



ERIE COUNTY WATER AUTHORITY INTEROFFICE MEMORANDUM

To: Jerome D. Schad, Chair
Peggy A. LaGree, Vice Chair
Michele M. Iannello, Treasurer
Mark S. Carney, General Counsel

Cc: Terrence D. McCracken, Secretary
Karen A. Prendergast, Chief Financial Officer
Russell J. Stoll, Chief Operating Officer
Leonard F. Kowalski, Executive Engineer

From: Rebecca A. Bylewski

Date: August 8, 2022

Subject: FEMA Appeals Process for Public Assistance

I. Background

i. Overview.

- a. **Appeal:** The appeals process for Public Assistance is codified in 44 CFR 206.206. The law states that “[a]n eligible applicant or recipient may appeal any determination previously made related to an application for or the provision of Public Assistance according to the procedures of this section.” *44 CFR 206.206(b). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu) retrieved 7/27/2022.*
- b. **Arbitration:** An eligible applicant may request arbitration to dispute the eligibility for assistance or repayment of assistance.” *Id. retrieved 7/27/2022.*

ii. Important Definitions

In the context of the appeals process, it is important to define terms. The two important terms for the ECWA to understand are applicant and recipient.

- a. **Applicant:** An applicant is defined as a “State agency, local government, or eligible private nonprofit organization, . . . submitting an application to the recipient for assistance under the State's grant.” *44 CFR § 206.201(a). 44 CFR § 206.201 - Definitions used in this subpart. | CFR | US Law | LII / Legal Information Institute (cornell.edu) retrieved 7/27/2022.*

- b. Recipient:** A recipient is defined as “the government to which a grant is awarded, and which is accountable for the use of the funds provided.” *44 CFR §206.201(m). 44 CFR § 206.201 - Definitions used in this subpart. / CFR / US Law / LII / Legal Information Institute (cornell.edu) retrieved 7/27/2022.*

II. Levels of Appeal for FEMA Public Assistance Denial

- i. First Appeal:** If the ECWA chooses to appeal, its first appeal must be in writing and submitted electronically through the recipient to the FEMA Regional Administrator. *See, 44 CFR 206.206(b)(1) and Federal Register: Public Assistance Appeals and Arbitrations, retrieved 7/27/2022.* “The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's first appeal to the Regional Administrator. The recipient may make recipient-related appeals to the Regional Administrator.” *44 CFR 206.206(b)(1) as retrieved on 7/27/2022.*

a. Requirements for First Appeal

1. ECWA must provide all Documentation: The first appeal must contain “all documented justification supporting the applicant or recipient's position” *44 CFR 206.206(b)(1)(i)(A). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) retrieved 8/1/2022*

2. ECWA must give specific dollar amounts: The first appeal must specify the amount in dispute. *Id. at (b)(1)(i)(B). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) retrieved 8/1/2022*

3. ECWA must cite specific Provisions of Law: The first appeal must “specific the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.” *Id. at (b)(1)(i)(C). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.*

b. Time Limits for First Appeal by ECWA

1. 60 Calendar Days and 120 Calendar Days: The ECWA must make its first appeal within sixty (60) calendar days “from the date of the FEMA determination that is the subject of the appeal and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. If the applicant or the recipient do not meet their

respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal.” *44 CFR 206.206(b)(1)(ii)(A)*. *44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022. A recipient may make a “recipient related first appeal within 60 days from the date of the FEMA determination that is the subject of the appeal and must electronically submit their first appeal to the Regional Administrator.” *Id.*

2. **90 Calendar Days**

a. Within 90 calendar days following the receipt of the first appeal, the Regional Administrator will provide electronic notice to the recipient and applicant if there is a need for additional information. *44 CFR 206.206(b)(1)(ii)(B)*. *44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* retrieved on 8/1/2022. The Regional Administrator generally gives the recipient thirty (30) calendar days to provide any additional information. *Id.* *44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022.

b. The Regional Administrator will provide a notice of disposition of the appeal to both applicant and recipient within the following time frames: 90 calendar days of receipt of the appeal, or within 90 calendar days following any additional information received or following the expiration of the time for providing the information. *Id. at (b)(1)(ii)(C)*. *44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022.

c. When an appeal involves highly technical issues, a Regional Administrator may submit the appeal to an expert in the subject matter of the appeal. *Id. at (b)(1)(iii)*. *44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* retrieved 8/1/2022. The statute provides that the time frame for technical review may be in addition to the time limits already established. *Id.* *44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022.

