U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

FEMA

BS

November 30, 2009

BY HAND-DELIVERY

Clerk of the Board
Civilian Board of Contract Appeals
1800 M Street, N.W.
6th Floor
Washington, D.C. 20036

DOCKET NUMBER: CBCA-1775-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by the West Cameron Port Commission and filed as CBCA-1775-FEMA. Submitted with the Response is a binder(s) of exhibits.

Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or lindam.davis@dhs.gov; and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or kim.hazel@dhs.gov.

Very truly yours,

Chad T. Clifford
General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472

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WEST CAMERION PORT COMMISSION
DREDGING OF CAMERON LOOP AND EAST FORK NAVIGATION CHANNELS,
PROJECT WORKSHEET ("PW") 4659
FEMA-1607-DR-LA
DOCKET # CBCA 1775 - FEMA

RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO ARBITRATION REQUEST OF THE WEST CAMERON PORT COMMISSION

On October 29, 2009, the Federal Emergency Management Agency (FEMA) received the request of the West Cameron Port Commission (Applicant) to arbitrate FEMA's denial of funding for PW 4659. See Exhibit 1.[1] PW 4659 represents FEMA's denial of $12 to $15 million for dredging the Cameron Loop and East Fork channels. See Exhibit 2. This constitutes FEMA's response to the Applicant's arbitration request.

JURSIDICTION

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, P.L. 111-5, which establishes an option for arbitration under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA. See 44 C.F.R. § 206.209.

The Applicant meets the regulatory guidelines for filing an arbitration request as outlined in 44 CFR § 206.209 as follows:

The Applicant's arbitration request exceeds the $500,000 threshold.

- The Applicant submitted a first level appeal to FEMA on April 7, 2009.

[1] The Applicant's Request for Arbitration package included attachments that were not numbered or identified as Exhibits. For clarity FEMA has identified the Applicant's attachments by their full title.

- FEMA denied the Applicant's first level appeal on July 29, 2009.
- The Applicant filed a Request for Arbitration on October 27, 2009.

SUMMARY OF FEMA'S POSITION

FEMA concurs that the Applicant is legally responsible to maintain the Cameron Loop and East Fork navigation channels. However, dredging of sediment from the Cameron Loop and East Fork navigation channels is not eligible for FEMA Public Assistance, as it is not disaster-related. Hurricane Rita did not deposit measurable quantities of sediment in the channels therefore, dredging is not necessary to restore the channels to pre-disaster function and capacity. As such, FEMA's denial of PW 4659 was reasonable and in accordance with law.

BACKGROUND

The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for administering and coordinating the Federal governmental response to Presidential-declared disasters pursuant to the Stafford Act.[2] See 42 U.S.C. §§ 5121, *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36, 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared area. See 42 U.S.C. § 5170.

The Declaration

On September 24, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Rita pursuant to his authority under the Stafford Act. See 42

[2] The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

U.S.C. § 5121. This declaration authorized all categories of Public Assistance, including permanent restoration of damaged facilities. See Exhibit 3. Restoration of damaged facilities includes funding for either repair or replacement of eligible facilities on the basis of the design of such facilities as they existed immediately prior to a major disaster declaration. See 42 U.S.C. § 5172; 44 C.F.R. § 206.226. The President's declaration included Cameron Parish. The Cameron Loop and East Fork channels are located in Cameron Parish.

Public Assistance

Under the Stafford Act, FEMA may provide, *inter alia*, Public Assistance. The Stafford Act states that FEMA "may make contributions" for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. Public Assistance allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200 - .206. PA funding can be provided in the form of grants for the state or local government's own recovery efforts, or FEMA may fund direct federal assistance through which a federal agency performs the recovery work. See 44 C.F.R. §§ 206.203, 206.208. FEMA may also fund eligible private nonprofit facilities, such as educational facilities or schools, through a subgrantee. See 44 C.F.R. § 206.223(b).

The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). The West Cameron Port Commission is a subgrantee of the State. See 44 C.F.R. § 206.201(l).

To receive PA funding for permanent restorative work, an eligible subgrantee must have a facility that was damaged by a declared major disaster; that facility must be within the disaster-declared area; and, that facility and the work to repair it must be the legal responsibility of the eligible subgrantee. See 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221 - .223; 206.226(c)(1). With PA, a Federal inspection team accompanied by the Subgrantee's local representative surveys the damaged facilities and estimates the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on project worksheets ("PWs"). Id. PWs estimate disaster damage, determine whether the damage is eligible for Public Assistance, and list, among other information, the scope and "quantitative estimate for the cost of eligible work." Id.

After PW completion, FEMA reviews the PW in order to make determinations on whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available, *i.e.*, "obligate," based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or Subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). Rather, a PW establishes the scope of work and provides cost estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See Id. 44 C.F.R. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 644 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States). If the actual cost to complete the approved scope of work described in the PW exceeds the estimate, FEMA may approve additional funding during the project closeout process.

Appeals and Arbitration

The Stafford Act authorizes appeals of PA assistance decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal; the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, establishes a new option, arbitration, under the PA program for contesting award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607.[3] See 44 C.F.R. § 206.209. The arbitration panel's decision constitutes the final decision on the issue under dispute, is binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

West Cameron Port Commission Channel Dredging

The West Cameron Port Commission was created in 1968 by R.S. 35:2551,et. seq., and is a political subdivision of the State of Louisiana and governing body over the West Cameron Port ("Port"). The West Cameron Port is situated as the port of entry to the Calcasieu Ship Channel in Southwest Louisiana. The Port is located on the U.S. Gulf of Mexico with the Calcasieu Ship, Cameron Loop, and East Fork channels located within its territorial limits.

