for damages to a facility caused by an applicant's own negligence. 44 CFR 206.223(e). Here, FEMA provided persuasive evidence that LDNR is precluded from receiving public assistance because of LDNR's failure to have a maintenance effort in place that would have protected the improvements made to the island in 2001.

#### Trinity Island (CBCA 5876-FEMA)

LDNR has requested \$16.2 million in federal assistance to place 389,000 cubic yards of sand on and to add sand fencing and vegetation to Trinity Island.

In 1998, EPA funded a CWPPRA project which included the installation of temporary containment dikes on the island and the addition of dredged materials to fill between the dikes. In 1999, the EPA added vegetation to the project.

However, LDNR did not meet its burden of showing that these improvement projects were maintained consistent with FEMA's standards requiring scheduled maintenance to ensure that these projects performed as designed. First, LDNR seems to assert that CWPPRA projects completed in 2007 (referred to as the New Cut projects) were to maintain the improvements made in 1999. However, the area where the New Cut projects were completed was actually under water at the time of Hurricane Katrina. Thus, we cannot find that, prior to the hurricane, there existed a facility that was maintained by LDNR, at least as relates to this New Cut area, and that was subsequently damaged by the hurricane.

Further, in a 2008 OM&M report on Trinity Island, CPRA stated,

Allocation of funding for maintenance of barrier island restoration projects was not considered due to the expense involved with replenishment of dredged material over the life expectancy of the project. Claims for FEMA assistance resulting from extensive or catastrophic damage to barrier islands from tropical storms and hurricanes are ineligible because there is no scheduled maintenance.

#### Timbalier Island (CBCA 5877-FEMA)

LDNR has requested \$33.6 million in federal assistance to place 1,315,978 cubic yards of sand on and to add sand fencing and vegetation to Timbalier Island.

In 2004, just prior to Hurricanes Katrina and Rita, EPA funded two CWPPRA projects for an approximate cost of \$15.4 million to add containment dikes and dredged material to build up the island's shoreline. EPA also installed sand fencing and plants as part of the projects.

However, the record indicates and Dr. Demich provided testimony that, in subsequent years, a substantial portion of these improvements were lost due to erosion. LDNR, for its part, failed to present persuasive evidence that it had a maintenance effort in place to ensure that the improvements made in 2004 performed as designed – especially in light of FEMA's persuasive evidence showing substantial erosion of the improvements over the twelve-plus years since the two hurricanes.

## II. Evidence Presented Applying to All Islands

The parties presented certain evidence, applicable to each of the islands, on the issue of whether the state had maintenance efforts sufficient to satisfy FEMA's eligibility standard. As an initial matter, we find unpersuasive LDNR's argument that the state's data-driven monitoring and maintenance programs satisfy FEMA's maintenance standards. On this point, LDNR identifies the state's Barrier Island Comprehensive Monitoring (BICM) and the state's Barrier Island Maintenance (BIMP) programs as exemplars of, respectively, the state's monitoring and maintenance efforts.

The purpose of the BICM is to provide integrated, long-term data on barrier islands to facilitate planning and design of future barrier island projects, assist operations and maintenance activities, and determine storm impacts. According to Mr. Maury Chatellier, a witness for LDNR who works for the state's CPRA, BIMP is a similar data-focused program which is used to develop a priority list of barrier island projects for each year. Mr. Chatellier explained the BIMP is utilized to categorize, prioritize, and then, hopefully, fund maintenance activities. The BIMP, as explained by Mr. Chatellier, looks at maintenance from a system-wide perspective, not on a specific project basis. Given the description and characterization of the BICM and the BIMP, both in the record and at the hearing, we cannot find that these data-focused programs, by themselves, qualify as *maintenance* on the specific improvements made to the islands at issue in these appeals. Further, LDNR identified no specific project for which BIMP or BICM funding was used to maintain the specific improvements made to each of the islands.

Additionally, FEMA asserts that project "monitoring," like the state's BICM, is not the same as project "maintenance" done on a "regular schedule" to meet eligibility requirement. We agree with FEMA. The plain meaning of "regularly scheduled maintenance" reflects an undertaking of some periodic, active intervention to ensure upkeep, conservation, or preservation of the natural feature. Monitoring, absent any concomitant action to safeguard the functionality of the improvement, cannot be considered maintenance sufficient to satisfy FEMA standards for an eligible facility.

Also, as explained by Mr. John Connolly, a FEMA witness who oversees the agency's arbitration cases, LDNR failed to produce a maintenance budget to support its requests for public assistance. The omission of a budget reflecting costs that have been incurred for regularly scheduled maintenance undermines LDNR's assertion that it has completed maintenance activities, consistent with FEMA's standards, on any of the improvements made to the four islands at issue.

To conclude, FEMA's decision to deny LDNR's requests for funding was entirely consistent with applicable statutory and regulatory provisions, and the agency's guidelines. Although the record shows that there were improvements made to each of the four islands, LDNR failed to show that these improvements were maintained for the purpose of establishing the existence of facilities eligible for public assistance.

Decision

The panel affirms FEMA's denial of LDNR's requests for public assistance.

*Beverly M. Russell*

BEVERLY M. RUSSELL  
Board Judge

*Jeri Kaylene Somers*

JERI KAYLENE SOMERS  
Board Judge

*Allan H. Goodman*

ALLAN H. GOODMAN  
Board Judge