



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 28, 2022

CBCA 7251-FEMA, 7252-FEMA

In the Matter of MONROE COUNTY ENGINEER

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

Anne Vitale, Associate Legal Counsel, 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**.

The Office of the Monroe County Engineer (Engineer or Monroe County Engineer) submitted two separate, but related, arbitration requests to the Board on November 19, 2021. In its two arbitration requests (CBCA 7251-FEMA and 7252-FEMA), the Monroe County Engineer seeks public assistance (PA) funding under the auspices of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), to repair damage to two different sections of County Road (CR) 37 (also known as Boltz Hill Road) in Monroe County, Ohio, allegedly caused by severe storms that struck the area between February 5 and 13, 2019, a presidentially-declared disaster.

We cannot find that the February 2019 storms caused road damage or soil instability at the sections of CR 37 at issue in these two matters. Accordingly, we deny the requests for funding.

Background

From February 5 to 13, 2019, Monroe County and nineteen other counties in Ohio were subjected to flooding and landslides as a result of severe storms. On April 8, 2019, the President declared the February 2019 incident a major disaster, DR-4424-OH, *see* 84 Fed. Reg. 19,793 (May 6, 2019), rendering PA available to, among others, eligible local government entities like Monroe County.

Alleged Damage at Mile 0.68 of CR 37 (CBCA 7251-FEMA). The Monroe County Engineer alleges that, at mile 0.68 of CR 37 (CR 37–0.68), surface flooding and soil saturation from the February 2019 storms caused road damage to 150 linear feet of the road surface and base as well as site instability to 159 linear feet of the adjacent sloped embankment. This section of CR 37, which was originally created by digging into the upper side of the portion of the hill on which the road now sits and dumping that soil as fill to the lower side, is a two-lane, eighteen-foot-wide asphalt road with an upslope on one side and a downslope on the other. The Engineer requested PA funding for road repairs and to stabilize the adjacent slope. FEMA created project 108379 to capture the claimed damages and the Engineer’s requested repair work.

After conducting a site inspection, FEMA issued an “Eligibility Determination Memorandum” (DM) on September 11, 2020, in which it indicated that FEMA site inspectors had identified a single large pothole, some alligator cracking caused by fatigue, and tension cracks on the surface – issues that, according to FEMA, are typically caused by the age of the road, traffic flow, frequent rain, and/or seasonal freeze-and-thaw cycles – but no damage that would have been caused by the declared disaster. FEMA also reported no observable damage to the sloped embankment and no signs of site instability in this section of CR 37. Accordingly, FEMA determined that neither road repairs nor slope stability measures for CR 37–0.68 were eligible for PA funding.

On October 28, 2020, the Engineer submitted its first appeal for project 108379 to the recipient, the Ohio Emergency Management Agency. The recipient forwarded the appeal to FEMA on December 22, 2020, along with its recommendation that FEMA approve \$454,800 for repairs and site stability work.

By decision dated September 3, 2021, FEMA’s Region V Acting Regional Administrator denied the first appeal, finding that “the Applicant has not provided sufficient documentation or evidence demonstrating that the Facility has been damaged or made unstable by a landslide or slope failure triggered by the declared disaster, or that the claimed surface and embankment damages were a direct result of the declared disaster in accordance with 44 C.F.R. § 206.223(a)(1).” The Monroe County Engineer received the first appeal

decision by certified mail on November 2, 2021, and timely submitted an application for arbitration to the Board on November 19, 2021.

Alleged Damage at Mile 1.35 of CR 37 (CBCA 7252-FEMA). The Monroe County Engineer alleges that, at mile 1.35 of CR 37 (CR 37–1.35), surface flooding and soil saturation from the disaster caused road damage and site instability to 148 linear feet of the road surface, base, and adjacent sloped embankment, as well as to an adjoining eighteen-inch-by-twenty-eight-foot-long corrugated metal culvert. That stretch of CR 37 is a two-lane, seventeen-foot-wide asphalt road with an upslope on one side and a fifty-five-degree downslope on the other side. The Engineer requested PA funding for road repairs and to stabilize the adjacent slopes. FEMA created project 108382 to capture the Engineer’s requested repair work.

After conducting a site inspection, FEMA issued a DM on October 1, 2020, notifying the Engineer of FEMA’s determination that the project was ineligible for PA funding. FEMA represented that, based upon photos taken at the site, erosion at the outlet of the culvert was evident but that FEMA could see no observable embankment or asphalt damage. Accordingly, FEMA indicated that the Engineer had not demonstrated that the roadway was damaged by the February 2019 storms or that integral ground in the embankment had become unstable because of the storms such that site stability measures were necessary.

The Engineer submitted a first appeal to the Ohio Emergency Management Agency on October 28, 2020, which that agency forwarded to FEMA on December 22, 2020, along with a letter of support recommending approval of the Engineer’s appeal in the amount of \$432,470.

