



FEMA

APR 22 2005

Douglas C. Friez
State Coordinating Officer
North Dakota Division of Emergency Management
P.O. Box 5511
Bismarck, North Dakota 58506-5511

Re: Second Appeal - City of Valley City, PAID 003-81180-00,
Audit Report DD-05-03, FEMA-1279-DR-ND,
Project Worksheets (PWs) 2243 & 2244

Dear Mr. Friez:

This is in response to your letter dated February 3, 2005, which transmitted the referenced second appeal. The City of Valley City (City) appealed the Regional Director's decision to deobligate \$1,498,589 in project funding based on an Office of Inspector General (OIG) audit recommendation.

The President declared a major disaster (1279-DR) for the State of North Dakota on June 8, 1999, due to severe storms and flooding. The City was eligible to receive assistance under the Public Assistance Program to repair public facilities that were damaged during the disaster event. The Federal Emergency Management Agency (FEMA) Region VIII staff approved PW 2243 (Sanitary Sewer Relining) and PW 2244 (Force Main Replacement) for the City in February and March 2001, respectively. The City completed the projects in September 2002. Subsequently, the OIG conducted an audit of the City's disaster grants and recommended that FEMA deobligate \$1,480,355 because the damages described in PWs 2243 and 2244 were not caused by the disaster as required by the law and program regulations. In addition, the OIG determined that FEMA ". . . inundation and ground saturation policy was not intended to address mitigation of future damages or increasing operational effectiveness of a facility." The deobligation amount was raised to \$1,498,589 with the addition of administrative allowance. FEMA subsequently requested the return of the \$1,312,573 which had been disbursed to the applicant and is the amount being disputed.

A fundamental requirement of FEMA's Public Assistance Program, as authorized by Section 406 of the Stafford Act (42 U.S.C. § 5172), is that the work for which FEMA is requested to provide reimbursement "[b]e required as a result of the major disaster event." 44 CFR § 206.223(a)(1). It is self-evident from the plain meaning of this regulation that FEMA's provision of funds under a particular major disaster declaration be limited to only the damages caused by the event that resulted in the declaration. Stated simply, disaster-specific funding can be provided only for disaster-specific damage.

It is ordinarily not difficult for FEMA to determine the amount and scope of disaster-related damages. However, as Valley City's appeal demonstrates, there are circumstances where determining the specific affect of a disaster event on a facility can be a challenge. In such instances FEMA must be mindful of its authority under the Stafford Act to limit the expenditure of disaster relief funds to damages caused by the disaster, while at the same time doing its best to ensure that Public Assistance applicants are not unduly penalized because they have a facility the nature of which makes determining disaster-related damages difficult.

There is no question in this matter that Valley City's sewer system had experienced problems for numerous years and that it had been negatively impacted by several disaster events prior to 1279-DR. However, the question FEMA must decide is what eligible damage resulted to the sewer system from the events of 1279-DR. By law, only this damage is eligible for Public Assistance reimbursement under the 1279-DR declaration.

To address the difficulties associated with determining damage associated with water inundation and ground saturation, FEMA's Executive Associate Director for the Response and Recovery Directorate issued a memorandum on November 7, 1997. In this memorandum, Mr. Suiter states that FEMA will consider a facility's loss of functionality due to inundation or excessive ground saturation as damage under the Stafford Act. This policy was intended to address reimbursement of damage that may not be readily apparent but which makes itself known because the facility's functionality post-disaster deteriorates or ceases. The test for FEMA then became determining what loss of functionality resulted from 1279-DR and, if there was loss of functionality, what work was necessary, and therefore eligible, to replace that functionality.

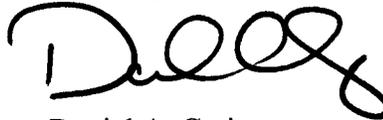
This was not an easy determination to make and after considerable back and forth, the details of which are discussed at length in the City's appeal, FEMA's former Director James Lee Witt determined that the work described in PWs 2243 and 2244 constituted eligible disaster-related damages. It is not the policy of FEMA to contradict a specific eligibility decision of a former Director unless it is found that the decision is contrary to law or regulation. FEMA is obligated to correct any decision that results in the expenditure of appropriated funds contrary to the Stafford Act or regulations.

If eligibility of this facility were being made today, FEMA might not find PWs 2243 and 2244 eligible. However, a reasonable person could conclude that the City's sewer system had to have suffered additional cracking during 1279-DR which would result in increased infiltration and inflow in the future and that this loss of functionality constituted repairable damage under Section 406 of the Stafford Act. The sewer relining reimbursed for in PW 2243 addressed this damage. PW 2244 funded the relocation of the force main portion of the City's sewer system. The relocation of the force main could be determined a rational way to prevent future repetitive damages and loss of use similar to what the City's sewer system had experienced in previous years. Pursuant to 44 CFR § 206.226 (e), FEMA may fund hazard mitigation measures not required by applicable standards. The former Director's decision to fund the relocation of the force main does not contravene this section of the regulations.

For the above reasons, I am granting the appeal. By copy of this letter, I am requesting the Regional Director to restore the funding for PWs 2243 and 2244.

Please inform the City of my determination. My determination is the final decision on this matter pursuant to 44 CFR § 206.206.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Craig', with a stylized flourish at the end.

Daniel A. Craig
Director
Recovery Division
Emergency Preparedness and Response

cc: Doug Gore
Acting Regional Director
FEMA Region VIII