

RECOVERY DIRECTORATE MANUAL PUBLIC ASSISTANCE PROGRAM APPEAL PROCEDURES

(Version 2)

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DEPARTMENT OF HOMELAND SECURITY

**FEDERAL EMERGENCY MANAGEMENT AGENCY
OFFICE OF RESPONSE AND RECOVERY
RECOVERY DIRECTORATE**

A handwritten signature in blue ink, appearing to read "Deborah Ingram", written over a horizontal line.

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Date: SEP 30 2013

FOREWORD

This Manual sets forth policies, procedures, and responsibilities for administering the Federal Emergency Management Agency's (FEMA) Public Assistance (PA) Program appeal system. It applies to all PA Program staff and touches on operations at joint field offices, recovery offices, regional offices, and FEMA headquarters.

All applicants for federal disaster assistance are entitled to appeal any FEMA decision regarding eligibility for, or the amount of, such assistance. For PA Program appeals, applicants, subgrantees and grantees are afforded two opportunities for administrative review, one by the applicable FEMA Regional Administrator and one by the Assistant Administrator for the Recovery Directorate at FEMA headquarters. In addition, in some instances, applicants, subgrantees and grantees may pursue binding arbitration administered by an independent review panel. This Manual is designed to help ensure that the PA Program provides applicants, subgrantees and grantees with a fair, orderly, and simplified appeal process; compiles a comprehensive set of materials upon which appeal decisions and arbitration procedures are based; and issues consistent, articulate, well-reasoned, and timely appeal decisions.

In order to accomplish these objectives, the commitment and cooperation of PA Program staff throughout the agency is vital. The coordinated approach outlined in this Manual calls for PA Program staff to, among other things:

- Communicate openly with applicants regarding eligibility issues and, when circumstances warrant, provide applicants with an opportunity to participate in a facilitated discussion regarding eligibility issues before making a final eligibility determination.
- Address as many eligibility issues as possible when making an eligibility determination.
- Share information about appeals and agency appeal decisions.
- Help develop procedures that ensure appeal decisions are issued accurately and timely.
- Adhere to standard appeal response templates and styles.
- Ask for or offer assistance on appeal processing, when appropriate.

The PA Appeals Branch (PAAB), a team of PA Program headquarters staff, working alongside embedded Office of Chief Counsel attorneys, is dedicated solely to administering and improving the PA Program appeals system. The PAAB's work will include coordinating with regional staff to develop standard operating procedures for processing first appeals, as well as issuing official memoranda, policies, and other guidance for PA Program appeal administration. The PAAB is available to answer questions and offer guidance on the policies, procedures, and responsibilities outlined in this Manual.

Deborah Ingram
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Date: _____

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CHAPTER 1: GENERAL INFORMATION

1-1. **Purpose**

This Manual describes policies, procedures, and responsibilities applicable to FEMA *Public Assistance Appeals Branch (PAAB)* and Public Assistance (PA) Program staff for adjudicating appeals filed by PA applicants, subgrantees, and grantees.¹

The policies, procedures, and responsibilities set forth in this Manual, in conjunction with the PA Program Appeals Directive (Directive), dated July 26, 2013, are designed to create an organized, consistent, and efficient system for responding to PA Program eligibility disputes. This system is designed to ensure that FEMA issues consistent appeal decisions within legally mandated response times and to highlight areas in which FEMA can improve PA Program policies and procedures, enhance communication with grantees and applicants, and enable field staff to render high-quality, accurate eligibility determinations in order to decrease the number of appeals filed by applicants.

1-2. **Applicability and Scope**

This Manual applies to all FEMA PA Program staff.

1-3. **Supersession**

None.

1-4. **Authorities/ References**

- A. Section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a.
- B. Section 1105 of the Sandy Recovery Improvement Act of 2013 (SRIA), Pub. L. No. 113-2.
- C. 44 Code of Federal Regulations §§ 206.206 and 206.210.

1-5. **Definitions**

- A. *Administrative record* means all documents and materials directly or indirectly considered and relied upon by FEMA in making a Public Assistance eligibility determination and subsequent *first appeal* determination. This record may include, but is not limited to, Project Worksheets (all versions) and their corresponding *Public Assistance Determination Memoranda*, supporting backup documentation, correspondence, photographs, technical reports, and other relevant information.

¹ The PA Program appeal process is available to PA Program applicants, subgrantees and grantees. Most appeals are submitted by applicants or subgrantees, through the grantee. For the sake of simplicity, the procedures set forth in this Manual assume that the party challenging an eligibility determination is an applicant or subgrantee. When a grantee itself challenges an eligibility determination on its own behalf, PA Program staff can follow appropriate, modified procedures consistent with those outlined in this Manual. For ease of reference, this Manual also refers to both applicants and subgrantees as “applicants.”

- B. *Dispute Resolution Pilot Program* means the program authorized by SRIA under which a PA applicant may request the use of alternative dispute resolution, including arbitration by an independent review panel, to resolve eligibility disputes under the PA Program, as set forth in 44 C.F.R. § 206.210. A PA applicant may only request arbitration when (1) the assistance pertains to declarations made on or after October 30, 2012; (2) the amount in dispute is \$1 million or more;² (3) the assistance is or would be subject to a non-federal cost share; and (4) the applicant has filed a *first appeal* and has received a *first appeal* decision.
- C. *First appeal* means the first-level appeal of a FEMA PA eligibility determination filed by an applicant that a FEMA Regional Administrator evaluates and decides upon, as set forth in 44 C.F.R. § 206.206.
- D. *Project Worksheet development (PW development)* means the development of PA subgrant applications or “Project Worksheets”—the mechanism for documenting federal disaster recovery assistance—which involves collecting essential information about applicants, damage, proposed project costs and scopes of work, and other information, as well as properly documenting this information.³
- E. *Public Assistance Appeals Branch (PAAB)* means the branch established within the PA Division at FEMA headquarters charged with developing, maintaining, and managing PA appeal doctrine and policy; providing PA appeal-related training and guidance materials; supporting FEMA regional offices’ *first appeal* adjudication efforts; and engaging in other PA appeals-related efforts. The *PAAB* includes FEMA Office of Chief Counsel attorneys assigned to advise and assist the branch.
- F. *Public Assistance Determination Memorandum* means the one-page synopsis of an eligibility determination that PA Program staff complete to concisely and accurately document and explain the determination.
- G. *Second appeal* means the second-level appeal of a FEMA PA eligibility determination filed by an applicant following a FEMA Regional Administrator’s *first appeal* decision that FEMA’s Assistant Administrator for the Recovery Directorate evaluates and decides upon, as set forth in 44 C.F.R. § 206.206.

