



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 6, 2026

CBCA 8515-FEMA

In the Matter of KAUAI COUNTY DEPARTMENT OF PUBLIC WORKS

Wade Lord, Program Administrative Officer, and Troy Tanigawa, County Engineer of Kauai County Department of Public Works, Lihue, Kauai, HI, appearing for Applicant.

Matthew Wall, Resilience Branch Chief, Brian Fisher, Chief Recovery Officer, Paul Hoe, Project Specialist Lead, and Skip Cerminaro, Consultant, Honolulu, HI, appearing for Grantee.

John Ebersole and Andrew Bevacqua, 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 **LESTER**, **SULLIVAN**, and **O'ROURKE**.

SULLIVAN, Board Judge, writing for the Panel.

Kauai County Department of Public Works (Kauai) sought public assistance funds to replace a culvert and a section of roadway that were washed away as the result of historic rainfall in April 2018. Upon learning that Kauai had completed the replacement work prior to the completion of its environmental and historic preservation (EHP) review, the Federal Emergency Management Agency (FEMA) denied Kauai's request for public assistance. We determine that Kauai demonstrated an immediate threat that justified proceeding with the project. We further determine that Kauai complied with the best management practices (BMPs) and avoidance mitigation measures (AMMs) that FEMA belatedly put in place as the result of its EHP review.

Background

Over four days in April 2018, Kauai experienced extensive rainfall. In May 2018, the President declared the event a major disaster which authorized FEMA to obligate public assistance funds for the repair or replacement of facilities damaged by the rainfall.

Kauai applied for public assistance in the amount of \$1,769,950 to replace a culvert and section of roadway on Kahiliholo Road. FEMA inspected the site in June 2018. FEMA Response to Request for Arbitration (FEMA Response), Exhibit 1 at 1.¹ During that inspection, FEMA's EHP inspector stated that FEMA was aware of the "exigent circumstances" of the project. Request for Arbitration (RFA) at 4. FEMA and Kauai agreed to a scope of work for the project in which the parties noted that the road was closed to public traffic and "[a]n alternate route through private property provide[d] access to parcels blocked by the closed access."² Exhibit 14 at 1.³ On November 1, 2018, Kauai gave the contractor a notice to proceed. Exhibit 15. The project was completed in September 2019. Exhibit 3.

FEMA did not submit the project for review by the EHP reviewers until March 15, 2019.⁴ The record submitted by FEMA contains a document, titled "record of environmental consideration," in which comments from an initial review were entered on March 19, 2019. Exhibit 4 at 2-4. In the initial review, FEMA determined that it did not need to prepare an environmental impact statement and that the only potential environmental effects from the project were to the endangered species or critical habitats near the construction site. *Id.*

¹ "Exhibit X" refers to exhibits attached to the FEMA Response.

² FEMA obligated funds for emergency work and the creation of a "temporary access" through private property. Exhibit 21 at 1, 2. In the project report, FEMA noted that the road repair construction would begin in December 2018. *Id.* at 13. FEMA indicated that EHP requirements for the emergency work were met and conditions of the Endangered Species Act were monitored. *Id.* at 7, 17.

³ Exhibit 14 is undated, and FEMA's exhibit list does not provide document dates. However, FEMA, in its response, reports that the scope of work was uploaded to the grants manager portal on October 4, 2018. FEMA Response at 10.

⁴ According to the testimony of FEMA's Environmental Officer, the EHP personnel responsible for the EHP review did not receive the scope of work until March 19, 2019. Written Testimony (Oct. 9, 2025) at 7. FEMA provided no explanation as to why it took more than five months for the EHP reviewers to obtain the scope of work.

at 1, 3. This determination regarding possible effects for endangered species required consultation with the United States Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act (ESA). FEMA did not send this consultation request to FWS until November 2019. Exhibit 1 at 3.⁵

In January 2020, FWS concurred both with FEMA's assessment that the project would likely not affect the wildlife near the project site and with the recommended preventative measures to be employed at the site: (1) reducing vehicle speeds; (2) notifying personnel of the presence of endangered species; (3) prohibiting work at night; (4) employing a biological monitor to survey for waterbirds; and (5) if any Hawaiian geese were observed, to cease work until a survey and mitigation plan could be developed. Exhibit 5 at 2-3. Kauai explained that the BMPs and AMMs required by FEMA and approved by FWS were not unique. Applicant Reply to FEMA Response (Applicant Reply) at 3. These BMPs and AMMs were used in all projects undertaken by Kauai and were included in two other projects that FEMA funded. *Id.*

On January 3, 2020, Kauai submitted project closeout documents. In February 2020, Kauai's contractor wrote a letter stating that, as addressed in the FWS letter, no waterbirds were observed in the project area, vehicle speeds were kept at a minimum, and work was only performed during daylight hours. RFA, Attachment 2. FEMA did not ask any questions of Kauai or its contractor regarding efforts to protect endangered species.

