

PUBLICATION

Direct Result of a Disaster

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The Federal Emergency Management Agency (FEMA) provides funding under its Public Assistance (PA) program to eligible applicants (states and territorial governments, tribal governments, local governments and certain private non-profits) for the repair, restoration, reconstruction or replacement of facilities damaged or destroyed by major disasters as declared by the President of the United States.

One of the initial thresholds eligible applicants must meet to receive PA funding is establishing that the scope of work is required as a result of a major disaster, i.e., that the work is necessary to repair damages caused by the disaster. Often applicants consider it a mere formality to establish that damage was caused by a major hurricane, tornado or flood – a facility's roof did not leak prior to the storm, but leaks were discovered during the post-storm inspection; roads were passable before the storm, but were severely cracked after extensive debris removal operations took place; or a facility was operational before the storm, but was inoperable after the storm impacted the area. Under these circumstances an applicant may think it is obvious that the damage was a result of the major disaster. Unfortunately, however, it's not always that simple.

So far in 2021, FEMA has decided 134 Second Appeals (as of the publication date of this brief.)

Of these 134 Second Appeals, 47 of them – more than 35 percent – addressed the issue of whether the applicant sufficiently demonstrated that the damage was a result of the declared incident.

FEMA does not provide Public Assistance funding for "repair of damage caused by deterioration, deferred maintenance, the applicant's failure to take measures to protect a facility from further damage or negligence. See [FEMA's Public Assistance Program and Policy Guide, FP 104-009-2, v. 4 \(June 1, 2020\)](#); 44 C.F.R. § 206.223(e). While FEMA acknowledges that "distinguishing between damage caused by the incident and pre-existing damage" caused by non-storm related factors is difficult, FEMA places the responsibility on the applicant "to demonstrate that damage was caused directly by the declared incident, and where pre-existing damage exists, to distinguish that damage from the disaster-related damage."

When making an eligibility determination, FEMA may consider the age of the facility, evidence of regular maintenance or pre-existing issues, and the severity and impacts of the incident, as it did in the Second Appeal analysis for the Baptist Hospitals of Southeast Texas whose hospital facility was severely impacted by Hurricane Harvey. There, the applicant sought FEMA Public Assistance funding for the replacement of its roof, citing to pre-disaster reports that showed the roof was in good condition before the storm. Though FEMA conceded that the roof appeared to be within its useful life based on the fact that it was less than 20 years old, FEMA found that the applicant's pre-disaster inspection reports, which for the most part provided only a one-word assessment of the facility's roof -- "good"-- did not sufficiently capture the pre-disaster condition of the roof. Further, FEMA found that while the applicant's maintenance reports confirmed that the roof had been inspected twice in the eight-month period prior to the storm, the maintenance records did not detail the condition of the roof observed during the inspections. Finally, FEMA determined that a post-disaster inspection report prepared by the applicant's contractor, which found that large areas of the roof were compromised as a result of Hurricane Harvey's rainfall, conflicted with post-disaster assessments prepared by FEMA and the

applicant's insurer, neither of which identified any Hurricane Harvey-related damage to the facility's roof. Consequently, FEMA found that the "Applicant's records do not enable FEMA to verify predisaster conditions" and that the conflicting post-disaster reports were not enough to establish that the roof damage was caused by Hurricane Harvey. Accordingly, FEMA denied \$4,369,888.64 in Public Assistance funding.

What can applicants do to avoid this result?

Documentation, Documentation, Documentation

The key is to act before a disaster strikes. If an applicant does not have sufficiently detailed inspection reports for its facilities, scheduling inspections should be first priority in order to establish a pre-disaster condition baseline for the facility. This will allow the applicant to distinguish disaster-related damages from pre-existing damages. Inspections should be performed by trained professionals, and reports should be detailed with supporting photographs. Any issues identified in the inspection should be quickly addressed and remedial measures should be similarly documented.

Storms may be unpredictable and can occur with little to no advanced warning, such as the devastating tornadoes that swept through six states in early December 2021. There may not be time for applicants to conduct inspections and prepare reports before the next storm hits. Even under these circumstances, all is not lost.

If a recent inspection report is unavailable, applicants may still be able to establish the pre-disaster condition of a facility with maintenance records showing periodic work at the facility, evidence of a maintenance plan for the facility and budgetary information showing that funds are dedicated to maintaining the facility. Photographs can also go a long way to establish pre-disaster condition. This documentation will allow FEMA to determine that the facility was appropriately maintained.

Remember: damages that appear obviously storm-related in the immediate aftermath may not be so obviously disaster-related when FEMA reviews the project, sometimes years after the storm. It is incumbent on the applicant to establish that damages are disaster-related; there is nothing that is too obvious to document.

If you have any questions on how to sufficiently document the condition of a facility before a disaster or are now faced with a FEMA Determination Memorandum that questions whether the damages were caused by the disaster, please contact [Jordan Corbitt](#) or any member of Baker Donelson's [Disaster Recovery and Government Services Team](#).

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