

# PUBLICATION

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## Category B Emergency Protective Measures vs. Routine Operations/Increased Operating Costs

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**Recent FEMA Determination Memoranda, first appeals, and arbitration filings before the Civilian Board of Contract Appeals (CBCA) reflect a consistent and increasingly rigid approach to Category B Emergency Protective Measures (EPMs). FEMA is drawing a bright line between discrete, incident-driven emergency actions and what it characterizes as routine or increased operating activities. When FEMA concludes that claimed work falls on the "routine operations" side of that line, it is denying entire projects as categorically ineligible – often without reaching questions of cost reasonableness or documentation sufficiency.**

This alert provides a summary of the denial patterns we are seeing, explains the legal framework FEMA is applying, and offers practical guidance for emergency managers and consultants on drafting scopes of work and cost narratives that are more likely to survive eligibility review.

### FEMA's Legal Framework for Category B Emergency Work

Category B EPMs are eligible for Public Assistance only when they are necessary to eliminate or lessen an immediate threat to life, public health, or safety, or to prevent immediate threats of significant additional damage to improved property.<sup>1</sup> On its face, this could include a limitless list of activities taken before, during, and after a disaster. This is supported by FEMA policy, which provides a list of EPMs and notes that the list is non-exhaustive.<sup>2</sup> However, FEMA routinely takes a narrow view of what constitutes an eligible EPM, often resulting in denials.

### Common Denial Rationales Appearing in Recent Determinations

**1. Characterization as Routine Operations:** FEMA frequently denies Category B claims where the activities existed prior to the incident, would have occurred absent from the disaster, or were performed using the applicant's ordinary staff, systems, or contractors. FEMA has treated expanded staffing, increased hours, and enhanced administrative effort as non-emergency operating costs rather than eligible EPMs.

**2. Failure to Fit Within an Enumerated EPM Category:** The Public Assistance Program and Policy Guide (PAPPG) provides a non-exhaustive list of EPMs FEMA considers eligible.<sup>3</sup> Despite this, FEMA increasingly treats its lists of eligible EPMs as exhaustive. If FEMA concludes that the scope of work does not squarely fit within a recognized EPM category, it has denied projects in full on work-eligibility grounds.

**3. Increased Operating Costs Are Not Emergency Work:** FEMA has repeatedly denied claims by characterizing them as increased operating costs, even where applicants demonstrated that the costs were disaster-related. Once FEMA applies this label, the claim often fails as a threshold eligibility matter.

**4. Failure to Separate Emergency Work From Routine Work:** FEMA is no longer treating commingled labor, blended invoices, or post hoc allocations as correctable accounting issues. Where applicants cannot contemporaneously segregate emergency tasks from routine operations, FEMA has denied entire projects.

### The "All or Nothing" Scope Problem

A critical trend in recent determinations is FEMA's reliance on scope level denials. If FEMA concludes that the scope of work itself is ineligible, it has denied all associated costs without parsing individual line items. This approach has appeared repeatedly in appeal responses and arbitration briefing, where FEMA frames disputes as categorical work eligibility failures rather than documentation or cost disputes. This approach increases the importance of providing a clear, concise scope of work that provides a direct link to the need created by the disaster.

### **Drafting Scopes That Are More Likely to Survive Review**

To reduce eligibility risk, Category B scopes of work should be drafted with the same precision as a litigation pleading. Based on recent FEMA determinations, we recommend that applicants and contractors:

- Define the immediate threat explicitly, tying the work to specific conditions, locations, and timeframes present during the incident period. Consider developing a disaster activity log to record this information for all disaster response activities performed and training your staff on how to use that form as part of your organization's disaster response preparations.
- Describe discrete emergency tasks rather than ongoing functions or responsibilities. Instead of describing the work as "performing hurricane-related duties," include specifics such as "fill and place sandbags at City Hall to prevent building flooding," "provide traffic safety services in conjunction with debris removal to ensure the safety of drivers and debris removal crews," etc.
- Explain why routine systems, staffing, or processes were insufficient to address the immediate threat.
- Track and document emergency work separately from routine operations from the outset and ensure that documentation includes the "who, what, when, where, why, and how much" for each item claimed. Consider creating disaster-specific cost codes to separately track time performing emergency work from time spent performing routine operations. For example, emergency medical services (EMS) may assist with evacuating people from medical facilities, nursing homes, or other facilities before, during, and in the immediate aftermath of a hurricane. That time, which is the direct result of the disaster, should be tracked separately from time responding to routine calls for service.
- Align scope language closely with FEMA's policy terminology and examples, avoiding expansive interpretations. Describe the immediate threat that exists as a direct result of the disaster and why the emergency work must be completed as soon as possible to "save lives," "protect public health and safety," "protect improved property," or "eliminate or lessen an immediate threat of additional impacts and damage."

### **Implications for Contractors**

Contractors play a central role in Category B eligibility outcomes. FEMA has denied EPM contract costs where time and materials contracts lacked enforceable cost ceilings, where oversight was inadequately documented, or where emergency tasks were not clearly distinguished from preexisting base contract services. It is critical to work with contractors and structure contracts and related documentation requirements to align with FEMA's application of EPM eligibility review, including requiring that contractors fill out daily activity logs as described above. Doing so will ensure both applicants and contractors are better positioned to avoid denials and downstream disputes.

### **Conclusion**

Category B eligibility disputes are increasingly decided at the scope definition stage. FEMA is applying narrow interpretations and bright line distinctions between emergency work and routine operations. Careful scope

drafting and contemporaneous documentation in the early days of a disaster can determine whether millions of dollars in costs are ultimately reimbursable.

For more information on this, please contact [Charles Schexnaildre](#), [Chris Bomhoff](#), or any member of Baker Donelson's [Disaster Recovery and Government Services](#) team.

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<sup>1</sup> FEMA Public Assistance Program and Policy Guide (PAPPG), Version 5 (Amended), at 130.

<sup>2</sup> *Id.*

<sup>3</sup>*Id.* at 130-132.