3. **Important Notes**

a. **Time frame:** The time frames listed above are the new time frames under the revised rules. The deadline was once calculated from the date that FEMA received the appeal. See, *Changes to FEMA's Public Assistance Appeals and Arbitrations Regulation Go Into Effect January 1, 2022 | Baker Donelson* as retrieved on 8/1/2022. Using these new revised rules, if the

ECWA received a Determination Memo from FEMA on June 3, 2022, then it “must submit its appeal to the recipient on or before August 2, 2022, and the recipient must forward the appeal with its recommendation to FEMA on or before October 1, 2022, *regardless of the date that the recipient actually files its appeal.*” *Id.* as retrieved on 8/1/2022.

b. Effect of an appeal pursuant to 44 CFR 206.206(b)(1)(iv)

- i. FEMA will take no action to implement any determination pending a decision from the Regional Administrator.
- ii. The ECWA should be aware that pending an appeal, FEMA may do the following three things:
 1. Suspend funding as provided under 2 CFR 200.339. One example of suspension under 2 CFR 200.339 includes temporarily withholding cash payments.
 2. “Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or
 3. Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.” *Id.* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

c. The Decisions of the Regional Administrator- Outcome of First Appeal

1. Appeal Granted: If the appeal is granted, the FEMA Regional Administrator takes appropriate action. Federal Register :: Public Assistance Appeals and Arbitrations as retrieved on 8/1/2022. This action may be approving additional funding or “sending a Project Specialist to meet with the appellant to determine additional eligible funding.” Federal Register :: Public Assistance Appeals and Arbitrations as retrieved on 8/1/2022. FEMA may also issue separate guidance if it deems it necessary to supplement. 44 CFR 206.206(b)(1)(iv). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

2. Appeal Denied: A second appeal may be submitted by the applicant if the FEMA Regional Administrator denies the

appeal.

- ii. **Second Appeal:** If the ECWA is denied a first appeal, whether in whole or in part, the ECWA may submit a second appeal electronically through the recipient to the Assistant Administrator for the Recovery Directorate. 44 CFR 206.206(b)(2) 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022. The recipient “must include a written recommendation on the applicant’s appeal to the Assistant Administrator for the Recovery Directorate.” *Id.* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

a. **Requirements for Second Appeal:** The requirements for the second appeal are the same as the requirements for the first appeal.

1. Documentation supporting the position. 44 CFR 206.206(b)(2)(i)(A). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.
2. Specific dollar amounts in dispute. *Id.* at (b)(2)(i)(B). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.
3. Provisions of the law that the ECWA argues FEMA was wrong about. *Id.* at (b)(2)(i)(C). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

b. **Time Limits**

1. **60 calendar days and 120 calendar days:** Within 60 calendar days of the Regional Administrator’s first appeal decision, the ECWA may make a second appeal through the recipient and “the recipient must electronically forward to the Assistant Administrator for the Recovery Directorate” the ECWA’s second appeal with its “recommendation within 120 calendar days from the date of the Regional Administrator’s first appeal decision.” 44 CFR 206.206(b)(2)(ii)(A). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022. FEMA will deny appeal if the applicant or recipient fail to meet their respective deadlines. *Id.* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022. A

recipient may seek a second appeal if its first appeal was denied 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically submit their second appeal to the Assistant Administrator of the Recovery Directorate. *Id.* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

2. 90 calendar days:

