



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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June 23, 2021

CBCA 7089-FEMA

In the Matter of CARLTON COUNTY TRANSPORTATION DEPARTMENT

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Wayne Lamoreaux, Deputy Public Assistance Officer, Homeland Security and Emergency Management, Minnesota Department of Public Safety, St. Paul, MN, appearing for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; 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 **DRUMMOND**, **SHERIDAN**, and **O'ROURKE**.

Following several weeks of severe storms, heavy rainfall, and widespread flooding in 2018, Carlton County requested public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) to replace a damaged culvert with a single span bridge as an Improved Project. FEMA determined that only in-kind replacement costs were eligible for PA funding. Carlton County sought arbitration of FEMA's determination under 42 U.S.C. § 5189a(d) (2018). We agree with FEMA that only the in-kind replacement costs are eligible for PA funding.

### Background

On September 5, 2018, the President declared a disaster in Minnesota following a period, from June 15 through July 12, 2018, in which the state experienced severe storms, heavy rainfall, and widespread flooding. As a result of damage sustained to a reinforced concrete pipe culvert in Nemadji Creek, Carlton County sought PA funding from FEMA.

In 2019, Carlton County sought to upgrade the culvert and replace it with a single-span bridge, claiming that the bridge was the only structure that met the Minnesota Department of Natural Resources (MN-DNR) permitting requirements. FEMA determined that the in-kind replacement costs were eligible for PA funding, but not the additional costs for the upgrade to a bridge. FEMA sought further substantiation that Minnesota rules and permitting standards required a bridge as the only option for the project.

On December 17, 2019, Carlton County appealed FEMA's eligibility determination, supplying additional information and asserting that the county, bound by Minnesota Administrative Rule 6115.0231 and General Permit 1999-2061, had no choice but to build the bridge. Under the General Permit, any structure built over Nemadji Creek in Carlton County had to include fish passage in which the two-year peak flow velocities did not exceed two feet per second. Carlton County stated that a single-span bridge was the only structure that would comply with the fish passage velocity requirement set by the MN-DNR.

FEMA denied the appeal, finding that Carlton County had not demonstrated that the MN-DNR permit requirements were applied uniformly to all similar types of facilities as required by FEMA's statutory criteria for upgrades. FEMA concluded that Carlton County was eligible for only an in-kind culvert replacement.

Carlton County submitted a request for arbitration to the Civilian Board of Contract Appeals, positing that it was eligible for funding the costs of the bridge replacement. The matter was docketed as CBCA 7089-FEMA, and the arbitration hearing was held on June 2, 2021, after which the arbitration was closed.

### Discussion

The issue before the panel is whether the Minnesota permitting requirements that Carlton County followed in replacing the culvert with a bridge comply with FEMA's statutory criteria for upgrades.<sup>1</sup>

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<sup>1</sup> After arbitration was elected, FEMA raised an argument that the culvert was damaged before the disaster and, therefore, the panel could opt to totally deny eligibility for

The Stafford Act limits PA funding to costs associated with work required to restore a facility to its pre-disaster design and function. 42 U.S.C. § 5172(e)(1)(A)(i). However, the work must also be in conformity with current building codes and standards. *Id.* § 5172(e)(1)(A)(ii). Sometimes, the repair or replacement of damaged facilities must include upgrades to the facility's design to comply with building codes and standards. Where codes and standards trigger upgrades to a facility's pre-disaster design, FEMA's regulations establish a five-part test which the code or standard upgrade must meet in order to be eligible for PA funding. The code or standard must:

- 1) apply to the type of repair or restoration required (standards may be different for the new construction and repair work);
- 2) be appropriate to the pre-disaster use of the facility;
- 3) be reasonable, in writing, and formally adopted and implemented by the state or local government on or before the disaster declaration date or be a legal Federal requirement applicable to the type of restoration;
- 4) apply uniformly to all similar types of facilities within the jurisdiction of the owner of the facility; and
- 5) be enforced during the time it was in effect.

*See* 44 CFR 206.226(d); Public Assistance Program and Policy Guide (PAPPG), version 3.1 at 87-88 (Apr. 2018). FEMA will not provide PA funding for upgrades if the code or standard does not meet all five criteria. PAPPG at 87. Therefore, Carlton County's request for total bridge replacement costs rests on whether the General Permit fish passage velocity requirement is an acceptable code or standard that meets all five criteria.

Carlton County argues that the General Permit meets the criteria because it applies to all new construction on Minnesota waterways within Carlton County and is implemented by the State. During the hearing, Carlton County representatives posited that, if the County did not comply with the fish passage requirement, the State would likely issue a stop-work order and demand that the project be adjusted to comply with the permit. Carlton County has consistently asserted that a single-span bridge was the only structure that would comply with the velocity requirement of two feet per second required by the General Permit. According to the County, it understands that the fish passage velocity imposed by the State in a particular general permit was determined by the species of fish found present in a particular waterway. FEMA maintains that the fish passage requirement does not meet the criteria because the criteria are discretionary and not applied uniformly. The panel did not receive any explanation or evidence from the MN-DNR regarding the fish passage velocity rates

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PA funding, allowing FEMA to deobligate the funds already granted for the in-kind replacement. The Board did not find that late-raised argument compelling.

associated with its general permitting process. While it appears that Nemadji Creek in Carlton County had a velocity requirement of two feet per second in June 2018, we agree with FEMA that the fish passage velocity requirements appear to have been discretionary and were not necessarily applied uniformly or consistently by the State. It does not appear that all waterways in Minnesota or Carlton County had the fish passage velocity requirement of two feet per second in June 2018.

We note that, although the panel is not bound by appeal decisions referenced by FEMA, FEMA has consistently held that upgrades based on national and/or state-wide general permits lack objective, specific design criteria and are, therefore, typically not eligible for PA funding. Here, General Permit 1999-2061, which expired in 2019, stated that “2-year peak flow velocities shall not exceed 2 feet per second” for the fish passage. The amended General Permit that expires in 2024 states that “[t]wo-year peak flow velocities through the structure shall not exceed the natural channel 2-year peak flow velocity.” The velocity requirement changed with the updated permit. During the hearing, Carlton County representatives explained that the general permits in Minnesota county waterways have different fish passage velocity requirements, and that the permitting requirements change every three to four years. The panel received no compelling evidence explaining the State permitting process, or how fish velocity passage rates were assessed and determined. Because the permit velocity requirements appear to vary among counties and frequently change, they appear discretionary, lacking in uniformity, and not based on objective, specific design criteria. The PAPPG is clear that where permitting requirements are discretionary, as these appear to be for the State, they do not meet the criteria for upgrades because they do not qualify as formally adopted codes and standards and are not applied uniformly. *See* PAPPG at 89, 90.

### Decision

While we recognize that Carlton County has no control over the Minnesota fish passage requirements, FEMA regulations and policy do not support a determination that the fish passage requirements contained in the General Permit are uniform and non-discretionary. Therefore, Carlton County does not meet FEMA’s criteria for an upgrade to a bridge. For these reasons, we find that FEMA correctly determined that only in-kind replacement costs were eligible for PA funding.

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

*Jerome M. Drummond*  
JEROME M. DRUMMOND  
Board Judge

*Kathleen J. O'Rourke*  
KATHLEEN J. O'ROURKE  
Board Judge