



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 18, 2025

CBCA 8342-FEMA

In the Matter of MUNICIPALITY OF CANÓVANAS, PUERTO RICO

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Jasmyn Allen, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR, counsel for Federal Emergency Management Agency.

Before the Arbitration panel consisting of Board Judges **LESTER**, **SULLIVAN**, and **KANG**.

LESTER, Board Judge, writing for the Panel.

The Municipality of Canóvanas, Puerto Rico (the Municipality), seeks arbitration under section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a(d) (2018), after the Federal Emergency Management Agency (FEMA) denied its request for approximately \$4 million in public assistance (PA) funding to repair a roadway area allegedly damaged during a hurricane in 2022 and for an additional \$5.5 million in hazard mitigation expenses. FEMA denied the request as largely duplicative of earlier requests for PA funding that the Municipality submitted in response to

hurricanes in 2011 and 2017 for repair of the same roadway area at issue here. Although FEMA granted the 2011 PA funding request, the Municipality never performed the repair work, and FEMA believes that the current claimed damage either is the same as or was the result of the non-repair of the 2011 damage. For that reason and others discussed below, FEMA denied the Municipality's current PA funding request.

As permitted under Rule 611 of the Board's rules governing this arbitration (48 CFR 6106.611 (2024)), the parties have requested a decision on the written record—that is, through a “paper hearing” without live testimony. In accordance with Board Rule 613, this decision is being issued within sixty calendar days after the submission of the last written brief in this arbitration, which was when the arbitration record was closed.

Factual Background

The disaster underlying this arbitration is Hurricane Fiona, which made landfall in Puerto Rico on September 17, 2022. The President declared Fiona a major disaster for all seventy-eight municipalities in Puerto Rico (DR-4761-PR) on September 21, 2022. *See* <https://www.fema.gov/disaster/4671/designated-areas> (last visited June 11, 2025). The Municipality claims that Fiona caused significant damage to an asphalt road, a culvert, and embankments (collectively, the facility) located in Barrio La Central, Calle Caribe.

Although the Municipality's PA funding request targets damage allegedly caused by Fiona, earlier disasters affect the manner in which we must analyze this PA funding request. Specifically, the Municipality previously claimed that Hurricane Irene (DR-4017), which struck Puerto Rico in August 2011, caused significant damage to the same facility at issue in this arbitration. The damage included collapsed asphalt road areas, eroded embankments, collapsed concrete swales, collapsed metal guard rails, a collapsed concrete catch basin, and concentrated rock debris. *See* FEMA Exhibit 12 at 4. In response to the Municipality's Irene PA funding request, FEMA prepared project worksheet (PW) 1482 and eventually approved PA funding of \$2.26 million to repair the facility and to install a sheet pile foundation system to mitigate against future damage. The Municipality, however, never commenced repairs to the facility. On April 5, 2023, twelve years after the disaster, and after having granted five time extensions, FEMA denied the Municipality's request for a sixth time extension, effectively rescinding PA funding for the 2011 Irene damage. FEMA upheld that denial in first and second appeal decisions on October 16, 2023, and April 16, 2024, respectively. *See* FEMA Exhibits 13, 14.

Hurricane Maria (DR-4339) struck Puerto Rico in 2017, which the Municipality tells us caused severe flooding, landslides, and prolonged power outages in the area, making the Municipality “among the hardest hit in the northeastern region.” Applicant's Response to

Motion to Dismiss (March 18, 2025) at 5. The Municipality submitted a request for PA funding to FEMA for damage to the facility allegedly caused by Maria, but it later withdrew that request. *See* FEMA Exhibit 3 at 3.

The Municipality tells us that it was “still in the process of recovery” from Hurricane Maria when Hurricane Fiona struck in September 2022 with 14.6 inches of rain and sustained winds of approximately 85 miles per hour, “bringing more widespread flooding, landslides, and power outages.” Applicant’s Response to Motion to Dismiss at 5-6; *see* FEMA Exhibit 8 at 3. The Municipality subsequently requested PA funding to repair the facility, *see* FEMA Exhibit 5, asserting that Fiona had damaged the asphalt surface, a concrete swale, a guardrail, the embankment, the roadway base, a culvert, a concrete headwall, and a concrete wingwall. FEMA Exhibit 11 at 1. The Municipality also sought PA funding to mitigate against future damage with an anchored sheet pile wall system. FEMA Exhibit 5 at 4. FEMA prepared Grants Manager Project (GMP) 699330 to document the Municipality’s claims. FEMA conducted a site visit on April 21, 2023. *See* FEMA Exhibit 10.