- a. If there is a need for more information, the Assistant Administrator for the Recovery Directorate will provide electronic notice to both the ECWA and recipient. *44 CFR 206.206(b)(2)(ii)(B).* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022. Once again, the Assistant Administrator will generally allow 30 calendar days to provide more information. *Id.* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.
- b. The Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the second appeal within 90 calendar days to the ECWA and recipient "or within 90 calendar days following the receipt of additional information or following the expiration of the period for providing the information." *44 CFR 206.206(b)(2)(ii)(C).* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.
- c. Once again, the Assistant Administrator for the Recovery Directorate may seek technical advice, and this may require more time. *44 CFR 206.206(b)(2)(iii).* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022. Within 90 calendar days of receiving this report, the Assistant Administrator for the Recovery Directorate, will electronically notify the ECWA and recipient. *Id.* 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

3. Pending Second Appeal: Pending the second appeal, the ECWA should be aware that FEMA may suspend funding as provided under 2 CFR 200.339, or “defer or disallow other claims”; or “[t]ake other actions to recover, withhold, or offset funds as authorized by statute or regulation. 44 CFR 206.206(b)(2)(iv)(B)(1)-(3). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

- c. The Decisions of the Assistant Administrator for the Recovery Directorate - Grant of Second Appeal-** The Assistant Administrator for the Recovery Directorate will order the Regional Administrator to take the appropriate action. 44 CFR 206.206(b)(2)(v). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022. FEMA may issue guidance as necessary. 44 CFR 206.206(b)(2)(vi). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.

iii. Arbitration

- a. Applicability:** The ECWA may request an arbitration from the Civilian Board of Contract Appeals (hereinafter “CBCA”) if the following criteria are met: “(A) There is a dispute of the eligibility for assistance or of the repayment of assistance arising from a major disaster declared on or after January 1, 2016; and (B) The amount in dispute is greater than \$500,000, or greater than \$100,000 for an applicant for assistance in a rural area; and (C) The Regional Administrator has denied a first appeal decision or received a first appeal but not rendered a decision within 180 calendar days of receipt.” 44 CFR 206.206(b)(3)(i)(A)-(C). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.
- b. Limitations: First appeal and Second appeal OR First Appeal and Arbitration:** If the first appeal is not successful, the ECWA may ask for either a second appeal or arbitration but not both. If the ECWA request an arbitration it is in lieu of the second appeal. 44 CFR 206.206(b)(3)(ii). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as retrieved on 8/1/2022.
- c. Time Limits for request- 60 calendar days:** The ECWA may request an arbitration by electronically submitting a request the recipient, CBCA and FEMA that the ECWA wants an arbitration. 44 CFR 206.206(b)(3)(iii)(A). 44 CFR § 206.206 - Appeals and arbitrations. / CFR / US Law / LII / Legal Information Institute (cornell.edu) as

retrieved on 8/1/2022. The time limits imposed are 60 calendar days from the date of the Regional Administrator's first appeal decision or if the ECWA submitted a timely appeal and the Regional Administrator has failed to render a decision within 180 calendar days of receiving the first appeal, the ECWA may arbitrate FEMA's decision. *44 CFR 206.206(b)(3)(iii)(B)(1). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022. "To request arbitration, the applicant must first electronically submit a withdrawal of the pending appeal simultaneously to the recipient and the FEMA Regional Administrator. The applicant must then submit a request for arbitration to the recipient, the CBCA, and FEMA within 30 calendar days from the date of the withdrawal of the pending appeal." *Id. at (b)(3)(iii)(B)(2). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022.

- d. **Content of Arbitration Request.** The ECWA must write a statement requesting the arbitration containing the disaster number, the dollar amounts in dispute, all the documentation supporting the ECWA's position, as well as the name and address of the ECWA's authorized representative or attorney. *Id. at (b)(3)(iii)(C). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022. The statute specifically provides that the expenses for each party will be borne by the party. *Id. at (b)(3)(iv). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022. This means that there would be no award of attorney's fees.
- e. **Finality of decisions.** The ECWA would not have further right to appeal from a second appeal or a FEMA final agency determination. *Id. at (c)(1). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022. Furthermore, if the ECWA chose to arbitrate and a decision was rendered by the CBCA, the majority opinion of the CBCA is the final decision that is binding on all parties. *Id. at (c)(2). 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022. This final decision is not subject to further administrative review. *Id. 44 CFR § 206.206 - Appeals and arbitrations. | CFR | US Law | LII / Legal Information Institute (cornell.edu)* as retrieved on 8/1/2022.