FEMA’s Region V Acting Regional Administrator denied the first appeal by decision dated September 3, 2021, finding a lack of “any information or documentation demonstrating that the Facility was damaged as a direct result of the declared event in accordance with 44 C.F.R. § 206.223(a)(1), or that the sloped embankment became unstable as a result of the disaster.” The Monroe County Engineer received the first appeal decision by certified mail on November 2, 2021, and timely submitted its application for arbitration to the Board on November 19, 2021.

Post-Incident Repair Work. Monroe County has a contract with an oil and gas company that uses Monroe County’s local roads for hauling through which the company pays for certain roadway maintenance to account for wear and tear on the roads caused by the company’s trucks. Pursuant to that contract, at some point after February 2019, the roadways at CR 37–0.68 and CR 37–1.35 were both repaved and the culvert at CR 37–1.35 restored. Those sections of CR 37 have not shown any alligator cracking or developed other cracks since that repaving occurred.

Discussion

Section 406 of the Stafford Act authorizes FEMA to provide assistance for “the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster.” 42 U.S.C. § 5172(a)(1)(A). Public facilities eligible for assistance can include local public roads and highways, *id.* § 5122(10)(B); 44 CFR 206.221(h) (2019), and include the roadways’ surfaces, bases, shoulders, and drainage structures (including culverts). *See* Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 115. Nevertheless, PA funding is available only if the damage to the roads was the result of a declared disaster. 42 U.S.C. § 5172(a)(1); *see* 44 CFR 206.223(a)(1) (“To be eligible for financial assistance, an item of work must . . . [b]e required as the result of the emergency or major disaster event.”). “Prior arbitration panels of the Board have construed this requirement to mean that ‘cause and effect [for any damage claimed] must be established.’” *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005 (quoting *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875). It is the applicant’s burden to establish that the declared disaster caused the claimed damage to the public facility. *City of Kenner*; PAPPG at 9, 19; *see* PAPPG at 133 (“[I]t is the Applicant’s responsibility to substantiate its claim as eligible.”).

We conclude that the Monroe County Engineer has not established that the roads or embankments at CR 37–0.68 or CR 37–1.35 were damaged as a result of the February 2019 storms. The photographs that the Engineer has introduced into the record do not show any direct evidence that the compacted soil beneath the roadways is pulling away or eroding down the hillside. The single pothole at CR 37–0.68, the erosion at the culvert at CR 37–1.35, the alligator cracking at the road surface at both locations, and the treads in the pavement simply do not evidence the type of slope movement or embankment instability that would require the type of remedial work that the Engineer believes needs to be performed. To the extent that the Engineer is arguing that a significant part of the slope at CR 37–1.35 has washed away, there is no absent foliage and exposed soil that would indicate a sudden and recent loss of embankment. We cannot find on the evidence presented that soil instability issues are prevalent in the areas of CR 37–0.68 and CR 37–1.35.

Even if there has been slope movement, there is no way to tie it to the February 2019 storms. Although there may have been areas within Ohio that experienced debilitating damage from flooding as a result of those storms, the amount of rain that fell during February 2019 in Monroe County was not so unusual that saturation levels were uncommonly high in that period of time. According to one of the exhibits that the Engineer prepared, up to six inches of rain fell in parts of Ohio during the first twelve days of February 2019, Applicant’s

Post-Hearing Exhibit 5 at 4,¹ and other records show a total rainfall in February 2019 of approximately 6.49 inches. Yet, Monroe County received even more rainfall – 7.72 inches – in February of the *prior* year and received significantly more than 6.49 inches of rain in several other months preceding February 2019 (i.e., 7.2 inches of rainfall in April 2018; 9.45 inches in June 2018; and 10.77 inches in September 2018). No claim of soil instability following those prior storms was asserted, and no explanation is provided as to how or why the February 2019 storms, as opposed to earlier storms, caused alleged slope movement. In fact, the evidence that FEMA presented showed that total soil saturation levels in the area of Monroe County were significantly higher in 2018 than they were in 2019, and imaging that FEMA presented showed a lack of soil saturation at CR 37–0.68 or CR 37–1.35 following the time period at issue. The goal of PA funding is to allow for repair of damage caused by specific declared disasters, not to provide federal money to state and local agencies to deal with the cumulative effect of various natural events that happen over the course of time.

Decision

For the foregoing reasons, we find that the Monroe County Engineer has not established that the February 2019 declared disaster caused the road damage and soil instability alleged. Accordingly, we deny the Engineer's requests for PA funding for CR 37–0.68 and CR 37–1.35.

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

¹ FEMA's expert testified that only 4.73 inches of rain, rather than six inches, fell in the area of Monroe County through February 13, 2019. Any difference in the parties' calculations does not affect the result here.