On May 17, 2024, FEMA issued a determination memorandum (DM) finding the work being claimed ineligible for PA funding. FEMA Exhibit 4 at 1. It represented that, “[a]lthough the Applicant asserts that the Facility was damaged as a result of DR-4671-PR, the record shows that the Applicant requested FEMA assistance for similar damage to the same Facility on previous disaster[] declarations, DR-4017-PR and DR-4339-PR,” *id.* at 2, the first of which FEMA originally approved (and the second of which the Municipality withdrew), but that the Municipality had never performed any of the previously identified necessary repair work. *Id.* at 3. FEMA determined that, “[w]hile the declared [Fiona] incident may have played a role in the claimed damage, the Applicant has not provided documentation that allows FEMA to differentiate between pre-existing damage or disaster-related damage.” *Id.* FEMA denied relief because “[t]he Applicant has not demonstrated that the claimed damage was a direct result of the declared [Fiona] incident.” *Id.*

On July 16, 2024, the Municipality submitted its appeal of the DM to the grantee, explaining that, although its current PA funding request included some damages from Irene-related PW-1482, it would separate those components of the project when finalizing the repair work. FEMA Exhibit 5 at 2. In response to a request for documentation from the grantee, the Municipality provided a Hurricane Maria damage assessment report from 2018, general maintenance certifications from 2023 and 2024, and a general maintenance activity log. FEMA Exhibit 17. It also provided a total cost estimate for repairs to the facility of \$9.5 million, \$5.5 million of which would serve as a mitigation effort to repair the embankment failure caused by Irene in 2011 and another \$4 million to repair supplemental embankment failures during Fiona. *Id.* at 3. The grantee forwarded the Municipality’s first-level appeal to FEMA on September 13, 2024.

On December 5, 2024, FEMA emailed the Mayor of the Municipality (as well as several representatives of the grantee) a “courtesy copy” of a decision that, on its face, was dated December 3, 2024, in which FEMA denied the Municipality’s first appeal.¹ The email forwarding the courtesy copy read, in its entirety, as follows:

Hello:

Attached please see FEMA’s First Appeal Determination for the item listed below:

- FEMA-4671-DR-PR-Municipality of Canovanas GMP 699330

For disasters declared on or after January 1, 2022, the official transmittal is through Grants Portal/Grants Manager. This email message and the attachments provide a courtesy copy.

Thank you,

Policy Implementation | Recovery Division | FEMA Region 2

FEMA Exhibit 6; *see* Applicant’s Response to Motion to Dismiss, Exhibit G. Although FEMA asserts in its briefing that it uploaded the first appeal decision in the Grants Manager/Grants Portal systems on December 5, 2024, *see* FEMA’s Motion to Dismiss (March 4, 2025) at 4, the Municipality provided the Board with a printout from the Grants Manager/Grants Portal systems showing that the first appeal decision was not distributed through those systems until February 4, 2025. *See* Applicant’s Response to Motion to Dismiss, Exhibits H & I.

In the first appeal decision that accompanied the email, FEMA found that the Municipality had “not demonstrated that the claimed damage to the Facility was directly caused by [Hurricane Fiona]” and that, “[t]herefore, [the Municipality’s] claim to repair the Facility as well as any corresponding hazard mitigation measures are ineligible for PA funding.” FEMA Exhibit 1 at 1. FEMA specifically referred to prior events that the

¹ As noted above, the “courtesy copy” email was sent to only one Municipality representative: the Municipality’s Mayor. When a notice of FEMA action is sent to the Municipality through the Grants Manager/Grants Portal systems, notice automatically goes to nineteen Municipality representatives. *See* Applicant’s Response to Motion to Dismiss at 9-12, 18-19 & Exhibit G.