III. **Conclusion:**

Once denied, the ECWA will have only 60 calendar days to prepare its first appeal from denial and submit it to the FEMA Regional Administrator. The ECWA must be prepared to plead its case in any appeal or arbitration with specificity providing all the documentation supporting its position, giving specific dollar amounts in dispute, and providing the applicable Federal law, regulation, or policy that bolsters its position and is contrary to FEMA's determination. If a first appeal is not won by the ECWA, then the Commissioners must analyze and decide what is the best path to take: a second appeal or arbitration. Regardless, there is no appeal from a second appeal or arbitration decision that is not in the favor of the ECWA.



ERIE COUNTY WATER AUTHORITY INTEROFFICE MEMORANDUM

To: Jerome D. Schad, Chair
Peggy A. LaGree, Vice Chair
Michele M. Iannello, Treasurer
Mark S. Carney, General Counsel

Cc: Terrence D. McCracken, Secretary
Karen A. Prendergast, Chief Financial Officer
Russell J. Stoll, Chief Operating Officer
Leonard F. Kowalski, Executive Engineer

From: Rebecca A. Bylewski

Date: July 25, 2022

Subject: Research on Viability of FEMA Appeal

I. Background:

As a national emergency was declared in response to COVID-19 in March 2020, state, local, tribal, and territorial governments (SLTT) and certain private nonprofits (PNP) may be eligible for assistance from FEMA under its Public Assistance program (PA) *FEMA Policy 104-21-0003, Version 2 page 1*. FEMA instituted policies detailing eligibility requirements of work eligible for PA funding in the safe opening and operation of eligible facilities as the pandemic continued. *Id.* There have been three policies that outline eligible assistance that concern reimbursement.

The first FEMA policy, FP 104-009-19, was enacted on September 1, 2020. Under section C.3 of this policy, “[o]nly work associated with the performance of emergency protective measures specifically listed in this policy is eligible for PA in COVID-19-declared events.” *FEMA Policy FP 104-009-19 at page 3*. The work that was eligible for PA was “only for the following emergency protective measures in response to COVID-19 declared event: a. Medical care, in accordance with COVID-19 specific policy or subsequent updates . . . d. Operation of Emergency Operations Centers to direct and coordinate resources and response activities for COVID-19 declarations. e. Communications to disseminate public information regarding health and safety measures and provide warnings about risks and hazards. . . g. Purchase and

distribution of Personal Protective Equipment (PPE) that is directly related to the performance of otherwise eligible emergency work, or is provided to healthcare workers, patients with confirmed or suspected COVID-19 infection, and first responders.” *Id. at pages 3-4.* The policy further provided that “5. FEMA may provide assistance for the following activities in response to COVID-19- declared events only when necessary to perform otherwise eligible emergency work listed in C.4:

a. Purchase and distribution of facemasks, including cloth facial coverings, provided to persons conducting eligible emergency work and/or in facilities where eligible emergency work is performed. b. Temperature scanning, including purchase and distribution of hand-held temperature measuring devices and associated supplies, in facilities where eligible emergency work is performed. c. Disinfection, in accordance with CDC guidance, in facilities where eligible emergency work is performed, including purchase and provision of necessary supplies and equipment, and in excess of current operating costs. d. Acquisition and installation of temporary physical barriers, such as plexiglass barriers, in facilities where eligible emergency work is conducted.” *Id. at page 4.*

On April 5, 2021, FEMA instituted interim policy FP-104-21-0003, Version 1, which applied to “the safe opening and operation work conducted from January 21, 2021, through September 30, 2021, notwithstanding Section C.3 of FEMA Policy (FP 104-009-19) Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim) (effective September 15, 2020).” *FEMA Policy FP-104-21-0003, Version 1, at page 2.* The policy allowed for 100 percent federal funding for eligible costs. *Id.* Under this policy, work that was eligible under FEMA Policy 104-009-19, remained eligible. *Id.*

