



FEMA

May 19, 2022

Mr. Daniel Kelly
Governor's Authorized Representative
New Jersey Office of Emergency Management
PO Box 7068
West Trenton, NJ 08628-0068

Re: FEMA-4086-DR-NJ
Hazard Mitigation Grant Program (HMGP)
HMGP Project# 4086-0488
Borough of Seaside Park
Bayfront Wave Energy Dissipation Structure- Appeal Determination

Dear Mr. Kelly:

This letter is in response to your February 18, 2022 letter from the New Jersey Office of Emergency Management (Recipient), which transmitted an appeal request on behalf of the Borough of Seaside Park (Subrecipient). The Subrecipient requests reconsideration of the Federal Emergency Management Agency's (FEMA) denial of funding for its Bayfront Wave Energy Dissipation Structure Project under the HMGP project number 4086-0488 (Project).

The first appeal submission did provide additional information but did not cite the policy provisions that the appellant believes is inconsistent with FEMA's December 27, 2021 denial. The Recipient's appeal letter dated January 24, 2022, asserts the following:

Neither "implementation" nor "execution" is defined in the FEMA mandates. Without definitions, these terms are subject to interpretation.

The Recipient explained that the Subrecipient interpreted the terms "implementation" and "execution" to mean construction activities, such as the initiation of construction or breaking ground. The Recipient also explained "the Subrecipient viewed the 'permitting process' as part of the planning process of the proposed scope of work (SOW) changes rather than the implementation of execution of change." As such, the Recipient asserts that the Subrecipient made a good faith attempt to advance this project in consultation with FEMA, NJOEM, US Army Corps of Engineers and New Jersey Department of Environmental Protection.

In correspondence dated December 18, 2019, FEMA approved the Phase II - Construction Activities for this project and the letter identifies the approved scope of work (SOW) for this mitigation activity as follows:

The installation of a wave dissipation wall in the upland area along the road to provide additional protection against wave action to an elevation of five (5) feet, six (6) inlets with tide flex valves are to be constructed. The existing outfalls are to be replaced and tied into new watertight inlet structures. The overall improvements are to be made along the bay

from the North Bayview Avenue right-of-way between I Street and Brighton Avenue. A concrete articulated block will be installed and topped a minimum of 3 inches of sand. These improvements are to be installed to dissipate the high velocity waves coming from the bay and to control beach erosion along the shoreline of the Barnegat Bay in the Borough of Seaside Park, New Jersey.

No additional design activities were authorized in the Phase II – Construction Activities.

In its supporting documentation, the Subrecipient requested a time extension along with a SOW change request in March 2021. FEMA did not receive that request and did not approve any changes to the approved SOW.

On October 12, 2021, FEMA received a change of SOW and budget revision request. The budget of the project for Phase 2 was proposed to be increased from \$1,205,000 to \$1,771,244.50, for an increase of \$471,244.50. The request also included a revised 365-day timeline for project completion. The Subrecipient coordinated with the Littoral Society and Stockton University to develop a living shoreline design for the site beginning in January 2021, submitted new permit documents to United States Army Corps of Engineers on September 22, 2021, and a sent tidelands permit to NJDEP on September 16, 2021. The Subrecipient initiated activities to support the new change in scope without receiving FEMA's approval of the new SOW.

As defined in this project's Conditions of Approval, and as required by regulations, any changes to the approved SOW as identified within the application must be submitted to FEMA for consideration and approval prior to implementation [See 2 C.F.R. § 200.308, and Hazard Mitigation Guidance (Feb. 27, 2015), Part VI, Section D.2]. Execution of any modification to the approved SOW without prior FEMA approval may jeopardize funding for the sub-grant project. FEMA must evaluate any change to the approved SOW to ensure the changes proposed in the SOW comply with the funding program eligibility requirements.

Consequently, FEMA Region 2 upholds the original denial based upon the information provided by the Recipient. There is no evidence that FEMA made a material, technical, or procedural error during the evaluation of the request. Therefore, there is no basis to reverse the initial determination for this project. FEMA's decision regarding this sub-application stands. FEMA denies this appeal under 44 C.F.R. § 206.434(d)(2), which states "Activities for which implementation has already been initiated or completed are not eligible for funding."

FEMA acknowledges the Subrecipient's interpretation of the terms "Implementation" and "Execution" was inconsistent with FEMA's application of those terms. Nevertheless, while this difference of interpretation may have been accidental, FEMA does not believe it justifies granting the appeal.¹ In addition, FEMA does understand that the project requires the Subrecipient to work

¹ FEMA's *Hazard Mitigation Assistance Guidance Addendum* (Feb. 27, 2015) elaborates on the meaning of "implantation" on p. 68 where it states, "Project implementation includes everything needed to actually complete the project. Implementation includes the pre-construction activities of plan review and inspection, site preparation, and all construction activities..." However, this applies to reconstruction projects.

with multiple agencies to develop a proposal capable of receiving all necessary permits and approvals. However, this does not change the requirement for subrecipients to obtain approval from FEMA for any change to the previously approved SOW prior to implementation [See Hazard Mitigation Guidance (Feb. 27, 2015), Part VI, Section D.2].

Please inform the Subrecipient of FEMA's determination to terminate Phase II of this project. Also, please initiate project closeout and reimbursement procedures for all eligible Phase II implementation costs. FEMA will only reimburse eligible Phase II implementation. FEMA will not reimburse any (if any) construction activities that were initiated for the modified project.

It is unfortunate we cannot allow the continuation of funding for this activity under this disaster declaration. We are committed to implementing mitigation in this community and my staff will work with your team in moving this mitigation measure forward under a different disaster declaration or a non-disaster grant program.

The Recipient or Subrecipient may appeal this determination to the FEMA Deputy Associate Administrator for Flood Insurance and Mitigation Administration (FIMA) under 44 C.F.R. § 206.440. If the Recipient or Subrecipient elects to file a second appeal, the appeal must:

- 1) Justify the appellant's position with documentation;
- 2) Specify the monetary figure in dispute;
- 3) Cite the provisions in Federal law, regulation, or policy with which the appellant believes the initial action is inconsistent.

The Subrecipient has 60 days from the date of receipt of this letter to submit a second appeal to the Recipient. The Recipient then has 60 days from the date of receipt of the Subrecipient's appeal to forward the appeal, with recommendation, to FEMA Region 2, Regional Administrator via email to fema-actionoffice-r2@fema.dhs.gov. The FEMA Region 2 office would then transmit the second appeal to FIMA at Headquarters for consideration. If you have any questions or require clarification, please contact Michael F. Moriarty, Mitigation Division Director, at (212) 680-3622 or by email Michael.Moriarty@fema.dhs.gov.

Sincerely,

DAVID S WARRINGTON

Digitally signed by DAVID S WARRINGTON
Date: 2022.05.19 17:13:27 -0400

David Warrington
Regional Administrator
FEMA Region 2

cc: Lt. Bradley Waugh, State Hazard Mitigation Officer, NJOEM
Mr. Michael Moriarty, Mitigation Division Director, FEMA Region 2