Municipality acknowledged had damaged the facility and FEMA's inability to distinguish between that damage and the damage now being claimed, as follows:

Here, the Facility was damaged by a 2011 previously declared incident and the Applicant had received PA funding to repair it under PW 1482. However, the Applicant did not repair any parts of the Facility and FEMA then determined PW 1482 was ineligible for PA. . . . [Eleven] years after the previous incident, the Applicant claimed that Fiona impacted the Facility and requested PA funding for repairs. In support, the Applicant provided a damage assessment report from 2018 (4 years prior to the incident), evidence of post-disaster maintenance activities, and general maintenance certifications signed in 2023 and 2024. Based on this, FEMA finds that the Applicant's supporting documentation is insufficient to demonstrate a routine maintenance program that allows FEMA to validate disaster-related damage. Consequently, the Applicant has not demonstrated that the claimed damage was directly caused by Fiona. Therefore, the Applicant's claim to repair the Facility as well as any corresponding hazard mitigation measures are ineligible for PA funding.

FEMA Exhibit 1 at 5. At the end of the decision, FEMA notified the Municipality that, in lieu of a second appeal, the Municipality could elect to submit a request for arbitration to the Board and indicated that the Municipality should consult 44 CFR 206.206(b)(3) and 48 CFR Part 6106 "for arbitration eligibility and procedural requirements." FEMA Exhibit 1 at 2.

The Municipality filed its request for arbitration with the Board on February 6, 2025. Subsequently, FEMA filed a motion to dismiss the arbitration as untimely because the request was submitted sixty-three days after the Municipality's Mayor received the December 5, 2024, "courtesy copy" email. After the Municipality responded to that motion, the Board directed FEMA to include any reply in its brief in response to the merits of the Municipality's arbitration request.

FEMA filed its response brief on March 31, 2025. As part of its response, FEMA provided the Board with a technical evaluation of the Municipality's claimed damages from Brandon R. Klein, P.E., who, at FEMA's request, mapped the damages claimed for Irene in 2011 and compared them to those claimed for Fiona. In his March 20, 2025, report, he found that, "[a]fter mapping the damages for both incident periods, it is clear the damages [claimed for Fiona] overlap with the damages previously claimed under Hurricane Irene (4017DR-PR)." FEMA Exhibit 11 at 4. He also explained his opinion, developed as a result of his review, that the Municipality's failure to repair the Irene damage would necessarily have been a significant factor in more recent deterioration of the roadway and embankment:

Typically, asphalt pavements are designed for a 20-year period of performance. One of the biggest factors that affect pavement life is improper drainage, which can result from insufficient pavement cross slope, cracking of the pavement surface, inadequate ditches, etc. This can lead to saturation of the base layers and result in support issues, whereby traffic stress will induce excess movement in the pavement layer and cause the pavement to crack and deteriorate. Normal maintenance procedures would entail cleaning ditches, patching potholes, crack sealing, etc., to help alleviate moisture penetration of the pavement surface and saturation of the base layers.

In summary, the Applicant has not established the damages being claimed are (1) a direct result of the incident or (2) beyond the damages previously claimed under Hurricane Irene. The other issue at hand is the damages from Hurricane Irene have not been repaired to date. After reviewing the site inspection photos, it is impossible to distinguish between (1) previously claimed damages under 4017DR-PR, (2) potentially new damages under 4671DR-PR, or [(3)] damages due to normal wear and tear. It would be normal for the roadways to continue to deteriorate from normal wear and tear if repairs are not completed in a timely manner.

Id. at 6.

On April 21, 2025, the Municipality and the grantee filed separate reply briefs addressing the merits of the Municipality's entitlement to PA funding. On April 28, 2025, the parties informed the Board that none were requesting a live hearing in this matter and asked that the Board issue a decision based solely on the exhibits in the record and the parties' written submissions. When FEMA subsequently filed its sur-reply on May 5, 2025, the record was closed.

Discussion

I. Timeliness of the Municipality's Request for Arbitration

As noted above, in its first appeal decision, FEMA notified the Municipality that, in lieu of a second appeal, the Municipality could elect to submit a request for arbitration to the Board and indicated that the Municipality should consult 44 CFR 206.206(b)(3) and 48 CFR Part 6106 "for arbitration eligibility and procedural requirements." The regulation at 44 CFR 206.206(b)(3)(iii)(B)(1) provides that "[a]n applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision." Here, FEMA's first appeal decision is, on its face, dated December 3, 2024, but the

Municipality first saw that decision when FEMA sent an email to the Municipality's Mayor on December 5, 2024, providing the Mayor with what FEMA called a "courtesy copy" of the decision. In that email, FEMA indicated that the "official transmittal" of the decision would come through the Grants Manager/Grants Portal systems. FEMA Exhibit 6. When uploaded into the systems, the decision was automatically distributed to nineteen Municipality representatives (including the Mayor). For reasons not explained in the record, that official transmittal did not occur until February 4, 2025.