On September 8, 2021, FEMA instituted another interim policy. FEMA policy 104-21-0003, Version 2, maintains the same scope of work as Version 1 including COVID-19 diagnostic testing, screening and temperature scanning, purchase and distribution of face masks, and cleaning and disinfection. *MEMORANDUM FOR: Regional Administrators FEMA Regions I – X September 8, 2021.* FEMA Policy 104-21-0003, Version 2, is an interim policy that “defines the framework, policy details, and requirements for determining the eligibility of safe opening and operation work and costs under the PA program” from COVID-19. *FEMA Policy 104-21-0003, Version 2, page 2.* To be eligible for PA, the applicant must be legally responsible for the item of work. *Id. at page 3.* Specifically, “[m]easures to protect life, public health, and safety are generally the responsibility of SLTT governments.” *Id.* This interim policy provides that “[l]egally responsible SLTT may enter into a formal agreement or contract with private organizations, including PNP organizations, when necessary to carry out eligible

emergency protective measures in response to the COVID-19 pandemic. In these cases, PA funding is provided to the legally responsible government entity which would then pay the private entity for the provision of services under the formal agreement or contract.” *Id.*

FEMA policy FP 104-21-0003, Version 2, is the policy that FEMA is using to deny PA funds for ECWA projects.

II. ECWA Project Claims Denied by FEMA

- A. Project 673068- DISPUTED AMOUNT: \$194,122.28.** Costs associated with LMHF health care coverage for employees per email from Alexander Frane from FEMA on July 7, 2022, to Karen Prendergast regarding DR-4480-NY - ECWA Project 673068 are being disputed.
- B. Project 182334 - DISPUTED AMOUNT \$504,608.22-** The ECWA claimed force account labor; however, FEMA’s Alexander Frane stated in his email to Karen Prendergast on July 7, 2022, that the amount may be considered as an increased operation cost and is ineligible for reimbursement.
- C. Project 332884 - DISPUTED AMOUNT \$24,905.93-** FEMA’s Alexander Frane stated in his email to Karen Prendergast on July 7, 2022, that eligibility issues exist for the LMHF contract and the services of John H. Ring, III. The argument is that the contract and the services of John H. Ring, III are not within the scope of an emergency protective measure and thus, are ineligible for PA reimbursement.
- D. Project 140287 - DISPUTED AMOUNT: \$188,661.10** FEMA’s Alexander Frane stated in his email to Karen Prendergast on July 7, 2022, that under updated “O & O guidance” some items have been deemed ineligible.

N.B. that in an email exchange between Joyce Tomaka and Alexander Frane, on Monday July 11, 2022, Alexander Frane provided multiple documents including the Safe Opening and Operation Guidance from September 2021. Given the context of the email, it is my understanding that Alexander Frane is referring to FEMA Policy 104-21-0003, Version 2. Also, this is the updated O&O guidance Alexander Frane refers to in the July 7 email to Karen Prendergast.

III. Issue of each claim and viability of appeal

A. Project 673068- DISPUTED AMOUNT: \$194,122.28. The eligibility amounts in question for this project are for the costs associated with LMHF health care coverage for employees as per email from Alexander Frane from FEMA on July 7, 2022, to Karen Prendergast regarding DR-4480-NY - ECWA Project 673068.

1. **Issue(s):** There are two issues to parse out regarding this denial. First, may the ECWA receive reimbursement for COVID-19 related health insurance claims since the ECWA had a contract for health insurance in place before the March 2020 COVID-19 declared emergency? Second, are the records provided to FEMA from the ECWA adequately detailed for FEMA to reimburse the ECWA for COVID-19 related illnesses of its employees who sought treatment?
2. **The Viability of Appeal: Unlikely.** The viability of obtaining reimbursement for health care coverage is unlikely given Alexander Frane's very specific reading of the FEMA policy. Although obtaining reimbursement may be unlikely, the Commissioners may decide that the risk to remove ineligible Blue Cross and Blue Shield payments and waive the right to seek appeal is too great given the high cost involved.

