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Inconsistency Between FEMA's Appeal Policy and Appeal Regulations Proves Fatal to Appeal – and How to Avoid a Similar Fate

Authors: Ernest B. Abbott, Wendy Huff Ellard, Erin J. Greten

July 06, 2023

In June, FEMA issued a second appeal decision that seemed incorrect, so we looked into it. The decision – available here – denied a Public Assistance second appeal filed by the East Boulder County Water District (District), in Boulder County, Colorado, on grounds that the state grant recipient forwarded the District's first appeal late.¹

What was surprising is that the "late" first appeal had in fact been forwarded by the state exactly 120 days from the date that FEMA issued the Determination Memorandum (DM) being appealed. Checking FEMA's Appeal Regulations online (found at 44 C.F.R. 206.206(b)(1)(ii)(A) for first appeals and 206.206(b)(2)(ii)(A) for second appeals), the state recipient forwarded the appeal to FEMA precisely on time: 120 days from FEMA's issuance of the Determination Memorandum. And according to the Federal Register notice promulgating the new appeal regulation:² "DATES: This rule is effective on January 1, 2022." So, FEMA denied an appeal as forwarded late when the state recipient filed precisely on time, under the appeal regulations that were in effect when the appeal was filed.

Nonetheless, FEMA's second appeal decision observed that the first appeal was forwarded 62 days after the District filed it with the state. (The District had filed its appeal two days early – which normally would be considered the responsible thing to do). FEMA observed that "Title 44 of the Code of Federal Regulations, section 206.206(c) (2021)" – which was the regulation in effect before January 1, 2022, when the new regulations became effective – requires Recipients to "review and forward appeals within 60 days after receipt of the appeal from the applicant." Appeal Denied.

So what happened?

In August 2021, FEMA modified its appeal regulations, intending (among other things) to end the controversy over when sub-recipients and recipients (respectively) must file and forward appeals, and to state definitively that late filing or forwarding by either sub-recipients or recipients would be fatal to the appeal. In the new regulation, FEMA changed the forwarding deadline for state recipients from "60 days from receipt of the appeal" to "120 days from" either FEMA's issuance of the Determination Memorandum (for first appeals) or the first appeal decision (for second appeals). To avoid disputes on when to start counting these 60- and 120-day periods, the new regulation requires FEMA's Determination Memoranda and first appeal decisions to be transmitted electronically so there is a record in everyone's files of the exact date when the decision was issued and transmitted.

FEMA's second appeal decision does not explain why it applied the 2021 appeal regulations to the District's 2022 first appeal. We presume FEMA followed the Appeals and Arbitration Policy that FEMA issued in February, 2022.³ That policy states that "For appeals, this policy applies to major disasters declared on or after January 1, 2022."⁴ And in the District's case, the major disaster was declared on December 30, 2021. So, under FEMA's *policy*, the old regulation applied, and the fact that the recipient forwarded the District's appeal timely under the new regulation was irrelevant.

Agency policies provide guidance on how the Agency will implement its governing statutes and regulations – not to change them. While FEMA generally makes new regulations and policies effective only for future disaster declarations, it is not required to.⁵ Even FEMA's "Public Assistance Appeals and Arbitrations Policy" selected different effective dates for different parts of the regulations which had become "effective" on January 1, 2022. In the Policy, the regulatory provisions relating to arbitration and to the 'method of counting' were effective immediately for all disasters declared on or after January 1, 2016. But, as to appeals, FEMA's Policy appears to apply the old regulation (appeal 60 days from DM, forward 60 days from receipt of appeal) rather than the new regulation (appeal 60 days from DM, forward 120 days from DM) for disasters declared before the rule went into effect.

Even if FEMA could override its effective regulations with a mere policy – does it make sense to do so here? With respect to administrative appeals, the statute requires FEMA to promulgate rules "which provide for the fair and impartial consideration of appeals under this section."⁶ FEMA was presumably trying to do so when it revised its appeal regulations to reduce uncertainty and potential litigation over appeal deadlines. By announcing the effective date of its new regulation as "January 1, 2022," FEMA clearly intended sub-recipients and recipients and FEMA staff alike to apply this regulation. If FEMA intended different effective dates for the arbitration and appeal portions of its regulations, it could easily have said so *in the regulation*. But it didn't. FEMA could have interpreted its policy as allowing recipients to continue to use the old appeal timelines for disasters declared before January 1, 2022 – but also permit recipients to use the currently effective regulations.

Instead, in *East Boulder County Water District*, FEMA chose to dismiss an appeal because the recipient used the currently effective FEMA regulation, rather than the FEMA policy implementing the regulation, to count its appeal deadlines. We understand that FEMA is strict and unforgiving on deadlines, with no excuses for late filing or forwarding of appeals. But to dismiss an appeal because a later *policy* delayed the effectiveness of a *regulation*, resembles more of a 'gotcha' game than the fair and impartial consideration mandated by the Stafford Act. FEMA should take another look at 2 C.F.R. §206.206 and its implementing policy, and eliminate the difference between the two.

In the meantime, applicants and recipients should be aware of this policy nuance. When in doubt – file and forward early. Also, if applicants file their appeals 60 days or less from issuance of a DM, and recipients forward them 60 days or less from receipt of the electronically filed appeal, then the recipients will necessarily forward within 120 days of the issuance of the DM - complying with both the old and new regulations.

Should you have any questions about this topic, please contact one of the authors or another member of Baker Donelson's [Disaster Recovery Team](#).

¹ Baker Donelson did not and does not represent either the sub-recipient or the recipient in connection with this appeal; this "Recovery Brief" is based solely on the information in the Second Appeal Letter, in FEMA's regulations, and in current FEMA Policy governing appeal and arbitration filings.

² Final Rule, Public Assistance Appeals and Arbitrations, 86 FR 45660 (August 16, 2021).

³ FEMA Policy # 104-22-0001, Public Assistance Appeals and Arbitration Policy

⁴ Other effective dates in the Policy: For arbitration, recipients and subrecipients are to apply the January 1, 2022. revised regulation, even if the disaster was declared before that date. And for the 'method of counting days,' the Policy goes into effect immediately.

⁵ FEMA has issued Disaster Specific Guidance for numerous disasters, including but not limited to COVID-19.

⁶ 42 U.S.C. 5189(c).