FEMA filed a motion seeking to dismiss this arbitration as untimely filed because the Municipality did not submit its arbitration request until more than sixty days after the Mayor was notified by email of the first appeal decision. The Stafford Act provides that an applicant may file an appeal of a first appeal decision (and, by extension, an arbitration request) within sixty days "after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance." 42 U.S.C. § 5189a(a); *see id.* § 5189a(d)(5)(B). FEMA's regulation is written a bit differently than the statute, stating that "[a]n applicant must submit a request for arbitration within 60 calendar days from *the date* of the Regional Administrator's first appeal decision." 44 CFR 206.206(3)(iii)(B)(1) (emphasis added); *see* FEMA Policy 104-22-0001: FEMA Policy, Public Assistance Appeals & Arbitration (PAAA Policy) (Feb. 24, 2022) at 4 "Requirements" ¶ B.2.a ("Applicants must make an arbitration request within 60 calendar days from date of first appeal decision."). FEMA has not argued that the "date" of the decision is the December 3 date written on the decision. Instead, it argues that, because the Mayor of the Municipality was "notified" of the decision when she received the "courtesy copy" email on December 5, that is the "date" of the decision from which the Municipality's time to seek arbitration began to run. Because the Municipality's arbitration request was not submitted until February 6, 2025, sixty-three days after the Mayor received the "courtesy copy" email, the request was, according to FEMA, untimely.

In its regulations, FEMA promises to "provide *electronic* notice of the disposition of the appeal to the applicant and recipient within 90 calendar days of receipt of the appeal" or, if FEMA requests additional information, "within 90 calendar days following [FEMA's] receipt" of the information. 44 CFR 206.206(b)(1)(ii)(C) (emphasis added); *see* PAAA Policy at 2-3 "Requirements" ¶ A.3 ("Electronic notice. For disasters declared on or after January 1, 2022, FEMA will provide electronic notice of the disposition of appeals, and if there is a need for additional information, make requests for appeals-related information electronically to Applicants and Recipients through Grants Manager/Grants Portal."). In its PAAA Policy, FEMA explains that the "'date of the Regional Administrator's first appeal decision' as used in 44 C.F.R. 206.206 means the date FEMA *electronically* transmits its . . . first appeal decision to the Applicant and Recipient." PAAA Policy at 3 "Requirements" ¶ A.4.b (emphasis added).

On its face, it might make sense to view FEMA’s email of the “courtesy copy” of the first appeal decision on December 5, 2024, to the Municipality’s Mayor and the grantee/recipient as an “electronic” delivery of that decision, even if the reference in the email that the official transmission would come through the Grants Manager/Grants Portal systems might create some ambiguity regarding the effect of the “courtesy copy.” If we viewed the “courtesy copy” as proper notice, the Municipality’s February 6, 2025, arbitration request would have to be viewed as having been filed three days late and, therefore, as untimely. Although the grantee has asked us simply to ignore any slight timeliness problems as insignificant and non-prejudicial, *see* Grantee’s Reply Brief (Apr. 21, 2025) at 6-7, “[t]he Board has no authority to extend the [statutorily-established arbitration request] filing deadline.” *City of Pine Bluff, Arkansas*, CBCA 7102-FEMA, 21-1 BCA ¶ 37,883, at 183,983.

Nevertheless, we cannot view the “courtesy copy” delivered to the Mayor as a delivery that started the sixty-day clock for requesting arbitration. We need not consider the extent to which the delivery of the December 5 “courtesy copy” to only one of the nineteen Municipality representatives who are supposed to receive notice of FEMA’s official actions through FEMA’s Grants Manager/Grants Portal systems creates some kind of prejudicial notification defect. Instead, we rely on FEMA’s PAAA Policy, in which it defines precisely what FEMA means in stating in its regulations that it will “electronically” transmit a decision and provide “electronic” notice:

Definition of Electronic and Electronically: For the purposes of 44 C.F.R. § 206.206(b)(1) and 44 C.F.R. § 206.206(b)(2), and as described in this policy, “electronic” and “electronically” means using FEMA’s web-based Grants Manager and/or Grants Portal systems.