In his Friday, June 10, 2022, email to Karen Prendergast, FEMA's Alexander Frane questioned if the costs associated with LMHF were for ECWA employees seeking treatment for COVID-19 and any subsequent treatments. FEMA's Alexander Frane stated that the LMHF contract presented to FEMA is the same for previous projects that were in eligibility review. Alexander Frane's was concerned that the LMHF contract has been renewed yearly since 2016; however, the alleged medical work performed is for a later period.

In its first policy, FEMA stated that it may provide PA for emergency protective measures only in response to a COVID-declared event with "Medical care, in accordance with COVID-

19 specific policy or subsequent updates.” *FP 104-009-19 at page 3*. FEMA Policy 104-21-0003, Version 2, does not mention medical care. Version 2 specifically provides that “[l]egally responsible SLTT governments may enter into formal agreements or contracts with private organizations, including PNP organizations, when necessary to carry out eligible emergency protective measures in response to the COVID-19 pandemic. In these cases, PA funding is provided to the legally responsible government entity, which would then pay the private entity for the provision of services under the formal agreement or contract.” *FP 104-21-0003, Version 2, at page 3*.

FEMA Policy 104-21-0003, Version 2, provides that FEMA may reimburse for emergency protective measures necessary to save lives and protect public health and safety in accordance with the Stafford Act sections 403 and 502. Section 403(b) of the Stafford Act lists “emergency medical care, emergency mass care . . . and other essential needs” as items that a federal agency like FEMA may provide that are essential to meeting immediate threats to life resulting from a major disaster. [Stafford Act, as Amended - FEMA P-592 vol. 1 May 2021](#) as retrieved on July 13, 2022. Plus, the work performed in these instances was as a direct result of an emergency in accordance with Emergency Management and Assistance as codified under 44 CFR §206.223(a)(1). [44 CFR § 206.223 - General work eligibility. | CFR | US Law | LII / Legal Information Institute \(cornell.edu\)](#) as retrieved on July 25, 2022. COVID-19 is a major disaster and life-threatening emergency and as such, the argument can be made that FEMA should reimburse the ECWA for medical costs.

Despite the obvious notion that FEMA may reimburse for emergency protective measures to save lives, FEMA’s Alexander Frane is reading FEMA Policy 104-21-0003, Version 2, very specifically and literally. Contracts with businesses must be in response to the COVID-19 pandemic. Alexander Frane refers to the ECWA having a contract with LMHF pre-COVID. The ECWA had a health care contract in place prior to COVID-19. There has been no termination of the LMHF contract between the ECWA and the LMHC. Since the ECWA health

care contract was not negotiated in response to COVID-19 medical care, the medical care provided in this instance is not eligible. The LMHF contract was already in place prior to the COVID-19 national emergency. As the ECWA did not negotiate a new contract for health care to specifically include COVID-19 related illnesses, PA for reimbursement will likely be denied.

Even if the ECWA can successfully argue for medical care reimbursement, another hurdle for reimbursement exists. In his Friday June 10, 2022, email, Alexander Frane states that the ECWA should “[p]lease include the invoice numbers and related amounts for the record summary” to be reimbursed. Karen Prendergast replied to Alexander Frane’s assertions in a June 13, 2022, that Blue Cross and Blue Shield provided the ECWA “with a list of COVID payments for each of the periods associated with the filed projects. The claims were paid on numerous invoices. There are claim numbers on both the COVID claims report and each paid invoice so I was able to identify some of the invoices where COVID claims were paid – there are too many to identify all invoices.”

Factors affecting the allowability of costs for a Federal award include that claimed costs must be adequately documented. 2 CFR 200.403(g). [2 CFR § 200.403 - Factors affecting allowability of costs. | CFR | US Law | LII / Legal Information Institute \(cornell.edu\)](#) as retrieved on July 25, 2022. Further, claims must “[b]e necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles.” *Id.* as retrieved on July 25, 2022. To be reimbursed, an invoice for reimbursement must adequately document invoice numbers and related amounts. This type of adequate documentation may require specificity. Specificity may require disclosing a COVID-19 affected employee’s protected health information. Therefore, specificity in an invoice by the ECWA may identify an employee and disclose an employee’s protected health information, which may violate HIPAA.