1-6. **Responsibilities**

- A. The *Public Assistance Appeals Branch* maintains overall responsibility for administering FEMA’s PA Program appeal system. This responsibility includes:
 1. Developing, maintaining, and managing PA Program appeal doctrine and policy. This doctrine and policy includes this Manual, as well as the accompanying Directive. This doctrine and policy is designed to provide uniformity of substantive and procedural decision-making agency-wide and to allow the *PAAB* to collect data and identify trends that form the basis of potential programmatic changes.

² Under SRIA, this amount will be adjusted annually based on the Consumer Price Index for All Urban Consumers published by the Labor United States Department of Labor.

³ For ease of reference and consistency, this Manual uses the term “PW” or “Project Worksheet.”

2. Ensuring that all appeal determinations (for both *first appeals* and *second appeals*) are issued within regulatory timelines by developing and maintaining standard operating procedures, tracking mechanisms, and procedures for arranging supplemental staff support as needed.
3. Providing regular updates (for both *first appeals* and *second appeals*) on important appeal decisions and trends through distribution of a PA Appeals Digest, broadcasts, and/or other communications means. These updates are designed to provide current, relevant information about appeal decisions and to improve the consistency of decision-making on an agency-wide basis.
4. Identifying, based on an analysis of collected data and recurring trends, improvements to the *PW development* process, such as recordkeeping, documentation, and decision-making improvements, as well as proposed regulatory changes to streamline and improve the appeal process (for both *first appeals* and *second appeals*).
5. Providing training on appeal processing (for both *first appeals* and *second appeals*), new developments in PA policy and law, and lessons learned to help refine *PW development* and other PA processes and procedures.
6. Coordinating with the Office of Chief Counsel's Disaster Litigation Branch to share information and best practices to improve both the PA appeal process and the PA *Dispute Resolution Pilot Program* process.
7. Processing *second appeals*, which includes analyzing all relevant documentation and legal and policy issues and drafting, reviewing, and finalizing thorough final appeal decisions.

B. PA Program staff in FEMA regional offices are responsible for:

1. Promptly transmitting to the *PAAB* (a) newly filed *first appeals*, (b) newly issued *first appeal* decisions, and (c) newly filed *second appeals*; providing the *PAAB* with information and updates on *first appeal* responses; and working with the *PAAB* to develop and update standard operating procedures for responding to appeals.
2. Drafting recommendations for *first appeal* decisions issued by Regional Administrators; ensuring that *first appeal* decisions inform applicants of their *second appeal* rights and responsibilities; and, when applicable, ensuring that *first appeal* decisions inform applicants of their rights and responsibilities under the *Dispute Resolution Pilot Program*.
3. Compiling and indexing the complete *administrative record*.
4. Consulting with regional counsel on legal issues presented in *first appeals*.

C. PA Program staff in FEMA joint field offices typically are not directly involved in PA appeal processing but, nonetheless, play a vital role in PA appeal adjudication by:

1. Disseminating information about the PA appeal process and the *Dispute Resolution Pilot Program* to applicants.

2. Being responsible for *PW development*, which generates much of the information and material included in the *administrative record*.
3. Working with applicants and grantees to address unresolved issues.
4. Issuing unequivocal, written eligibility determinations informing applicants as to their appeal rights and responsibilities.

1-7 Revisions and Supplemental Information

An electronic version of this Manual will be available on the [PAAB intranet site](#).⁴

- A. Any changes to this Manual will be reflected in a Record of Change incorporated with the document.
- B. When warranted, the *PAAB* will issue instructional memoranda to provide further guidance on the procedures outlined in this Manual

1-8. Questions

Any questions or comments concerning this Manual should be addressed to the Public Assistance Program's *Public Assistance Appeals Branch* at (202) 646-3057 or PAAB@fema.dhs.gov.

⁴ The site is located at <http://on.fema.net/components/orr/recovery/pad/Pages/AppealsBranch.aspx>.

CHAPTER 2: PRE-APPEAL PROCEDURES

2-1. Disseminating Information About the Appeals and Dispute Resolution Pilot Program Processes

- A. At an applicant's Kickoff Meeting, PA Program staff must brief applicants on the PA appeal and *Dispute Resolution Pilot Program* processes and provide the applicant with a copy of a PAAB brochure containing information about both. PA Program staff must also inform the applicant that the brochure will be made available online, along with other resources related to PA appeals and the *Dispute Resolution Pilot Program*.
- B. Specific topics to be highlighted at the Kickoff Meeting include:
1. The invitation to informally discuss unresolved issues regarding eligibility with FEMA as early as possible.
 2. The potential to participate in a facilitated discussion regarding unresolved eligibility issues prior to a FEMA eligibility determination.
 3. The time for filing an appeal.
 4. The importance of identifying and updating applicant points of contact for receiving FEMA eligibility determinations.
 5. The contents and structure of an effective *first appeal* letter.
 6. The option to pursue arbitration under the *Dispute Resolution Pilot Program* following a FEMA *first appeal* decision, and the eligibility requirements and general procedure for requesting arbitration.
 7. The option to pursue a *second appeal* following a FEMA *first appeal* decision, the timeline for filing a *second appeal* of a FEMA eligibility determination, and the contents and structure of an effective *second appeal* letter.
 8. The need to provide all pertinent information and supporting documentation at the *first appeal* stage, given that the administrative record will close following a *first appeal* and no new information will be accepted in a subsequent arbitration under the *Dispute Resolution Pilot Program* or a *second appeal*.⁵

⁵ With respect to arbitration under the *Dispute Resolution Pilot Program*, evidence not previously entered into the *administrative record* will be excluded from arbitration proceedings. With respect to *second appeals*, if an applicant provides additional, pertinent information on *second appeal* that likely would have changed the outcome of the *first appeal* decision, and the applicant was unable to provide the information during the *first appeal* due to circumstances beyond its control, PAAB will remand the appeal back to the relevant region for further consideration.