FEMA PAAA Policy at 2 “Requirements” ¶ A.1. As stated in the PAAA Policy, FEMA relies on the Grants Manager/Grants Portal systems delivery as the defining event for purposes of establishing receipt and defining the effective date of a first appeal decision because it “promotes transparency for all stakeholders by using an electronic submission system that allows for verification and tracking of applicable dates.” *Id.* “Principles” ¶ A. Because FEMA policy clearly interprets the date of a first appeal decision as the date on which the decision was delivered electronically through the Grants Manager/Grants Portal systems, we cannot find that the sixty-day clock for the Municipality to file an arbitration request was triggered at some point *before* the February 4 official decision date—that is, before the date when the decision was first delivered to recipients through the Grants

Manager/Grants Portal systems.² Because the Municipality submitted its arbitration request two days after receipt of the first appeal decision through the Grants Manager/Grants Portal systems, we deny FEMA’s request to find the Municipality’s request untimely.

II. PA Funding for Repairs and Restoration

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) (2022), and encompasses the roadways’ surfaces, bases, shoulders, and drainage structures (including culverts). *See* Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 168-69. “Nevertheless, PA funding is available only if the damage to the roads was the result of a declared disaster.” *Monroe County Engineer*, CBCA 7251-FEMA, et al., 22-1 BCA ¶ 38,061, at 184,800-01 (citing 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, at 180,199 (quoting *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,387). It is the applicant’s burden to establish that the declared disaster caused the claimed damage to the public facility. *Monroe County Engineer*, 22-1 BCA at 184,801; *City of Kenner*, 15-1 BCA at 175,389; *see* PAPPG at 52 (“The Applicant must demonstrate that damage was caused directly by the declared incident.”).

² In its response brief, FEMA asserts that, because the definitions of “Electronic” and “Electronically” are housed underneath a heading in the PAAA Policy titled “Appeals,” delivery of the first-level appeal decision through the Grants Manager/Grants Portal systems is necessary only to trigger the sixty-day clock for filing a second appeal. FEMA’s Response Brief (Mar. 31, 2025) at 15. FEMA believes that, although the PAAA Policy does not so expressly state, the trigger for starting the clock for requesting arbitration could be *any* type of electronic delivery (like a “courtesy copy” email) without the need for delivery through the Grants Manager/Grants Portal systems. *Id.* at 15-16. Under FEMA’s argument, there would potentially be different triggers for starting the sixty-day deadline for requesting arbitration and the sixty-day deadline for filing a second-level appeal. Nothing in the PAAA Policy suggests that FEMA intended to create different first-level appeal decision finality dates, one applicable only to triggering the arbitration request clock with a later one for triggering the second-level appeal clock. FEMA’s assertion to the contrary does not reflect a fair or logical interpretation of FEMA’s published policies.

Further, for an applicant to obtain PA funding, “the pre-disaster condition” of the facility cannot be “a significant contributing factor in the cause of failure.” PAPPG at 52. “No assistance will be provided to an applicant for damages caused by its own negligence.” 44 CFR 206.223(e). Although at least one prior panel, applying an arbitration authority limited to allowing us to review Hurricanes Katrina and Rita PA funding matters, placed the burden on FEMA to show an applicant’s negligence, *see Forrest County Board of Supervisors*, CBCA 1772-FEMA, 10-1 BCA ¶ 34,453, at 169,998, current PAPPG policy establishes that the applicant, in demonstrating “that damage was caused directly by the declared incident,” bears the burden of demonstrating that the damage was *not* caused by “[d]eterioration; [d]eferred maintenance; [t]he Applicant’s failure to take measures to protect a facility from further damage; or [n]egligence.” PAPPG at 52; *see Monroe County Engineer*, 22-1 BCA at 184,801.

When the damage being claimed involves a roadway, showing cause and effect, as well as the absence of negligence or pre-existing damage, can be potentially more difficult than showing the source or existence of damage for other types of structures:

If a tornado strikes and demolishes a building, there is little doubt that the tornado caused the building’s destruction. The type of erosion and slope instability at issue [when a roadway fails], though, does not necessarily happen all at once as the result of a single event. It can, but it might also develop over time through the cumulative effect of numerous heavy storm events that progressively cause[s] seepage, soil instability, and growing erosion.