B. Project 182334 - DISPUTED AMOUNT \$504,608.22. The ECWA has claimed force account labor; however, FEMA's Alexander Frane stated in his email to Karen Prendergast on July 7, 2022, that the amount may be considered as increase operation cost, such as: straight time and overtime for water treatment plant workers and as such is ineligible for PA.

1. Issue. Is the cost of labor for water treatment plant workers during the COVID-19 pandemic eligible for reimbursement under FEMA policy 104-21-0003, Version 2?

2.The Viability of Appeal. Unlikely. The viability of winning an appeal is unlikely.

Although “[r]eimbursement for force account overtime costs, costs related to hiring temporary employees, and contract labor costs associated with performance of eligible emergency protective measures,” is possible under earlier FEMA Policy FP 104-009-19 (C)(5)(g), the work eligible for reimbursement is not specifically listed as eligible emergency work under section 4 of the policy or the most recent interim policy FEMA Policy 104-21-0003, Version 2. After reading the emails of Alexander Frane, his interpretation of FEMA Policy 104-21-0003, Version 2, is very strict and, with little room for argument.

FEMA may assist only for specifically enumerated emergency protective measures in response to COVID-19 declared events. From the application of project 182334- Category B – Emergency Protective Measure- Essential Worker Protection 3/23/2020 to 6/14/2020, the ECWA provided a detailed description in seeking assistance as they attempted to curtail activities to reduce the threat of COVID-19 transmission as well as address positive or presumed positive COVID-19 cases in the workplace. The application stated that the ECWA complied with then Governor Cuomo’s Executive orders 202.4 and 202.39, by rotating essential workers from March 23 to June 14, 2020. *Id.* ECWA employees were protected and could continue to provide safe water service to its customers. *Id.* ECWA employees earned an additional ¼ hour pay for each hour worked. *Id.* Water Treatment plant operators

were segregated into four teams working 12 hour shifts during their two-week rotation from March 23, 2020, to May 31, 2020. *Id.* The ECWA did its job. Although it is the legal responsibility of the ECWA to provide clean drinking water and operate a water treatment plant, those activities are not specifically listed in the FEMA Policy FP-104-21-0003 Version 2, or its predecessors. And given Alexander Frane's strict interpretation of the policy, the ECWA will likely not receive reimbursement.

It is worth noting that under §403 of the Stafford Act, a possible argument may be made to appeal the labor reimbursement issue. Under the Stafford Act, federal agencies may provide assistance to immediate threats to life from a major disaster when "[p]erforming on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including - . . . provision of food, water, medicine durable medical equipment, and other essential needs," [Stafford Act, as Amended - FEMA P-592 vol. 1 May 2021](#) as retrieved on July 18, 2022. Although the language of the Stafford Act may leave open room for argument; however, given Alexander Frane's interpretation of the policy, it is unlikely that a §403 Stafford Act argument will succeed.

C. Project 332884- DISPUTED AMOUNT \$24,905.93. FEMA's Alexander Frane stated in his email to Karen Prendergast on July 7, 2022, that eligibility issues exist in Project 332884 because some items are not within the scope of emergency protective measures. The following contracts were identified as ineligible for reimbursement under FEMA policy 104-21-003, Version 2, which was implemented in September of 2021: Labor-Management Healthcare Fund (LMHF) (\$23,205.93); John H. Ring III (\$1,700.00).

N.B. Health care has been discussed under Project 673068 and not repeated in this section as appeal will likely not be viable for the same reasons.

1. Issues: The issue is as outside legal counsel costs reimbursable under the current FEMA policy?

2. The Viability of Appeal. Unlikely. The likelihood of success for reimbursement of legal services is very unlikely as those services are not specifically listed under the FEMA policy as an emergency protective measure.