2-2. Developing PWs

PA Program staff, in developing PWs in accordance with the Project Worksheet Development Guide (July 2008), also must do so in accordance with guidance for developing an *administrative record*. That guidance appears in Appendix A of this Manual. Developing PWs in accordance with the requirements for an *administrative record* will help ensure that project information is robust and complete, which will be useful for effective project administration and, therefore, be beneficial regardless of whether a dispute arises at all, or a dispute arises that could lead to a *first appeal* and, potentially, an arbitration or *second appeal*.

2-3. Discussing Unresolved Issues

- A. PA Program staff should communicate openly and collaborate closely with applicants and grantees in order to resolve eligibility issues.
- B. PA Program staff are encouraged to consult with FEMA's Alternative Dispute Resolution (ADR) staff about offering an applicant and the grantee the opportunity to participate in a facilitated discussion to resolve outstanding eligibility issues. Such a facilitated discussion is encouraged if, in the discretion of PA Program and ADR staff, the conversation would provide a reasonable opportunity for all interested parties to identify, clarify, and attempt to resolve outstanding eligibility issues before the agency makes an official eligibility determination. PA Program staff can contact ADR representatives at (202) 646-2835. A facilitated discussion may be appropriate when:
 1. FEMA, grantee, and applicant attempts to resolve eligibility issues appear to have reached an impasse, and relationships and focus among the parties appear to be deteriorating.
 2. The parties do not appear to be in agreement on the precise eligibility issue(s) involved or do not appear to understand one another's position on the eligibility issue(s) involved.
 3. The applicant is not forthcoming with documentation or information requested by FEMA needed to resolve the eligibility issue(s).
- C. PA Program and ADR staff should always offer a facilitated discussion when an eligibility issue, if appealed, would qualify for resolution under the *Dispute Resolution Pilot Program*. Specifically, a facilitated discussion should be offered if the amount in dispute is greater than \$1 million and the project is or would be subject to a non-federal cost share.
- D. If an applicant is offered the opportunity to participate in a facilitated discussion, PA Program staff must inform the applicant that it will not lose any appeal or arbitration rights if the applicant declines or if a facilitated discussion does not resolve all issues.
- E. A facilitated discussion will take place only if the applicant agrees to participate. If an applicant requests a facilitated discussion, it should take place if, based on the guidance discussed above, PA Program staff and ADR staff determine that such discussion is warranted.
- F. If PA Program staff offers a facilitated discussion, PA Program staff must note in the appropriate PW and/or Case Management File (CMF) (a) when the facilitated discussion

was offered to the applicant, (b) whether the offer was accepted, and, if accepted, (c) when the facilitated discussion took place, and (d) its outcome.

- G. If a facilitated discussion takes place, PA Program staff should, within five (5) business days after the discussion, either:
1. Issue an eligibility determination as specified under Section 2-5; or
 2. If additional actions are necessary or would be helpful, issue the parties participating in the discussion a brief memorandum setting forth (a) a summary of the discussion, (b) any issues resolved, (c) any issues outstanding, (d) specific action items and the parties responsible for those items, and (e) any other relevant information.

2-4. Making Eligibility Determinations

- A. When making eligibility determinations in which the issues involved are particularly complex or the decision to be made is unclear, PA Program staff should consult *second appeal* decisions available online. *Second appeal* decisions offer key guidance on how eligibility issues should be resolved, based on the facts and circumstances of each particular matter. Because *second appeal* decisions address specific factual situations, PA Program staff should carefully consider such decisions in light of their specific context. To the extent *second appeal* decisions are squarely on point and provide clear guidance on how an eligibility issue should be decided, however, PA Program staff should follow those decisions, as doing so promotes efficiency and uniformity in agency decision-making.
- B. In order to limit the prospect of multiple appeals filed by a single applicant on a single project, PA Program staff should strive to address and make determinations on as many different eligibility issues as possible at one time. For example, if there is a question about whether an applicant is eligible, the eligibility of the facility and disaster damage could also be addressed at the same time.
- C. PA Program staff should seek to obtain assistance from, and coordinate with, regional and agency headquarters staff, as appropriate, in making eligibility determinations.

2-5. Issuing Eligibility Determinations

- A. If, pursuant to Section 2-3 of this Manual, a facilitated discussion occurs but does not resolve the issue(s), the PA Program staff should issue a formal eligibility determination within five (5) business days. If a facilitated discussion does resolve the issue(s), that resolution should be noted in the appropriate PW and/or Case Management File.
- B. If no facilitated discussion occurs, the PA Program staff should issue a formal eligibility determination as soon as practicable.
- C. For the purposes of the PA appeals procedures set forth in 44 C.F.R. § 206.206, agency actions that constitute an eligibility “determination” subject to appeal include:
1. Determining that the applicant, facility, work, and/or cost is ineligible.

2. Awarding a PW or amendment of a PW.⁶
 3. Denying a request for an alternate project.
 4. Denying a request for an improved project.
 5. Denying a hazard mitigation proposal.
 6. Denying a request for a time extension.
 7. Denying a request for a net small project overrun.
 8. Denying a request for additional funding for the closeout of a large project.
 9. Acting upon an Office of the Inspector General recommendation.
- D. A formal eligibility determination consists of a letter PA Program staff send to the grantee. The letter will:
1. Notify the grantee that the agency has made an eligibility determination and explain the reasons for the determination by either referencing and attaching a completed *PA Determination Memorandum* or, if no *PA Determination Memorandum* was completed, clearly explaining why the determination was made, specifically referencing applicable provisions of law and policy supporting the decision.
 2. Note the applicant's *first appeal* rights, specifically stating that:
 - a. The applicant may appeal the determination to the appropriate FEMA Regional Administrator, pursuant to 44 C.F.R. § 206.206.
 - b. If the applicant elects to appeal, the *first appeal* must: (1) contain documented justification supporting the appeal position; (2) specify the monetary figure in dispute; and (3) cite the provisions in federal law or policy with which the applicant, subgrantee, or grantee believes the determination was inconsistent.
 - c. The applicant's opportunity to provide documentation and other information in support of its position is at the *first appeal* stage, as FEMA will not accept additional materials after it issues a *first appeal* decision.
 - d. The applicant must submit the *first appeal* to the grantee, which will forward the *first appeal* to the appropriate FEMA Regional Administrator.
 - e. Pursuant to 44 C.F.R. § 206.206(c), the applicant must submit the *first appeal* to the grantee within 60 days of receiving the eligibility determination.
 3. Provide a brief index of the *administrative record* compiled to that point, listing all relevant materials associated with the applicant and the eligibility determination.