Monroe County Engineer, CBCA 7288-FEMA, et al., 22-1 BCA ¶ 38,142, at 185,260; *see City of Pacific Junction, Iowa*, CBCA 8099-FEMA, 24-1 BCA ¶ 38,650, at 187,879 (“[B]ecause roadways typically erode and degrade with time even if maintained, ‘[d]etermining causation for [particular roadway] damage . . . can, in many ways, be more difficult than for damage resulting from many other types of disasters.’” (quoting *Monroe County Engineer*, 22-1 BCA at 185,260)); PAPPG at 169 (acknowledging that, when roadways are involved, “distinguishing between preexisting damage and damage caused by the incident is often difficult”). Despite the potential difficulty of the task, “the Applicant must demonstrate that the damage [to the roadway and its support] was directly caused by the incident.” PAPPG at 169-70.

In this case, the Municipality has a Herculean task in attempting to show that its requested damages are unrelated to Irene and its now-fourteen-year delay in repairing the Irene-related damages. During those fourteen years, additional significant weather events, including Hurricane Maria, would certainly have impacted the roadway area, and the Municipality has provided scant evidence of maintenance or care of the facility in the years

between Irene and Fiona. Although the Municipality asserts that it has carved out its Irene-related damages from those that it is now seeking, the report from FEMA's technical engineer shows significant overlap in the claimed damage areas. Further, as he reports, the deterioration that is now evident at the facility has to be attributed, in large part, to the fourteen years that have passed since Irene, with no repairs to the embankments and roadways during that time. The Municipality has not established that its current claimed damages are the direct result of Fiona, rather than the result of Irene and the effects of continuing deterioration following Irene.

The Municipality argues that FEMA's denial of PA funding for Fiona is based in large part on what the Municipality says is "commonly referred to as the duplication of benefits (DOB) prohibition," which it calls "a foundational safeguard in disaster recovery funding." Applicant's Reply Brief (Apr. 21, 2025) at 52-53. By statute, an applicant cannot receive "assistance with respect to any part of [a] loss as to which he has received financial assistance under any other program or from insurance or any other source." 42 U.S.C. § 5155(a). Accordingly, "[i]f [an] Applicant receives funding from another source for the same work that FEMA funded, FEMA reduces the eligible cost or de-obligates funding to prevent a duplication of benefits." PAPPG at 93. The Municipality argues that, to the extent that FEMA is declining to provide PA funding because some of the damage at issue here was caused by Irene in 2011, FEMA cannot do so because the Municipality never actually received any payment of Irene PA funding, meaning that the damages being claimed now do not overlap with prior funding that the Municipality received. Applicant's Reply Brief at 53-58.

Although the Municipality may have correctly described the DOB prohibition, it is misguided when it suggests that FEMA's prior 2011 determination about the damage that Irene caused is irrelevant now. The only reason that the Municipality ultimately did not receive the Irene PA funding is because, years after the Irene disaster, the Municipality had yet to start any repair work. FEMA decided that, at a certain point in time, it was too late for the Municipality to receive PA funding for repair work that it had never commenced, and it effectively rescinded its funding decision. The Municipality challenged that rescission decision in separate proceedings, and FEMA's second-level appeal decision affirming the Irene funding rescission is final and not before us. For purposes of this matter, the important part of the Irene PA funding analysis is what it tells us about the source of the Municipality's currently claimed damage. As noted above, PA funding for damage from Hurricane Fiona is limited to that "required as the result of the emergency or major disaster event" at issue. 44 CFR 206.223(a)(1). The Municipality cannot seek PA funding under the guise of repairing Fiona damage for damage that, in reality, is from or associated with Irene—damage that the Municipality never repaired. The current arbitration only addresses funding for damage caused by Fiona. Damage from Irene is not eligible for PA funding in this

matter—not just because of the DOB prohibition but because any covered damage here must be directly related to and caused by Fiona.