D. Project 140287- DISPUTED AMOUNT: \$188,661.10. Per Alexander Frane email July 7, 2022, the following items have been deemed ineligible for PA reimbursement: “WC Materials total cost is \$1687.08 for: 5-Touchless Towel Dispenser- \$292.50 1-Sharp 0.7-CU FT Black CTP (Microwave) - \$55.79 3- 2.7 Cubic FT Compact Black (Refrigerator) - \$340.56 1-.9 CU FT Digital Microwave- \$89.99 3-Toaster Oven -\$161.97 3- K80 K-Select Brewer-Mat - \$350.97 3- Tables- \$107.94 1-Chair-\$35.56 10-Touchless Trash Receptacle - \$251.80 CONTRACT total cost is \$186,974.02 for: John H. Ring IV- Consultant/Developed employee and vendor health screening application 6/6/2020 - 6/16/2020- \$5900.00 John H. Ring IV- Consultant/Developed employee and vendor health screening application- 6/20/2020 - 8/10/2020- \$3100.00 John H. Ring IV- Consultant/Developed employee and vendor health screening application- 8/11/2020 - 9/14/2020 -\$1800.00 Health Care Coalition- Labor Management Healthcare Fund- Cost Sharing multi-employer health care coalition- \$176,174.02 The total cost is \$188,661.10”.

N.B. Health care has been discussed under Project 673068 and not repeated in this section as appeal will likely not be viable for the same reasons.

1. Issues:

- a. Do the items listed above in section F, fall under the category of PPE as covered under *FEMA Policy 104-21-0003, Version 2*?
- b. Does consulting and development of health screening qualify for PA reimbursement.

2. The Viability of Appeal.

- a. **Unlikely.** The viability of winning an appeal on chairs, table, microwave, trash receptacle, microwave, refrigerator towel

dispenser, toaster oven, etc., is not likely to occur. FEMA may aid eligible PA applicants for the “Purchase and distribution of face masks, including cloth face coverings, and Personal Protective Equipment (PPE).” *FEMA Policy 104-21-0003, Version 2 page 5*. PPE is defined to include items such as “N95 and other filtering respirators, surgical masks, gloves, protective eyewear, face shields, and protective clothing (e.g., gowns). Eligibility includes necessary training for proper use of PPE.” *Id. at page 5, footnote 16*. The specific items listed, do not qualify as PPE as defined in the FEMA policy. The items listed are not eligible and therefore the viability of winning an appeal is unlikely.

- b. **Dependent upon more information.** The viability of obtaining PA reimbursement regarding the consulting and development of employee health screening by John H. Ring, IV, depends on the specifics of the services provided by Mr. Ring, IV. The current policy provides for “iii. COVID-19 diagnostic testing. iv. Screening and temperature scanning, including, but not limited to, the purchase and distribution of hand-held temperature measuring devices or temperature screening equipment.” *FP 104-21-0003, Version 2 page 5*. Footnote 18 states that “[a] diagnostic test determines if an active coronavirus infection is present and if an individual should take steps to quarantine or isolate from others.” *Citing, <https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testingbasics>*. On the Department of Homeland Security Federal Emergency Management Agency Streamlined Project Application for Project 140287 on page 6 of 16, the scope of contract is that John H. Ring, IV, would design and maintain a health screening application for employees and vendors.

The viability of winning an appeal depends on the technical specifics. The document provided does not give technical specifics. If the application John H. Ring IV, developed determines if an active coronavirus infection is present and if an employee should quarantine or isolate, then the likelihood of obtaining reimbursement on appeal is greater. The likelihood of

reimbursement is dependent upon how much the health screening application tests for COVID-19 or screening and temperature scanning as provided under the current policy.

E. Conclusion.

FEMA representative Alexander Frane is reading FEMA policy very strictly. Strict interpretation of FEMA policy FP 104-21-0003, Version 2, means that ECWA will likely not be successful on appeal unless the items it is seeking PA reimbursement are specifically listed under the policy's guidance.

If FEMA is unlikely to provide reimbursement, a solution to defray costs may be to determine if the items fall under another federal or state funding reimbursement framework.