In July 2020, FEMA denied Kauai's request for reimbursement of its project costs because Kauai completed the work prior to the EHP review and without implementing the specific conservation measures that FEMA and FWS believed were necessary. Exhibit 17 at 3. FEMA determined that Kauai "completed the work in a manner that is not compliant with the requirements under the ESA." *Id.* FEMA's Environmental Officer (EO) testified that this meant that Kauai completed the project without following the BMPs and AMMs that FEMA recommended, and that FWS agreed should be followed, for the project.

The state of Hawaii submitted Kauai's first-level appeal on September 9, 2020. In its decision dated May 19, 2025, FEMA denied this appeal because Kauai completed the project before FEMA could complete its EHP review and because Kauai had not "demonstrated the

⁵ FEMA's Environmental Officer explained that FEMA and FWS worked to prepare the biological assessment between April and October 2019. Written Testimony at 7.

existence of an imminent threat or extenuating circumstances justifying completion of the project work prior to FEMA's completion of the EHP review." Exhibit 1 at 1.⁶

Kauai filed its RFA on July 21, 2025. The panel convened a hearing on December 4, 2025.⁷ Two witnesses testified on behalf of Kauai. The fire chief for the county testified that the fire department's heavy trucks would not have been able to use the temporary access road. Therefore, the fire department could not reliably provide fire protection to the 100 homes that were cut off as a result of the culvert washout, making expeditious restoration of the roadway and culvert important. FEMA asked the fire chief no questions and provided no information to rebut his testimony.

The program administrative officer (PAO) for the Kauai County Public Works Department testified that the BMPs and AMMs were included in the construction plans for the project and that the project before the panel was located very close to these other two projects funded by FEMA. The PAO also testified that, during the site inspection, FEMA's EHP inspector gave Kauai instructions to proceed with the road replacement procurement process. He also explained that Kauai officials are familiar with endangered species and work hard to protect the environmentally sensitive island in all of its projects. Regarding the need for permits under the Clean Water Act (CWA), the PAO testified that the flood plain manager for the Public Works Department contacted the Honolulu District of the United States Army Corps of Engineers (USACE) before work on the project began and was referred to the guidance memorandum on CWA permitting issued by the USACE Portland District. Based on that guidance, the flood plain manager determined that the project was properly considered to be a maintenance project for which no permit was required.⁸ *See also* Applicant Reply at 5.

FEMA's EO also testified at the hearing. The EO was not involved in the EHP review of the project, the issuance of the determination memorandum, or the first-level appeal but became involved in the matter in September 2025. Based upon FEMA's initial determination that the project "may affect, but [was] not likely to adversely affect" endangered species, FEMA conducted an informal consultation with FWS. The EO testified that there are no

⁶ FEMA provides no explanation as to why it took almost five years to issue its first-level appeal decision.

⁷ The hearing was originally scheduled for October 14, 2025, but had to be rescheduled following the lapse in appropriations that began on October 1, 2025.

⁸ Kauai stated that the project did not require any additional fill. Applicant Reply at 5.

regulatory time requirements for an informal consultation and that the EHP personnel acted reasonably in processing the review. Written Testimony at 7-8.⁹ The EO did not review the testimony of the fire chief and offered no testimony about the substance of the fire chief's testimony. The EO explained that, during project closeout, FEMA determines whether the applicant complied with requirements such as BMPs and AMMs. According to the EO, evidence of compliance includes letters from construction companies about how they complied with requirements.

Discussion

FEMA EHP Policy. FEMA's policy guide advises that applicants should attempt to allow FEMA to complete its EHP review prior to beginning construction:

The Applicant needs to make every effort to afford FEMA the opportunity to perform EHP reviews prior to the start of construction for any Permanent Work project. Proceeding with Permanent Work before FEMA completes EHP reviews jeopardizes [public assistance] funding.

Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 85. As support for this proposition, FEMA cites two sources—42 U.S.C. § 5159 (2018) and 44 CFR part 19—neither of which provides the necessary support. Section 5159 establishes that projects that restore facilities to their pre-disaster condition do not require National Environmental Policy Act, 43 U.S.C. § 1638, review. The regulations to which FEMA cites involve a subject unrelated to EHP review and provide no support for FEMA's policy. Nevertheless, viewing this provision as a ban on construction prior to EHP review, FEMA denied Kauai public assistance because Kauai started construction before the EHP review was complete.

Contrary to FEMA's current position, this policy provision is clearly not an absolute ban on public assistance funding for projects involving construction prior to the completion of EHP review. In the PAPPG, FEMA advises that applicants should make "every effort" to defer permanent construction work until the completion of EHP review and that starting construction prior to that date will "jeopardize" funding. The term "jeopardize" means "to expose to danger or risk: imperil," <https://www.merriam-webster.com/dictionary/jeopardize> (last visited Feb. 6, 2026), or "to put in jeopardy; to endanger." Webster's New Twentieth

⁹ When asked whether completing the EHP review twenty-one months after the disaster was reasonable in light of the FEMA regulatory requirement that permanent work projects be complete within eighteen months, 44 CFR 206.204(c)(1)(2017), the EO offered only that the eighteen-month requirement is a deadline for applicants, not FEMA.

Century Dictionary 982 (2d ed. 1975). While performing permanent work before the completion of EHP review might “imperil” or “endanger” public assistance funding, it does not, under the policy as written, provide an absolute *ban* on funding.

In other cases, FEMA has not treated its policy as a prohibition on construction. Instead, FEMA has proceeded to evaluate EHP compliance when construction was started before an EHP review was completed. In its second-level appeal decision in *Florida Department of Environmental Protection*, FEMA-4399-FL-DR, GMP 133304 (Aug. 19, 2024) (available at <https://www.fema.gov/appeal/ehp-and-other-compliance-5> (last visited Feb. 6, 2026)), FEMA determined, consistent with its position here, that the applicant’s failure to delay its permanent work until the completion of an EHP review “jeopardize[d] [public assistance] funding for the project.” Nevertheless, although FEMA ultimately denied the appeal, it did not do so for the sole reason that the construction work had pre-dated the EHP review. Instead, the appeal was denied because, after the applicant “did not afford FEMA an opportunity to complete its EHP review prior to starting work,” it “did not provide documentation otherwise demonstrating compliance with EHP requirements and related Executive Orders.” Thus, the reason for the denial of public assistance funding was because the applicant could not establish EHP compliance after failing to delay its work until the EHP review was completed. Similarly, the Board has previously considered other situations in which FEMA, to support potential public assistance funding, attempted to conduct a retroactive EHP review when an applicant had completed construction work prior to completion of an EHP review. *See Chemung County, New York*, CBCA 8019-FEMA, 25-1 BCA ¶ 38,766, at 188,413 (discussing situation in which FEMA attempted to conduct an after-the-fact EHP review); *Puerto Rico Infrastructure & Financing Authority*, CBCA 8197-FEMA, 25-1 BCA ¶ 38,756, at 188,386 (same). Although undertaking construction work before completion of the EHP review can jeopardize public assistance funding, FEMA policy still requires an evaluation of whether applicant complied with any EHP requirements for the project.

We also recognize that FEMA denied the first-level appeal, in part, because Kauai had made no showing of immediate threat or extenuating circumstances that would necessitate expedited action on Kauai’s part. Yet, Kauai made this showing before the panel with the un rebutted testimony of the fire chief regarding the inaccessibility of 100 houses by the heavy fire equipment. FEMA argues that the work could not be classified as emergency work because there was no immediate threat to human life or property. FEMA Response at 19-21. Yet, the inability to provide full fire response for 100 houses represents an immediate threat and justified Kauai moving forward with construction even though FEMA’s

EHP review was not complete.¹⁰ In evaluating whether Kauai was justified in performing the construction work at issue prior to FEMA's completion of the EHP review, we cannot ignore FEMA's unexplained delays in conducting the EHP review when it was essential, for public safety reasons and in the face of an immediate threat, that the review be completed quickly. FEMA did not act with any sense of urgency in addressing the construction work that needed to be performed here to protect the safety of the individuals residing in the homes that, because of the loss of the culvert and roadway, could not be fully accessed by the fire department in the event of an emergency. We cannot support FEMA's view that it can inexplicably delay EHP reviews and then criticize an applicant for taking action necessary to protect against immediate threats during such delays. FEMA cannot ignore its own delays in addressing immediate threats when it evaluates whether an applicant acted reasonably in the circumstances and whether public assistance funding should be made available.