In its reply brief, the Municipality offers the declaration of its Mayor, who attests that it was Hurricane Fiona which caused the 2022 embankment failure at the facility. Applicant Exhibit AS at 1 ¶ 2. Yet, the Mayor has no engineering background and conducted no engineering investigation and analysis. We cannot give any weight to such a declaration. *See City of Kenner*, 15-1 BCA at 175,388 (“Various casual observations . . . are of limited value in determining when the damage may have occurred and what may have been the cause.”). Similarly, the grantee asserts that the facility’s “infrastructure experienced geophysical movement and erosion not previously recorded in PW 1482 or other documents associated with Hurricanes Maria or Irene,” citing to “[d]rone imagery and geo-tagged photographs” in the record “taken immediately after Fiona [that] document acute washouts and failures at specific coordinates outside the scopes of PW 1482 and prior repair claims” which “confirm[] that these areas experienced new soil displacement patterns consistent with Fiona’s hydrological pressure and surface runoff.” Grantee’s Reply Brief at 7-8 (citing FEMA Exhibits 8, 9, 10, 11, 23, 24). We do not find the cited exhibits as compelling as the grantee does and give more weight to the report of FEMA’s technical expert, who found a high degree of overlap in the damage that followed Irene and the damage that the Municipality now claims. We also see little if any evidence that, prior to Fiona, the Municipality had engaged in serious maintenance efforts to try to protect the facility against the type of damage that resulted.

The Municipality asserts that this repair project “is crucial to saving lives and protecting property, as Calle Caribe serves as a primary access route for first responders, medical services, and evacuation efforts during emergencies for [L]a Central Sector residents and visitors.” Applicant’s Response to Motion to Dismiss at 6. It states that “isolated communities depend on this road for access to work and to essential services, including hospitals, emergency shelters, and gas stations” and that “[t]he restoration and reinforcement of this roadway are not merely about infrastructure recovery but about ensuring the safety and security of Canóvanas residents.” *Id.* at 6-7. Regardless of which party equity favors, equities do not override FEMA policy.

The Municipality is not entitled to PA funding for Fiona repairs.

III. PA Funding for Hazard Mitigation Expenses

The Municipality seeks \$5.5 million in hazard mitigation expenses to fund construction of an anchored sheet pile wall system at the facility.

“Hazard mitigation is any sustained action taken to reduce or eliminate long-term risk to people and property from natural hazards and their effects,” and “FEMA has authority to provide PA funding for cost-effective hazard mitigation measures for facilities damaged by the incident.” PAPPG at 153; *see* 44 CFR 206.226(e). “To be eligible for PA funding, the mitigation measures must directly reduce the potential of future damage to the damaged portion(s) of the facility.” PAPPG at 155. FEMA’s regulations make clear that, when speaking of “the damaged portion(s) of the facility,” it means damage to the facility *caused by the disaster at issue*, not by prior disasters. *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.”).

Here, the Municipality acknowledges that the \$5.5 million hazard mitigation plan that it now proposes is essentially the same one that it proposed in response to the 2011 Hurricane Irene disaster (albeit now with a significantly higher price tag). As FEMA correctly argues, the Municipality “is essentially attempting to fund a project that was [originally funded but then] denied under a prior disaster and project number (PW 1482) due to delays and noncompletion, under this [new] disaster and project number (PW 699330),” FEMA’s Sur-Reply (May 5, 2025) at 12-13, which it cannot do under FEMA policy.

In addition, the proposed hazard mitigation effort is not cost effective under FEMA’s guidelines. “FEMA evaluates proposed PA mitigation measures for eligibility, cost-effectiveness, technical feasibility and effectiveness, and compliance with [environmental planning and historical preservation] laws, regulations, and [Executive Orders].” PAPPG at 154. A measure may be considered cost effective if its cost “does not exceed 15 percent of the total eligible repair cost (prior to any insurance reductions) of the facility or facilities for which the mitigation measure applies,” *id.* at 156, but the sheet pile wall costs proposed here far exceed 15 percent of the \$4 million repair cost. Alternatively, a PA mitigation measure may be deemed cost effective if it is specifically listed in PAPPG Appendix J, titled “Cost Effective Public Assistance Mitigation Measures,” *see id.* at 242, *and* the cost “does not exceed 100 percent of the eligible repair cost (prior to any insurance reductions) of the facility or facilities for which the mitigation measure applies.” *Id.* at 156. Here, even if the proposed sheet pile wall could be considered covered by Appendix J, its \$5.5 million price tag exceeds the \$4 million facility repair price tag.

Decision

For the foregoing reasons, we deny FEMA's request to find the Municipality's request for arbitration untimely. On the merits, the Municipality's requested costs are ineligible for PA funding.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Jonathan L. Kang

JONATHAN L. KANG

Board Judge