



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

December 17, 2021

CBCA 7219-FEMA

In the Matter of STARTEX-JACKSON-WELLFORD-DUNCAN WATER DISTRICT

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

Elizabeth R. Polk of South Carolina Emergency Management Division, West Columbia, SC, counsel for Grantee.

Shahnam Yazdani and Christiana Cooley, 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 **VERGILIO, KULLBERG, and SULLIVAN.**

Representatives of Startex-Jackson-Wellford-Duncan Water District (applicant or subrecipient) sought this arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) over public assistance associated with a declared disaster. FEMA determined that portions of a spillway were not damaged as a result of the disaster. That is, FEMA concluded that the applicant failed properly to repair and maintain the spillway, so it deemed those affected portions of the work ineligible for public assistance. The grantee (or recipient) under the public assistance grant is represented in this matter by the South Carolina Emergency Management Division.

The question presented is: Does the record in this arbitration justify and require or permit FEMA under statutes, regulations, guidelines, and policy to provide public assistance for the full cost (as yet undetermined) of repair to a spillway as sought by the applicant? The

panel held a hearing under Board Rule 611 (48 CFR 6106.611 (2020)) on December 2–3, 2021. This decision is the final administrative action on the arbitrated dispute. Rule 613.

The panel concludes that the record does not demonstrate that there existed inadequate maintenance or repairs prior to the disaster. Therefore, FEMA’s determination of ineligibility for the costs associated with portions of the work at issue must be revised consistent with this opinion. However, that does not entitle the applicant automatically to the full cost of repair. A conclusion regarding ultimate available public assistance requires FEMA, not this panel, to make other determinations in the first instance. Further, FEMA has found ineligibility based upon a needed Environmental/Historic Preservation (EHP) compliance review, which FEMA maintains was not performed prior to work beginning on the underlying project post-disaster. That issue was not made part of this proceeding.

### Background and Rationale

The applicant owned and oversaw the maintenance and upkeep of a dam, including a spillway system. The spillway was a sloping reinforced concrete “chute” to carry overflow water away from the dam. Prior to the applicant’s ownership, a report from 1981 concluded that the spillway slab was placed on residual soils with a relatively high potential for erosion. The report proposed three options. Option one was a wait-and-see approach, doing nothing immediately. Option two required that the area be mapped to determine the extent of the voids below the spillway and then fill or grout the voids. The report noted that such would be considered a stop-gap measure because “even with a good job of repair design and construction, the original slab lacked a continuous drainage system, and the formation of additional voids in the future remains a distinct possibility.” The report also identified option three, which was the “most positive approach” – to remove and reconstruct the spillway slab while installing a properly designed filtered drainage system. The then-owner opted for option two, grouting the voids. A later inspection found that repair work was successful. Post-disaster inspections confirm that grouting had occurred.

Inspections, including those done annually by a state agency, before and after the applicant became the owner, did not find the site to be improperly maintained and did not identify deficiencies in the spillway system that would suggest eroding soil below the slab. The applicant and grantee were aware that this was a high hazard dam and failure would be expected to cause a loss of life and/or significant property damage. The applicant accepted responsibility for the safe maintenance and operation of the dam and reservoir and to implement an emergency notification plan and a surveillance plan.

During the disaster rain event in February 2020, water overtopped the dam and flowed down the spillway. During or shortly after the event, the lower portion of the spillway

collapsed, and upper portions of the spillway broke and/or were displaced as soil eroded up the slope. FEMA determined that the applicant is eligible to receive public assistance for the lower portion of the spillway but is ineligible for assistance for the upper portions.

As FEMA points out, to be eligible for public assistance funding, an item of work must be required as the result of the declared incident. FEMA states that it will not provide financial assistance to an applicant for damages caused by (1) deterioration, (2) deferred maintenance, (3) the applicant's failure to take measures to protect a facility from further damages, or (4) negligence, citing 42 U.S.C. § 5172(a)(1) and 44 CFR 206.223(e) and its guidelines. The record does not contain particular standards or information which suggest or demonstrate that the maintenance, care, and inspections by the applicant and the state were inadequate or failed to protect from further damage or permitted relevant damage.

FEMA does not ask the panel to revisit FEMA's determination regarding the lower portion of the spillway, for which the applicant is eligible to receive public assistance according to FEMA. The spillway is a single unit; the record does not indicate that the subsurface soils and conditions or the maintenance of the lower portion were materially different from that of the upper portion. The record does not support FEMA's determination for the upper portion of the spillway. The spillway passed annual inspections and multiple reviews by the state, the applicant, and others. The record does not support a proposition that the spillway, in whole or part, should have withstood the disaster event and that preexisting voids below the spillway were a cause of the damage.

Therefore, the panel concludes that the applicant is eligible for further consideration to receive public assistance for the spillway; however, FEMA must make additional determinations before arriving at the appropriate dollar figure. FEMA already has noted concerns with EHP.

Joseph A. Vergilio  
JOSEPH A. VERGILIO  
Board Judge

H. Chuck Kullberg  
H. CHUCK KULLBERG  
Board Judge

Marian E. Sullivan  
MARIAN E. SULLIVAN  
Board Judge