⁶ FEMA's obligation of a PW version or amendment does not necessarily constitute a new determination for any decisions that were made in a prior version of that PW.

4. Instruct the grantee to transmit the eligibility determination to the applicant and provide FEMA with proof of the applicant's receipt within fifteen (15) calendar days.

FEMA's letter to the grantee will serve as the agency's official notice of its eligibility determination pursuant to 44 C.F.R. § 206.206, and the date the applicant receives that notice (e.g., proof of receipt obtained by the grantee) will serve as the date from which the applicant's 60-day time period to file a *first appeal*, through the grantee, runs.⁷ The date of receipt will serve as the date from which the applicant's 60-day time period to file a first appeal runs, regardless of whether the applicant anticipates or learns of an eligibility determination before that date.

The grantee is responsible for ensuring that the applicant receives the eligibility determination in a timely fashion. If the grantee fails, however, to transmit the eligibility determination and provide FEMA with proof of the applicant's receipt within fifteen (15) calendar days, PA Program staff shall issue the eligibility determination letter directly to the applicant by certified mail, return receipt requested, with a copy to the grantee. In such cases, the applicant's 60-day time period to file a first appeal, through the grantee, will run from the day it receives the letter from FEMA.

⁷ Pursuant to 44 C.F.R. § 206.206, after the applicant submits its *first appeal* to the grantee, the grantee reviews the appeal and forwards it, along with a written recommendation, to the appropriate FEMA Regional Administrator within 60 days.

CHAPTER 3: FIRST APPEAL PROCEDURES

3-1. Sharing Information About First Appeals Filings and Decisions

- A. Regional PA Program staff can provide valuable support to the *PAAB* by promptly sharing information about *first appeal* filings, response progress, and decisions. Such information will help the *PAAB* carry out its mission, which includes offering support on *first appeal* processing and tracking common or complex issues being addressed in *first appeals* across all FEMA regions.
- B. Regional PA Program staff must update a first appeal tracker stored on the [PA Program SharePoint site](#)⁸ every week.
- C. Regional PA Program staff must, within three (3) business days of receiving a *first appeal* from an applicant, provide an electronic copy of the appeal to the *PAAB* via the [PA Program SharePoint site](#). Providing copies of *first appeals* to the *PAAB* will enable *PAAB* staff to identify and track appeals issues and trends in development across all FEMA regions.
- D. Regional PA Program staff must, within three (3) business days after a *first appeal* decision is issued, provide an electronic copy of the decision to the *PAAB* via the [PA Program SharePoint site](#).

3-2. Compiling the Administrative Record

- A. Regional PA Program staff must compile the *administrative record* when an applicant submits a *first appeal*.
- B. The *administrative record* contains all the documents and materials directly or indirectly considered by the agency and relied upon in making its eligibility determination and *first appeal* decision. This record may include, but is not limited to, project worksheets (all versions) and their corresponding *PA Determination Memoranda*, supporting backup documentation, correspondence, photographs, technical reports, and other relevant materials.
- C. SRIA requires FEMA to provide the *administrative record* when the applicant requests arbitration under the *Dispute Resolution Pilot Program* following a *first appeal* decision.
 1. An applicant has an opportunity to pursue arbitration under the *Dispute Resolution Pilot Program* following a *first appeal* decision when the assistance pertains to declarations made on or after October 30, 2012, the amount in dispute is \$1 million or more, and the assistance is or would be subject to a non-federal cost share.
 2. In all *first appeal* cases in which an applicant has an opportunity to pursue arbitration under the *Dispute Resolution Pilot Program*, PA Program regional staff must prepare and index the *administrative record* at the same time they are evaluating and deciding the *first appeal*. Doing so will help ensure that the agency is able to comply with *Dispute Resolution Pilot Program* regulatory provisions should an applicant pursue arbitration following a *first appeal* decision.

⁸ The PA Program SharePoint site is located at: <https://esw.fema.net/esw/Recovery/PA/default.aspx>.

- D. Regional PA Program staff must compile an *administrative record* for all *first appeals*, even if an appeal would not be eligible for the *Dispute Resolution Pilot Program*, because doing so will ensure consistency in *first appeal* processing and contribute to more thorough, well-reasoned and well-supported *first appeal* decisions.

3-3. Reviewing, Analyzing, Drafting, and Finalizing First Appeal Decisions

- A. Regional PA Program staff should rely on the Appeals Analysis Checklist (Appendix B) and *first appeal* response templates (Appendix C) when reviewing and analyzing *first appeals* and drafting, finalizing, and issuing *first appeal* responses.
- B. The *PAAB*, in consultation with regional PA Program staff and counsel, will develop a standard operating procedure (SOP) for reviewing and analyzing *first appeals* and drafting, finalizing, and issuing *first appeal* decisions. The SOP will include a requirement that only *PAAB*-certified appeal analysts may review and analyze appeals and will enable certified analysts to review and analyze a *first appeal* and draft, finalize, and issue an accurate and articulate *first appeal* decision within the 90-day response time limit set forth in 44 C.F.R. § 206.206(c)(3).
- C. Because the *administrative record* will close following a *first appeal* decision, and applicants will not be allowed to provide additional information in a subsequent arbitration under the *Dispute Resolution Pilot Program* or a *second appeal*, PA Program staff will provide applicants with a final opportunity to supplement the *administrative record* on *first appeal*. Specifically:
 - 1. When, following a preliminary review, PA Program staff anticipates that the applicant's first appeal will be denied, PA Program staff should issue a request for information (RFI) asking for any additional information within 30 days.
 - 2. The RFI should remind the applicant that it cannot provide additional information in a subsequent arbitration or *second appeal*.
 - 3. The RFI should include a brief index of the *administrative record* compiled to that point, listing all relevant materials associated with the applicant, the eligibility determination, and the *first appeal*. If the case would be eligible for the *Dispute Resolution Pilot Program* following a *first appeal* decision, the RFI should also include the full *administrative record* compiled to that point.
 - 4. After the applicant responds to the RFI or fails to within 30 days, PA Program staff should proceed with finalizing the *first appeal* decision.
- D. When reviewing and analyzing a *first appeal*, PA Program staff might identify an eligibility issue unrelated to the original issue presented on appeal and not previously identified by FEMA, the applicant, and/or the grantee. In such circumstances, PA Program staff might determine that one issue is so fundamental that resolution of that issue is necessary to determine whether the applicant will receive any assistance at all. That "fundamental issue" may take precedence over the other issue. In order to preserve the integrity of the PA Program and provide fairness to applicants, PA Program staff in such cases should adhere to the following procedures:

1. If the decision is to deny the appeal based on the original issue presented, and the newly identified issue is a “fundamental issue,” PA Program staff should pause its appeal analysis and issue an RFI letter that:
 - a. Identifies the newly identified “fundamental issue”;
 - b. States that FEMA is making an eligibility determination on the newly identified issue;
 - c. Asks the applicant to inform FEMA whether to issue decision on the original issue or to defer decision until the applicant files and FEMA is able to decide on a *first appeal* addressing the newly identified issue;
 - d. Informs the applicant of its *first appeal* rights regarding the newly identified issue (as detailed in Section 2-5); and
 - e. Notifies the applicant that that the date the applicant receives the letter (as indicated in the certified mail return receipt) will serve as the date from which the applicant’s 60-day time period to file a *first appeal*, through the grantee, runs.
2. If the decision is to deny the appeal based on the original issue presented, and the original issue is a “fundamental issue,” PA Program staff should proceed with the appeal analysis and issue a decision that:
 - a. Denies the applicant’s appeal based on the original issue;
 - b. Informs the applicant of its *second appeal* rights and responsibilities (and, if applicable, its arbitration rights and responsibilities under the *Dispute Resolution Pilot Program*) regarding the original issue (as detailed in Section 3-4); and
 - c. Includes an appeal analysis that mentions the newly identified issue but specifies that FEMA is not making an eligibility determination on that issue because the issue is moot until or unless the original issue is reversed on *second appeal* or arbitration under the *Dispute Resolution Pilot Program*.
3. If the decision is to grant the appeal based on the original issue presented, PA Program staff should proceed with the appeal analysis and issue a decision that: .
 - a. Grants the applicant’s appeal based on the original issue;
 - b. Includes an appeal analysis that addresses the newly identified issue, regardless of whether it is a “fundamental issue”;
 - c. States that FEMA is making an eligibility determination on the newly identified issue;
 - d. Informs the applicant of its *first appeal* rights regarding the newly identified issue (as detailed in Section 2-5); and
 - e. Notifies the applicant that the date the applicant receives the letter (as indicated in the certified mail return receipt) will serve as the date from which the applicant’s 60-day time period to file a *first appeal*, through the grantee, runs.

3-4. Issuing First Appeals Decisions

- A. Regional PA Program staff must issue final *first appeal* decisions simultaneously to the grantee and applicant. The appeal response letter shall be addressed to both and sent by certified mail, return receipt requested. (See template in Appendix C.) The letter, signed by the Regional Administrator, must set forth the applicant's *second appeal* rights and responsibilities and, in cases in which the amount in dispute is \$1 million or more and the project is or would be subject to a non-federal cost share, the applicant's right to an arbitration under the *Dispute Resolution Pilot Program*.
1. With respect to *second appeals*, the decision must inform the applicant that:
 - a. The applicant may appeal the *first appeal* decision to FEMA headquarters by filing a *second appeal*, pursuant to 44 C.F.R. § 206.206.
 - b. If the applicant elects to appeal, the appeal must: (1) contain documented justification supporting the appellant's position; (2) specify the monetary figure in dispute; and (3) cite the provisions in federal law or policy with which the applicant believes the determination was inconsistent.
 - c. The applicant must submit the *second appeal* to the grantee, which will forward the *second appeal* to the appropriate FEMA Regional Administrator. The Regional Administrator will then forward the *second appeal* to FEMA headquarters for review and decision.
 - d. Pursuant to 44 C.F.R. § 206.206(c), the applicant must submit the *second appeal* within 60 days of receipt of the *first appeal* decision.
 2. With respect to disputes eligible for arbitration under the *Dispute Resolution Pilot Program*, the decision must inform the applicant that:
 - a. The applicant may pursue binding arbitration by an independent review panel under the *Dispute Resolution Pilot Program*, pursuant to 44 C.F.R. § 206.210.
 - b. If the applicant elects to pursue arbitration, it must submit a Request for Arbitration form simultaneously to the grantee, the arbitration sponsor, and FEMA within fifteen calendar days of receipt of the *first appeal* decision.
- B. In addition to providing the appeal analysis, the letter shall provide the applicant with an index of the *administrative record*, listing all relevant materials associated with the applicant and the *first appeal* decision.
- C. The date on which the applicant receives the *first appeal* decision (as indicated in the certified mail return receipt) will serve as the applicant's official date of receipt of the decision from which the time to file a *second appeal*, through the grantee, runs,⁹ as well as from which the time to submit a request for arbitration under the *Dispute Resolution Pilot Program* runs.

⁹ Pursuant to 44 C.F.R. § 206.206, after the applicant submits its *second appeal* to the grantee, the grantee reviews the appeal and forwards it, along with a written recommendation, to the appropriate FEMA Regional Administrator within 60 days.

3-5. Processing Second Appeals Filings

When a grantee transmits an applicant's *second appeal* to a FEMA regional office, regional PA Program staff must, within three (3) business days of receiving the appeal, provide an electronic copy of a *second appeal* transmittal memo (see Appendix D for template), the appeal, and any supporting documentation to the *PAAB* via the [PA Program SharePoint site](#). Hard copies of these materials do not need to be provided to the *PAAB* unless they cannot easily be converted in to an electronic format and sent to the *PAAB* electronically. When PA Program staff do need to send hard copies, they should do so within ten (10) business days of receiving the materials.

3-6. Obtaining Assistance from the Public Assistance Appeals Branch

- A. Regional PA Program staff are strongly encouraged to request assistance from the *PAAB* whenever there is a risk that a *first appeal* decision may not be issued within the 90-day time limit set forth in 44 C.F.R. § 206.206(c)(3) due to, for example, an unusually high volume of appeals, particularly complex appeals, or unanticipated staffing shortages.
- B. When requested, the *PAAB* may provide assistance by (1) requesting assistance from an appeals analyst assigned to another regional office, (2) directly analyzing and drafting first appeal responses; or (3) coordinating contractor support. When *PAAB* staff members provide direct support by analyzing and drafting first appeal responses, they shall recuse themselves from working on any subsequent second appeals.

CHAPTER 4: SECOND APPEAL PROCEDURES, AND PUBLIC ASSISTANCE APPEALS BRANCH OPERATIONS

4-1. Monitoring First Appeals Filings and Decisions

- A. The *PAAB* will continually review and monitor *first appeal* filings provided by regional PA Program staff in order to identify PA eligibility issue trends and anticipate additional PA Program appeal activity.
- B. The *PAAB* also will review and monitor *first appeal* filings in order to track regional PA Program staff progress in complying with allowable timeframes and, when necessary, identify resources for assistance when there an indication that a *first appeal* response will not be provided within the 90-day time limit set forth in 44 C.F.R. § 206.206(c)(3).

4-2. Reviewing, Analyzing, Drafting, and Finalizing Second Appeal Decisions

- A. *PAAB* staff will review and analyze *second appeals* and draft, finalize, and issue *second appeal* decisions.
- B. *PAAB* staff will rely on the Appeals Analysis Checklist (Appendix B to this Manual) when reviewing and analyzing *second appeals* and drafting, finalizing, and issuing *second appeal* responses.
- C. When reviewing and analyzing a *second appeal*, *PAAB* staff might identify an eligibility issue not previously identified by FEMA, the applicant, and/or the grantee. In such circumstances, *PAAB* staff will follow procedures similar to those discussed in Section 3-3.

4-3. Issuing Second Appeals Decisions

- A. The *PAAB* will issue final *second appeal* decisions, signed by the Assistant Administrator for the Recovery Directorate, simultaneously to the grantee and applicant. The appeal response letter shall be addressed to both and sent by certified mail, return receipt requested.
- B. All *second appeal* decisions must inform the applicant that the decision represents the agency's final decision in the matter.

4-4. Updating and Assisting Regional Public Assistance Staff

- A. *PAAB* staff will, when appropriate, reach out to regional PA Program POCs on appeals issues to determine whether any assistance in responding to *first appeals* or addressing other, related appeal issues is necessary. If assistance is necessary, *PAAB* staff will work with the POC to determine the most effective way *PAAB* can provide assistance.
- B. The *PAAB* will provide additional assistance to regional PA Program staff by providing regularly updated appeals digests highlighting and discussing significant appeals and appeals trends, offering training opportunities, and offering suggestions on process improvements.
- C. The *PAAB* will provide regional PA Program staff with regular updates and more detailed information on the policies and procedures outlined in this Manual.

APPENDIX A: ADMINISTRATIVE RECORD CHECKLIST

The specific materials required to be included in each *administrative record* will be dictated by the issues involved in each individual first appeal. Appendix D (Categorical Checklist) of the Project Worksheet Development Guide (July 2008) should serve as a guide for what materials to include.

Every *administrative record* should contain:

- All versions of all relevant Project Worksheets, including backup documentation.
- Public Assistance Determination Memoranda.
- The applicant's *first appeal* correspondence and any supporting documentation.
- The grantee's correspondence to FEMA regarding the *first appeal*.
- Any other correspondence relate to the *first appeal*.
- All information stored in the Emergency Management Mission Integrated Environment ("EMMIE") related to the eligibility determinations for the project at issue. Such written materials should include, but is not limited to:
 - Meeting notes, including lists of meeting attendees.
 - Site visit notes.
 - Damage assessments.
 - Photographs of damaged sites.
 - Case Management File notes and materials.
 - All substantive emails containing information leading to the agency's decision. Inconsequential email exchanges or emails reflecting personal opinions of employees should not be included.
- A written statement indicating whether a facilitated discussion occurred.
- Depending on the issues involved, additional materials addressed in Appendix D (Categorical Checklist) of the Project Worksheet Development Guide (July 2008).

Items that should never be included in an *administrative record* include:

- Documents containing personally identifiable information (PII)
- Documents that are attorney-client privileged
- Document drafts

Always consult with OCC when determining what to include in the *administrative record*.

APPENDIX B: APPEAL ANALYST CHECKLIST

TASK	INFORMATION AND INSTRUCTIONS	
REVIEW APPLICABLE STATUTES, REGULATIONS, POLICIES, AND GUIDANCE	<ul style="list-style-type: none"> ▪ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5207 ▪ Title 44 of the Code of Federal Regulations ▪ PA Program 9500 series policies and standard operating procedures ▪ Public Assistance Guide (FEMA 322) ▪ Public Assistance Policy Digest (FEMA 321) ▪ Debris Management Guide (FEMA 325) ▪ Public Assistance disaster specific guidance ▪ FEMA Appeal Response Database (www.fema.gov/appeals) ▪ Disaster Operations Legal Reference (DOLR) 	
REVIEW TIMELINE	<ul style="list-style-type: none"> ▪ Applicant must request a first-level appeal in writing to the grantee within 60 days of receipt of FEMA's notification of the eligibility determination ▪ The grantee will review appeal documentation and request additional information if necessary ▪ The grantee will prepare a recommendation on the merits of the appeal and forward its recommendation and the appeal to the FEMA Regional Administrator within 60 days of receiving the applicant's appeal letter ▪ If the applicant submits the appeal after the regulatory deadline, discuss with the appropriate PA Program supervisor before moving forward with the appeal analysis ▪ The Regional Administrator will review the appeal and take action within 90 days of receipt of the first-level appeal package: <ul style="list-style-type: none"> - Provide a decision on the appeal and inform the grantee and applicant of the decision - Request additional information and establish a deadline for submittal, after which FEMA has 90 days to render a determination - Request a technical review, after which FEMA has 90 days to render a determination 	
REVIEW APPEAL PACKAGE AND REQUEST ADDITIONAL DOCUMENTATION	<ul style="list-style-type: none"> ▪ Review appeal package for pertinent information and supporting documents ▪ Complete Administrative Record Index using the Administrative Record Checklist 	<ul style="list-style-type: none"> ▪ Appeal and supporting documentation should include: <ul style="list-style-type: none"> - Appeal correspondence - PWs pertaining to the appeal - Supporting documentation - NEMIS/EMMIE Summary Report - Disaster-specific guidance pertaining to the appeal issue ▪ When required, submit a Request for Information (RFI) to the applicant with a complete list of additional information needed
IDENTIFY APPEAL ISSUES	<ul style="list-style-type: none"> ▪ Identify specific issues in the applicant's appeal letter ▪ What is the applicant appealing and why? 	<ul style="list-style-type: none"> ▪ Identify all issues raised by applicant and the basis for the appeal for each issue ▪ Identify the reasoning behind the applicant's position on the issue(s) ▪ Review the grantee's appeal recommendation for further background on the issue(s)
	<ul style="list-style-type: none"> ▪ Identify any other issues pertinent to resolution of the appeal not raised by the applicant or grantee 	<ul style="list-style-type: none"> ▪ Address newly identified issues in accordance with Section 3.3 of this Manual
	<ul style="list-style-type: none"> ▪ Establish chronological background of each appeal issue 	<ul style="list-style-type: none"> ▪ Identify dates, scopes of work, funding amounts, issues, and description of all decisions and correspondence ▪ Obtain a summary of all relevant PWs prepared for the applicant, if necessary
ANALYZE APPEAL	<ul style="list-style-type: none"> ▪ Establish contextual understanding 	<ul style="list-style-type: none"> ▪ Research each issue in detail to establish how and why the decision being appealed was reached ▪ Research all relevant sections of statute, regulation,

APPENDIX B: APPEAL ANALYST CHECKLIST

TASK	INFORMATION AND INSTRUCTIONS	
		and policy
	<ul style="list-style-type: none"> ▪ Assess eligibility of appeal 	<ul style="list-style-type: none"> ▪ Based on the review of available documentation, determine whether the appealed FEMA decisions are consistent with FEMA laws, regulations, and policies
	<ul style="list-style-type: none"> ▪ Develop a recommendation for the appeal 	<ul style="list-style-type: none"> ▪ The recommendation must be <ul style="list-style-type: none"> - Logical and defensible - Supported by FEMA law, regulations, and policies - Supported by accepted engineering practices, if appeal includes technical issues
DOCUMENT APPEAL RECOMMENDATION	<ul style="list-style-type: none"> ▪ Prepare an Appeal Analysis, Appeal Response Letter, and Appeal Brief (internal FEMA document) for all appeals (see templates) ▪ An Appeal Analysis is presented in three sections: <ul style="list-style-type: none"> - <u>Background</u> <ul style="list-style-type: none"> • Situation • Issue - <u>Discussion</u> <ul style="list-style-type: none"> • Rule • Analysis - <u>Conclusion</u> 	<ul style="list-style-type: none"> ▪ Background includes: <ul style="list-style-type: none"> - A chronological summary - Description of the damage and the effect of the event, including reported damage - Process involved in determining eligibility of the PWs - Any other relevant disaster events - Eligible scope of work and approved funding amounts - The determination that is being appealed (include dollar amount) - The issues brought up by the applicant relative to the appeal - The applicant's position with respect to the issue(s) - A description of any additional documentation submitted with appeal - A description of any relevant points made by the grantee (but there is no need to summarize the grantee's letter – only include points/issues that were not included by the Applicant, but are relevant to the appeal) ▪ Discussion includes: <ul style="list-style-type: none"> - The substantive discussion of the merits of the request and the documentation - The sections of the statutes, regulations, or policies that apply to each issue - An eligibility analysis of each issue with respect to the appropriate statute, regulation, or policy - The recommendation for each issue - The basis of each recommendation - If multiple issues must be addressed, a subdivision of the Discussion section to allow for a clear discussion of each issue ▪ Conclusion includes: <ul style="list-style-type: none"> - One-paragraph summary of the Discussion - Simple presentation of the issue, recommendation, and associated revised funding ▪ The Appeal Response Letter addressed to the grantee and the subgrantee should be a short letter summarizing issues and determination

APPENDIX C: APPEAL RESPONSE TEMPLATES

APPEAL BRIEF TEMPLATE:

[Note: this template is for internal FEMA use for when regions to submit to the PAAB their first appeal responses; it does not have to go to grantee or the applicant]

**FIRST APPEAL BRIEF
FEMA-XXXX-DR-XX
Applicant Name, PA ID XXX-XXXXX-XX,
Project Title, Project Worksheet XX**

Cross-Reference: *[Enter keywords from appeals keywords list.]*

**Requested Funding/
Funding**

Approved: *[Enter amount in dispute/amount of additional funding approved in appeal response (if any)]*

Resolution: *[Enter “Approved,” “Partially Approved,” or “Denied”]*

Issues:

1. *[State the issue in the form of a question that the appeal decision answers].*
2. *[State any additional, separate issues in the form of a question answered by the appeal decision].*

Findings:

1. *[Provide a “Yes” or “No” answer to the question. If needed, add a sentence to explain the answer].*
2. *[Provide a similar answer for any additional issues.]*

Rationale: *[List all law, regulation, and/or policy citations supporting the findings.]*

APPENDIX C: APPEAL RESPONSE TEMPLATES

Cross-Reference Keywords for Appeal Briefs (current as of July 2013)

- Administrative Costs
- Alternate Project
- Audit Findings
- Applicant Eligibility
- Audit Findings
- Bridges
- Buildings
- Codes and Standards
- Contracting
- Cost Eligibility
- Cost Overruns
- Debris on Private Roads
- Debris Removal
- Direct Administrative Costs
- Documentation
- Duplication of Benefits
- Eligibility
- Emergency Protective Measures
- Emergency Work
- Environmental Compliance
- Equipment
- Equipment Rates
- Equipment Replacement
- Facility Eligibility
- Force Account Labor
- Flood Control Works (FCWs)
- General Eligibility
- Grant Acceleration Program (GAP)
- Hazard Mitigation
- Improved Projects
- Increased Operating Costs
- Insurance
- Labor Costs
- Landslides
- Legal Responsibility
- Levees
- Net Small Project Overrun
- Other Federal Agency (OFAs)
- Overtime
- Permanent Work
- Pre-Disaster Condition
- Private Nonprofit (PNP)
- Private Property and Private Roads
- Project Management Costs
- Reasonable Cost
- Repair vs. Replace (50% Rule)
- Request for Public Assistance (RPA)
- Roads
- Scope of Work
- Snow Removal
- Temporary Facilities
- Time Limitations
- Work Eligibility

APPENDIX C: APPEAL RESPONSE TEMPLATES

APPEAL RESPONSE LETTER TEMPLATE:

[Name of grantee representative]	[Name of applicant representative]
[Director]	[Director]
[Name of grantee organization]	[Name of applicant organization]
[Street address]	[Street address]
[City, state, Zip Code]	[City, state, Zip Code]

Re: First Appeal–Applicant Name, PA ID [PA ID number], [Disaster or emergency number, in “FEMA-XXXX-DR-XX” format], Project Worksheet (PW) [PW number(s)]

Dear [last name of grantee representative and applicant representative]:

This letter is in response to a letter from [name of grantee organization] dated [date], which transmitted the referenced first appeal on behalf of [name of applicant organization] (Applicant). The Applicant is appealing the Department of Homeland Security’s Federal Emergency Management Agency’s (FEMA) denial of funding in the amount of \$[amount] for [description of project].

As explained in the enclosed analysis, I have determined that [*provide summary of decision giving enough information to convey the rationale for the decision*]. Accordingly, I am [granting or denying] this appeal. This letter constitutes the official notification of this determination to the Applicant.

The Applicant may appeal this determination to the Assistant Administrator, Recovery Directorate, at FEMA Headquarters pursuant to 44 CFR § 206.206, **Appeals**. If the Applicant elects to file such a second appeal, the appeal must: 1) contain documented justification supporting the Applicant’s position, 2) specify the monetary figure in dispute, and 3) cite the provisions in federal law, regulation, or policy with which the Applicant believes the initial action was inconsistent. A second appeal must be submitted to [name of grantee organization] by the Applicant within 60 days of the Applicant’s receipt of this letter. The [name of grantee organization]’s transmittal of that appeal, with recommendation, is required to be submitted to my office within 60 days of your receipt of the Applicant’s letter. My office will transmit the second appeal to FEMA headquarters.

[*If the appeal is eligible for arbitration under the Dispute Resolution Pilot Program, add the following text*]:

Based on the amount in dispute in the first appeal, the Applicant has the option to forego its right to pursue a second appeal and, instead, request arbitration through the Dispute Resolution Pilot Program established under the Sandy Recovery Improvement Act of 2013, Public Law 113-2, 127 Stat. 43 (Jan. 29, 2013), 42 U.S.C. § 5189a. Should the Applicant opt to proceed with arbitration, it must simultaneously submit a Request for Arbitration form to the [name of grantee organization], the arbitration sponsor, and FEMA within 15 days of receipt of this letter.

Sincerely,

APPENDIX C: APPEAL RESPONSE TEMPLATES

[Name]
Regional Administrator
[Region]

Enclosure

APPENDIX C: APPEAL RESPONSE TEMPLATES

APPEAL ANALYSIS TEMPLATE:

FIRST APPEAL ANALYSIS

FEMA-XXXX-DR-XX

Applicant Name, PA ID XXX-XXXXX-XX

Project Title, Project Worksheet (PW) XXX

[Organize analyses using the SIRAC (SITUATION, ISSUE, RULE, ANALYSIS, CONCLUSION) method. For more information on analyzing and responding to an appeal, see Appendix B.]

Background

[Provide a summary of the event and key actions relevant to the appeal that were taken by the applicant and FEMA (SITUATION):

- *Type of disaster and date it occurred*
- *Specific damage or emergency work at issue in the appeal*
- *PW(s) prepared and funding amount (do not have to describe every version/amendment in detail, unless it is pertinent – just provide final funding amount after all versions and a general scope of work)*
- *Determination made that led to appeal (include determination date – if known)]*

First Appeal [use this as a subheading under this Background section]

[Provide a brief description of the first appeal, including the issue(s) (ISSUE) to be addressed:

- *The determination that is being appealed (include dollar amount)*
- *The issues brought up by the applicant relative to the appeal*
- *The applicant's position with respect to the issue(s)*
- *A description of any additional documentation submitted with appeal*
- *A description of any relevant points made by the grantee (but there is no need to summarize the grantee's letter – only include points/issues that were not included by the Applicant, but are relevant to the appeal)]*

Discussion

[This is the substantive discussion of the merits of the request and the documentation. The discussion must include the section of the law, regulations, or policies (RULE) that applies to each issue and an eligibility analysis (ANALYSIS) of each issue with respect to the appropriate law, regulation, or policy. If multiple issues must be addressed, subdivide the Discussion section to allow for a clear discussion of each issue.]

Conclusion

[Present the rationale for the conclusion (CONCLUSION). Conclude with a sentence stating that the work or costs are eligible or ineligible.]

APPENDIX D: SECOND APPEAL TRANSMITTAL MEMORANDUM TEMPLATE



[Date]

MEMORANDUM FOR: Deborah Ingram
Assistant Administrator, Recovery Directorate

FROM: [Sender's name]
[Title]

SUBJECT: Second Appeal – [Applicant name], PA ID [PA ID number],
[Disaster or emergency number, in “FEMA-XXXX-DR-XX” format],
Project Worksheet (PW) [PW number(s)]

Attached is a second appeal dated [date], from the [Grantee] on behalf of [Applicant/Subgrantee]. A complete set of relevant documentation is attached, including the following:

[Include all that apply]

- The second appeal letter from [Applicant/Subgrantee], including attachments.
- The second appeal transmittal letter from [Grantee].
- A list of new documentation submitted with the 2nd appeal.
- The Regional Administrator’s first appeal response.
- Regional Counsel’s analysis.
- The first appeal letter from [Applicant/Subgrantee], including attachments.
- The first appeal transmittal letter from [Grantee].
- PW [list PW number(s)], including all relevant back-up documentation relevant to this appeal.
- Relevant correspondence, including e-mail messages, from the Case Management File.
- Applicable Disaster Specific Guidance.
- A list of any documentation too large to submit electronically and which will be sent in hard-copy form.

If you have any questions, please contact [name] at [contact information].

Attachments