Endangered Species Act. FEMA contends that Kauai proceeded with construction without implementing measures required by the ESA. The ESA requires that agencies consult with FWS to determine whether agency actions are likely to jeopardize endangered species. 16 U.S.C. § 1536(a)(2). While that consultation proceeds, agencies may not commit funds to projects that have "the effect of foreclosing the formulation and implementation of any reasonable and prudent alternative measures." *Id.* § 1536(d). Both in the determination memo and the first-level appeal, FEMA found that Kauai had completed the work before FEMA completed its EHP review. However, FEMA did complete its EHP review and determined, with concurrence of FWS, that the project was not likely to jeopardize endangered species and Kauai should follow a standard set of BMPs and AMMs. There was no need for alternative measures. When FEMA learned that Kauai had completed the project, it did not investigate whether these BMPs and AMMs had been followed. It simply denied funding for the project.

After a project is complete, FEMA evaluates whether BMPs and AMMs have been followed. According to FEMA's EO, FEMA evaluates evidence such as the letter from the

¹⁰ FEMA's regulations permit projects to be undertaken as emergency protective measures, but FEMA policy states that applicants still need to comply with environmental laws. PAPPG at 43-44. FEMA explains that FWS will consult on an after-the-fact basis for emergency projects but that such consultation was not appropriate here because FWS only provides such reviews when there is an imminent threat to human life or property. FEMA Response at 20. Here, an after-the-fact consultation was not necessary because FEMA had already consulted with FWS and FWS concurred that the project was not likely to jeopardize endangered species.

construction management firm that Kauai provided. FEMA declined to consider this evidence in this case.

The evidence that Kauai followed the BMPs and AMMs is compelling. Its construction management contractor stated that no waterbirds had been sighted at the project, no work was conducted at night (so no lights were necessary), and vehicle speeds were kept to a minimum. FEMA quibbles that this evidence does not match the BMPs and AMMs exactly, but FEMA chose not to ask further questions about Kauai's compliance with the BMPs and AMMs. We accept Kauai's evidence that it complied with the recommended BMPs and AMMs. FEMA's determination that Kauai's actions foreclosed compliance with the ESA is unsupported.

Clean Water Act. FEMA also contends that Kauai has not demonstrated compliance with the CWA. The USACE is charged with enforcement of the CWA. Both the CWA and its implementing regulations state that a permit is not required for projects undertaken for emergency repairs of transportation structures, such as roads. 33 U.S.C. § 1344(f)(1)(B); 33 CFR 323.4(a)(2). The USACE Portland District issued a memorandum providing guidance on these regulations that explains that "replacing an existing culvert with one that is larger in diameter or one that has a different shape, i.e. arched vs. round, is considered a maintenance activity that does not change the character, scope or size of the original fill design unless additional fill is required." Exhibit 6 at 22 (Interpretation of Federal Regulations and Information for Culvert Maintenance, USACE, Portland District).¹¹

Kauai's project manager testified that the Public Works Department's flood plain manager checked with USACE Honolulu District before the project was undertaken and the Public Works manager was told to consult the guidance issued by the Portland District for road and culvert maintenance projects. Based upon this guidance, Kauai determined that this project was a maintenance project that did not require a permit. We find that Kauai has established CWA compliance.

¹¹ FEMA objects to Kauai's reliance upon this memorandum because Kauai is governed by the USACE Honolulu District, not the Portland District. FEMA Response at 18. FEMA misapprehends the purpose of this memorandum. It is meant to provide guidance regarding USACE's regulations. It is not specific to entities within the responsibility of the USACE Portland District.

Decision

FEMA's determination that the project is ineligible for funding because Kauai undertook construction before FEMA completed its EHP review was incorrect. We further determine that Kauai met the requirements identified in the EHP review. The panel returns the matter to FEMA for further review of the request for public assistance in accordance with this decision.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge