



FEMA

February 24, 2021

Mr. Jared Moskowitz
Director
Florida Division of Emergency Management
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Mr. Joseph Giammanco
Disaster Recovery Grant Director
St. Johns County
500 San Sebastian View
St. Augustine, Florida 32084

Reference: FEMA-4337-DR-FL
St. Johns County
PA ID: 109-99109-00
First Appeal, Grants Manager Project 26097/Project Worksheet 2743

Dear Mr. Moskowitz and Mr. Giammanco:

This is in response to a letter from the Florida Division of Emergency Management (Recipient) dated May 26, 2020, which transmitted the referenced first appeal on behalf of St. Johns County (Subrecipient). The Subrecipient is appealing the U.S. Department of Homeland Security's Federal Emergency Management Agency's (FEMA) decision to deny \$16,519,928.00 in Public Assistance (PA) funding on Grants Manager Project (GMP) 26097 for the construction of emergency sand berms on beaches impacted by Hurricane Irma. The appeal is conditionally granted as explained below and in the enclosed analysis.

Background

St. Johns County (Subrecipient) sustained natural beach and dune erosion as a result of Hurricane Irma, declared September 10, 2017, resulting in widespread flooding in adjacent neighborhoods. The erosion and subsequent flooding occurred from monument markers R-1 to R-209, approximately 30.6 miles within a 41.5 mile stretch of coastline, situated east of State Road A1A—the same areas previously affected by erosion as a result of Hurricane Matthew, declared October 8, 2016. Following Hurricane Matthew, FEMA prepared a project to fund the construction of emergency sand berms along the affected beaches¹; however, the Subrecipient had not begun construction of those berms prior to Hurricane Irma's landfall. Following Hurricane Irma, FEMA prepared a separate project, GMP 26097, to provide additional funding in the amount of \$16,519,928.00 to bring the emergency sand berms initially approved as a result of Hurricane Matthew to a height that would protect the area against the threat of damage from a five-year flood event.

In a letter to the Recipient dated February 12, 2019,² the Subrecipient requested a time extension through December 31, 2021, to complete work associated with GMP 26097. The Subrecipient justified its request in stating that the project was complex and that it was unable to move

¹ See FEMA-4283-DR-FL, Project Worksheet 1061.

² Time Extension Request from Applicant Agent, St. Johns County, to FDEM (Feb. 12, 2019) [hereinafter *GMP 26097 Time Extension Request*].

forward pending the completion of an Environmental Assessment (EA). As of this date, the Recipient has not formally responded to the Subrecipient's time extension request purportedly because GMP 26097 has not been approved and obligated by FEMA. However, it is noted that the full time extension requested exceeds Recipient's regulatory granting authority under Title 44 of the Code of Federal Regulations (44 C.F.R.) § 206.204(c)(ii), and the Recipient has not forwarded the request to FEMA in accordance with § 206.204(d).

In a Determination Memorandum (DM) dated January 23, 2020,³ FEMA denied GMP 26097 because Federal regulations and FEMA policies mandate that Public Assistance (PA) projects are completed within specific deadlines, subject to approved extensions, in order to receive funding for eligible work. FEMA noted that the Subrecipient had not requested a deadline extension until February 12, 2019; nearly 18 months after the disaster declaration, nor had it provided sufficient justification to substantiate the delay.⁴ Moreover, FEMA found that the Subrecipient had taken no action to construct the emergency berms in order to eliminate or lessen the threat of future damages more than three years after the major disaster declaration. Accordingly, FEMA denied GMP 26097, removing a total of \$16,519,928.00 in PA funding. The Subrecipient viewed the DM in Grants Manager on February 20, 2020.⁵

First Appeal

On March 20, 2020, the Subrecipient submitted a first appeal of GMP 26097 to the Florida Division of Emergency Management (Recipient)⁶ asserting that: 1) it was not possible to request an extension prior to the project's obligation, pursuant to guidance provided in a Recipient memorandum; and 2) completion of the scope of work was delayed due to its size, complexity, and scope, and to the Environmental Planning and Historic Preservation (EHP) review process.⁷ The Recipient forwarded the Subrecipient's first appeal to FEMA, with a letter of recommendation on May 26, 2020.⁸ In its transmittal letter, the Recipient reiterates that its memorandum advised subrecipients that time extension requests could only be made for an approved, obligated project.

Discussion

Time Extension

Generally, subrecipients have six months from the date of declaration of the disaster to complete emergency work.⁹ A recipient may extend the deadline by an additional six months based on extenuating circumstances or unusual project requirements beyond the control of the

³ Determination Memorandum from Public Assistance (PA) Management, Region IV, FEMA, to St. Johns County (Jan. 23, 2020).

⁴ *Id.*

⁵ Read Receipt located in Grants Manager (Feb. 20, 2020).

⁶ First Appeal Letter from Applicant Agent, St. Johns County, to Executive Director, Florida Division of Emergency Management (FDEM) (Jan. 30, 2020) [hereinafter *Subrecipient's First Appeal Letter*]; Covid-19 Memorandum from Assistant Administrator, FEMA (Mar. 30, 2020).

⁷ *Id.*, at 3.

⁸ Recipient Letter from Executive Director, FDEM, to Regional Administrator, Region IV, FEMA (May 26, 2020).

⁹ Title 44 of the Code of Federal Regulations (44 C.F.R.) § 206.204(c)(1) (2016).

subrecipient.¹⁰ A request for a time extension beyond a recipient's authority must be submitted to the Regional Administrator and include a detailed justification for the delay and a projected completion date.¹¹

On February 26, 2018, the Recipient issued a memorandum informing all subrecipients that time extension requests without corresponding obligated projects could not be approved and that, only upon project obligation, would the Recipient work with the subrecipient on the official time extension request.¹² As a result, the Subrecipient did not submit a time extension request for GMP 26097 to the Recipient until February 12, 2019. Thereafter, the Subrecipient submitted two retroactive requests to address the six-month time periods between March 11 and September 11, 2018, and September 12, 2018, and February 11, 2019. The Subrecipient followed the guidance of the Recipient and understood that this request would not be processed as an "official request" until the project had been obligated.¹³ The Subrecipient made a good faith effort to submit its time extension requests within the presented guidelines; thus, the delayed submission is not of concern.

Extenuating Circumstances

Emergency work, such as the construction of emergency beach berms, is that which must be done immediately to save lives; protect public health and safety; protect improved property; or eliminate or lessen an immediate threat of additional damage. As previously stated, subrecipients have six months from the date of declaration of the disaster to complete emergency work; however, the completion deadline may be extended if there are extenuating circumstances outside of the subrecipient's control. FEMA generally considers the following to be extenuating circumstances beyond a subrecipient's control: delays related to permitting or EHP compliance due to other agencies involved; and environmental limitations (such as a short construction window). Delays in permitting or EHP compliance is not considered an extenuating circumstance outside the subrecipient's control when caused by a subrecipient's delay in requesting permits.¹⁴ The onus rests with the Subrecipient to take necessary actions and precautions to perform emergency work when necessary, regardless of the availability of Federal funding.

On appeal, the Subrecipient states that all parties were aware that six months was not a realistic timeframe to complete the project and that delays were associated with the EHP process, which was not finalized until September 2019. Specifically, the Subrecipient indicates that delays were attributed to the development of the following: an EA; consultations with the State Historic Preservation Office (SHPO); analysis as required under the Coastal Barrier Resources Act (CBRA); and coordination/permits from the Florida Department of Environmental Protection (FDEP), U.S. Fish and Wildlife Service (USFWS), and the U.S. Army Corps of Engineers (USACE). The Subrecipient also points to complicating factors such as nesting habitats for

¹⁰ 44 C.F.R. § 206.204(c)(2)(ii).

¹¹ 44 C.F.R. § 206.204(d).

¹² Memorandum from Executive Director, FDEM (Feb. 26, 2018).

¹³ *Subrecipient's First Appeal Letter*, at 4.

¹⁴ *Public Assistance Program and Policy Guide*, FP 104-009-2, at 141-142 (Apr. 2018) [hereinafter *PAPPG*].

endangered species and identification of an environmentally acceptable upland sand source as additional delays.¹⁵

The EHP review process includes several expedited mechanisms for consideration of emergency and non-emergency projects. Notably, the Robert T. Stafford Disaster Relief and Emergency Assistance Act provides FEMA emergency exemptions under the National Environmental Policy Act (NEPA).¹⁶ In this case, the emergency beach berms could have been statutorily excluded from NEPA review and EHP could have conducted an expedited review within the initial six-month timeframe after the declaration. However, due to the duration of time that passed from the date of declaration to the initiation of the NEPA process, FEMA EHP could no longer statutorily exclude the project from NEPA. The Subrecipient's delay in constructing the sand berms effectively negated the categorization of GMP 26097 as emergency work; therefore, requiring an EA to comply with NEPA requirements.¹⁷ Likewise, the Subrecipient and FEMA EHP could no longer utilize many other expedited review procedures that would have been available if the emergency work began within the first six months as intended, including:

- USACE issued alternative procedures in response to Hurricane Irma to expedite projects for a period of six months after the date of the notice, or March 7, 2018.¹⁸ These procedures would allow for a 24-48 hour turnaround on permit decisions;¹⁹ thus, USACE could have expedited permitting for this project had it been initiated within the six-month timeframe.
- FDEP issued guidance after Hurricane Irma for emergency authorizations required to address the need for immediate action.²⁰ This guidance authorizes sand placement and the restoration of a damaged dune system, if completed prior to October 4, 2018.²¹
- USFWS has a programmatic Biological Opinion (BO)²² which specifically addresses emergency berm repair along the Florida coast and outlines prior consultation with FEMA addressing how projects should be implemented to protect endangered species, resulting in a significant time savings compared to starting a new consultation. Upon request by the Subrecipient, FEMA initiated further consultation with USFWS to modify

¹⁵ *Subrecipient's First Appeal Letter*, at 4.

¹⁶ The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988, Pub. L. No. 93-288, § 102, 42 U.S.C. § 5122 (2013); Section 316 (42 U.S.C. 5159); Council on Environmental Quality (CEQ) Fact Sheet: *The Stafford Act and its relation to the National Environmental Policy Act*.

¹⁷ Environmental Assessment (EA), St. Johns County Emergency Beach Berms, FEMA-DR-4283-FL, FEMA-DR-4337-FL (Sept. 2019); The National Environmental Policy Act (NEPA) § 101 – 102, 42 U.S.C. §§ 4331 – 4332 (2012); Department of Homeland Security, *Instruction Manual 023-01-001-01, Revision 01, Implementation of NEPA, Categorical Exclusions and Extraordinary Circumstances*, V-3 (Nov. 6, 2014); There was missing project information from the Subrecipient during the timeframe the EA was being developed; therefore, EHP conditioned the project to apply for permits as appropriate.

¹⁸ USACE Public Notice, *Alternative Permit Application Processing Procedures for Activities in Response to Hurricane Irma* (Sept. 7, 2017).

¹⁹ *Id.*

²⁰ FDEP (Seventh) Eighth Amended and Restated Emergency Final Order: *Emergency Authorization for Repairs, Replacement, Restoration, and Certain Other Measures Made Necessary by Hurricane Irma*, OGC No. 17-0989 (Feb. 27, 2018).

²¹ *Id.*, Section C.3.a.(3), at 22 (regarding restoration of a damaged dune system).

²² *FEMA Emergency Berm Repair for the Florida Coast*, BO prepared by USFWS (Apr. 3, 2008).

conditions in the BO to be less stringent and in line with other BOs issued in recent years. This consultation was completed in under 6 months.²³ Lastly, turtle nesting season is between May – October and is almost entirely outside of the initial six-month timeframe that construction could have occurred without risk to endangered species.

- The Florida SHPO has a Programmatic Agreement²⁴ in place with FEMA which allows for expedited review procedures. FEMA may conduct expedited reviews of emergency undertakings for 30 days from the beginning of the incident period and, as necessary, this timeframe can be extended in 30-day increments. This allows for a potential three-day turnaround on emergency projects that would need consultation with the SHPO and participating Tribes.²⁵ In this case, FEMA did conduct an emergency consultation with the SHPO and while the construction of new beach berms has the potential to affect historic properties, the SHPO concurred that FEMA has the authority to determine whether the projects qualify under Title 36 of the Code of Federal Regulations § 800.12, *Emergency Situations*,²⁶ and would be exempt from further review under Section 106 of the National Historic Preservation Act (NHPA).²⁷ However, because the Subrecipient had not begun work to construct the emergency berms, FEMA determined that the work could no longer be considered an emergency action exempt from Section 106 review and was, instead, required to use standard review timeframes for consultation. Still, this consultation was completed in under six months.²⁸
- FEMA’s analysis involving CBRA received concurrence from the USFWS 30 days after consultation was provided. Thus, consultation can be completed in under six months.²⁹
- The Unified Federal Review (UFR) process encourages unique approaches to EHP review and, if the Subrecipient had independently completed its own EHP review, FEMA could have ensured that it complied with agency standards and adopted it.³⁰ Thus, the Subrecipient could have initiated its own EHP review early during project formation.

Conclusion

²³ ESA Consultation Letter from Environmental Advisor, FEMA, to USFWS (June 26, 2019); Concurrence Email from USFWS, to Environmental Advisor, FEMA (Sept. 17, 2019, 1511 EST).

²⁴ *National Historic Preservation Act (NHPA) Programmatic Agreement Among FEMA, Florida SHPO, FDEM, Alabama Coushatta Tribe of Texas, Choctaw Nation of Oklahoma, Mississippi of Choctaw Indians, and the Advisory Council on Historic Preservation (ACHP)* (July 16, 2014).

²⁵ *Id.*, I.E.2; II.B.1(a)(b).

²⁶ NHPA, 36 C.F.R. § 800.12, *Emergency Situations*, applies to provisions II.B, *Expedited Review for Emergency Undertakings* in the *PA*, at 12.

²⁷ Email from Compliance Reviewer, SHPO, to Environmental Advisor, FEMA, regarding emergency consultation under Section 106 of the NHPA (Sept. 6, 2017, 1725 EST).

²⁸ NHPA Consultation Letters from Environmental Advisor, FEMA, to Executive Director, SHPO (Jan. 29, 2019) (Apr. 16, 2019); SHPO Concurrence Letter from Executive Director, SHPO, to Environmental Advisor, FEMA (May 21, 2019).

²⁹ CBRA Consultation Letter from Environmental Advisor, FEMA, to USFWS (Jan.4, 2019); Concurrence received from Field Supervisor, USFWS (Feb.4, 2019).

³⁰ Unified Federal Environmental and Historic Preservation Review Library, <https://www.fema.gov/emergency-managers/practitioners/environmental-historic/review/library> (last visited Nov. 24, 2020).

It is evident that the Subrecipient awaited the completion of the full EHP review and permitting process (finalized in September 2019) rather than proceeding immediately following the disaster declaration to protect the immediate area by constructing emergency beach berms; that said, the Subrecipient has had four months since the completion of the EHP process to proceed with the emergency berm work in good faith, and has provided no request nor justification for a time extension beyond December 31, 2021, as requested in its latest time extension request. Accordingly, FEMA will allow a time extension through December 31, 2021; however, it should be noted that a significant amount of time has elapsed from the damage sustained during Hurricane Matthew and the subsequent damage sustained during Hurricane Irma. The current state of the beach's profile is unclear; therefore, this appeal is conditionally granted based on the premise that costs may only be reimbursed on GMP 26097 upon the Subrecipient's compliance with the following conditions:

- 1) Actual project costs for all emergency berms constructed in relation to Hurricane Matthew and Hurricane Irma will be accrued and divided by the total quantity of sand actually placed (in cubic yards) to result in an all-inclusive cost per cubic yard. This cost per cubic yard shall be multiplied by the eligible quantity of sand for each disaster and invoiced accordingly;³¹
- 2) All work from Hurricane Matthew and Hurricane Irma must be completed in conjunction to reduce environmental impacts;
- 3) All conditions outlined in the attached Finding of No Significant Impact (FONSI) are followed; and,
- 4) Subrecipient must justify any future time extensions in accordance with the requirements of 44 C.F.R. § 206.204(d) and such time extension requests must be based upon extenuating circumstances or unusual project requirements beyond the control of the Subrecipient.

This letter constitutes the official notification of this determination to the Subrecipient. If you have questions or need additional information, please contact Mr. Terry L. Quarles, CEM, Director, Recovery Division, at (770) 220-5300.

Sincerely,



For: Gracia B. Szczech
Regional Administrator

Enclosures:

FEMA-4337-DR-FL, *St. Johns County*, GMP 26097, Finding of No Significant Impact (FONSI)
Administrative Record Index

³¹ E.g., Total sand placement cost (for both Hurricane Matthew and Hurricane Irma) / Cubic Yards Placed = Cost/CY; Cost invoiced to GMP 26097 = Eligible Cubic Yards for GMP 26097 x Cost/CY. Please contact the FEMA Region IV Public Assistance Branch for additional explanation.

ADMINISTRATIVE RECORD INDEX
FEMA-4337-DR-FL
St. Johns County, PA ID: 109-99109-00
Grants Manager Project 26097/Project Worksheet 2743

Doc #	No. of Pages	GMP	Document Date	Document Type	From	To	Document Description/ Subject
1	2	26097	05/26/20	Letter	Recipient	FEMA	1 st Appeal
2	5	26097	03/20/20	Letter	Subrecipient	Recipient	1 st Appeal
3	10	26097	01/23/20	Letter	FEMA	Subrecipient	Determination Memorandum
4	11	26097	11/14/19	Project Information	FEMA	N/A	Appeal Attachment #1 Damage, Descriptions, and Dimensions
5	2	26097	02/26/18	Memorandum	Recipient	N/A	Appeal Attachment #2 Time Extensions
6	4	26097	02/12/19	Letter	Subrecipient	Recipient	Appeal Attachment #3 Extension Requests
7	2	26097	03/17/20	Letter	Subrecipient	Recipient	Appeal Attachment #3 Retroactive Extension Request
8	2	26097	03/18/20	Letter	Subrecipient	Recipient	Appeal Attachment #3 Retroactive Extension Request
9	2	26097	Various	Spreadsheet	FEMA	N/A	Appeal Attachment #4 Beach Process Status History
10	3	26097	Various	Spreadsheet	FEMA	N/A	Appeal Attachment #5 Project Comments
11	9	26097	Various	Emails	Various	Various	Appeal Attachment #6 Glassen Email Chain
12	36	26097	03/29/07	Ordinance	Subrecipient	N/A	Appeal Attachment #7 Beach Code 2007-19
13	118	26097	01/2004	Manual	Subrecipient	N/A	Appeal Attachment #8 Beach Management Plan

Doc #	No. of Pages	GMP	Document Date	Document Type	From	To	Document Description/ Subject
14	7	26097	04/04/17	Land Development Code	Subrecipient	N/A	Appeal Attachment #9 Sec. 4.01.08 Environmentally Sensitive Areas
15	4	26097	2025	Comprehensive Coastal Management Plan	Subrecipient	N/A	Appeal Attachment #10 Objective E.1.3 Post Disaster Planning
16	137	26097	08/18/03	Manual	Subrecipient	USFWS	Appeal Attachment #11 Habitat Conservation Plan
17	19	26097	08/10/06	Permit	USFWS	Subrecipient	Appeal Attachment #12 Accidental Take Permit
18	47	26097	2019	Florida Statutes	N/A	N/A	Appeal Attachment #13 Ch. 161 Beach and Shore Preservation
19	4	26097	05/09/17	Memorandum	Subrecipient	Subrecipient	Appeal Attachment #14 Beach Restoration: Legal Considerations
20	1	26097	03/30/20	Memorandum	FEMA	N/A	Appeal Attachment #15 Covid-19 Deadline Extension
21	1	1061	04/14/20	Letter	Recipient	FEMA	File Attachment: Time Extension Request
22	2	1061	04/01/20	Letter	Subrecipient	Recipient	File Attachment: Time Extension Request
23	4	1061	05/23/17	Letter	Subrecipient	Recipient	File Attachment: Time Extension Request
24	227	26097/1061	04/03/08	Biological Opinion	USFWS	FEMA	File Attachment: Emergency Berm Repair
25	22	26097	09/07/17	Public Notice	USACE	N/A	File Attachment: Alternative Permit Process for Hurricane Irma
26	41	26097	02/27/18	Emergency Order	FDEP	N/A	File Attachment: 8 th Emergency Authorization

Doc #	No. of Pages	GMP/ PW	Document Date	Document Type	From	To	Document Description/ Subject
27	30	26097	09/2019	Environmental Assessment	FEMA	N/A	File Attachment: Emergency Beach Berms DR-4283-FL, DR-4337-FL
28	51	26097/1061	09/10/14	Programmatic Agreement	Various	N/A	File Attachment: Historic Preservation FL Statewide PA
29	1	26097	09/06/17	Email	SHPO	FEMA	File Attachment: Emergency Beach Berm Consultation
30	10	26097/1061	01/04/19	Letter	FEMA	USFWS	File Attachment: CBRA Consultation
31	18	26097/1061	01/29/19	Letter	FEMA	SHPO	File Attachment: NHPA Consultation
32	1	26097/1061	02/27/19	Email	SHPO	FEMA	File Attachment: NHPA Consultation Questions
33	20	26097/1061	04/16/19	Letter	FEMA	SHPO	File Attachment: Follow up NHPA Consultation
34	1	26097/1061	05/21/19	Letter	SHPO	FEMA	File Attachment: NHPA Consultation Concurrence
35	3	26097/1061	06/26/19	Letter	FEMA	USFWS	File Attachment: ESA Consultation
36	4	26097/1061	09/17/19	Email	USFWS	FEMA	File Attachment: ESA Consultation Concurrence
37	N/A	26097/1061	10/15/66	Law	ACHP	N/A	NHPA, 36 CFR § 800.12, Emergency Situations
39	91	26097/1061	11/06/14	Directive and Instruction Manual	DHS/FEMA	N/A	File Attachment: Implementation of NEPA
40	10	26097/1061	N/A	Fact Sheet	CEQ	N/A	File Attachment: The Stafford Act and its relation to NEPA
End of Record							