The Applicant requested funding to dredge 1,700,000 cubic yards of sediment from a 3.3 mile stretch of the Cameron Loop and East Fork channels.[4] In response, FEMA prepared PW 4659 on December 18, 2008, for the amount of $0 to document the Applicant's request. See Exhibit 2. FEMA originally determined that work to dredge the Cameron Loop and East Fork channels was

[3] Approved disaster requests are assigned serially-ordered major disaster declaration numbers beginning with declaration #1, a Georgia tornado approved by President Eisenhower in May 1953.

[4] The Applicant has not provided a cost or quantity estimate for sediment at the East Fork channel.

ineligible because (1) the facilities appeared to be under the authority of another Federal agency, and (2) the Applicant failed to demonstrate that dredging work was required as a result of the declared disaster. Id. at 2-7. Furthermore, the Applicant first dredged the channels in 1999/2000 to a -25 MLG (Datum Mean Low Gulf; a datum is a reference system used to compare elevations at various places), and has failed to perform maintenance dredging since

PROCEDURAL HISTORY

First Appeal

In a letter dated April 7, 2009, the Applicant filed a first level appeal with FEMA requesting $12-$15 million in PA funding to dredge an estimated 1,700,00 cubic yards of sediment from the Cameron Loop channel in order to restore it to its permitted depth of 25 feet. See Exhibit 4. The Applicant claimed that it had legal responsibility to maintain the Cameron Loop channel, and that hydrographic surveys conducted by the United States Army Corps of Engineers (USACE) establish that dredging of the channel is required as a result of the declared disaster.

FEMA denied the first level appeal because (1) the Applicant had not demonstrated legal responsibility for dredging the Cameron Loop channel; (2) sedimentation in the channel was not disaster-related; and (3) eligibility criteria for debris removal were not met. See Exhibit 5.

Request for Arbitration

The Applicant now files this Request for Arbitration ("Request") seeking $12-$15 million for the dredging of sediment from the Cameron Loop and East Fork facilities.[5] The Applicant disputes FEMA's determination that the channels are under the authority of another Federal agency and

[5] As with its first level appeal request, the Applicant has not submitted any cost or quantity estimates for East Fork channel.

that sedimentation is not disaster-related. The Applicant's Request includes documentation supporting its claim of legal responsibility to dredge the Cameron Loop and East Fork channels. Also, the Applicant submitted drawings and a letter from a consultant which purportedly establish that sedimentation of the Cameron Loop was caused by the disaster. The Request does not include documentation or evidence of disaster-related sedimentation of the East Fork channel.

STANDARD OF REVIEW

While the ARRA provides for a limited waiver of immunity, it is silent as to the standard of review to be used in the arbitrations. However, the text of the ARRA clearly **contemplates an "arbitrary and capricious" -- and not a *de novo* -- standard of review**. First, the provision "the President shall establish an arbitration panel *under* the Federal Emergency Management Agency public assistance program," (emphasis added) illustrates two clear concepts: (1) the Executive Branch is responsible for establishing the arbitration panel and defining its authority; and (2) the authority is "under" the FEMA PA program. It does not follow from that phrase that Congress intended a *de novo* review.

Second, the express purpose of the arbitration panel is "to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region." Again, the plain text does not contemplate a *de novo* review that will duplicate previous time-intensive efforts to determine the amount of hurricane damage to facilities that is eligible for a grant under FEMA's PA program.

Third, the ARRA grants the arbitration panel "*sufficient authority* regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406,

or 407 of [the Stafford Act]." (emphasis added). The phrase "sufficient authority" indicates that this Panel's authority is not absolute. Congress could not have intended the arbitration panel to have review authority that exceeds that of any Federal court. Indeed, this was settled by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), where the Court noted that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[6] By implementing the appropriate "arbitrary and capricious" standard, the arbitration panel has sufficient review authority.

Finally, the ARRA tasked the arbitration panel to make determinations regarding the "award or denial" of the PA application for "covered hurricane damage." Again, the ARRA provides for review of the prior administrative proceedings – the "award or denial" – not for an independent evaluation. The plain meaning of the phrase "covered hurricane damage" is that damage for which FEMA reimbursement is authorized by the Stafford Act. The ARRA plainly does not expand FEMA's authority under sections 403, 406 and 407 to provide Federal funding for hurricane damages and an arbitration panel must also necessarily be guided by, and limited to, the scope of sections 403, 406 and 407.

The arbitration panel must also consider "general principles respecting the proper allocation of judicial authority to review agency orders" when making its decision regarding the standard of

[6] An arbitration under the ARRA is a unique circumstance resulting from special legislation specific to a particular set of entities that mandates FEMA, as the entity charged with implementing the Stafford Act, participate. It is therefore akin to an arbitration where one party is required to pursue a statutory claim. See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468-69, 1476 (D.C. Cir. 1997) (comparing arbitration under a collective bargaining agreement where nearly unlimited deference is paid with an arbitration of a statutory claim where such deference is "not appropriate").

review. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985). It is well-settled that review of Agency action, where Congress has not designated a standard of review, defaults to the arbitrary and capricious standard articulated in the Administrative Procedure Act (APA), 5 U.S.C. § 706:

> In cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme Court] has held that consideration must be confined to the administrative record and that no de novo proceeding may be held.

United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Nat'l Broad. Co. v. United States, 319 U.S. 190, 227(1943)). Accordingly, courts consistently hold that, in the absence of a statutorily-defined type of review, the reviewing body must seek guidance in the APA and only "hold unlawful or set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " GTE South, Inc. v. Morrison, 1997 U.S. Dist. LEXIS 23871 (E.D. VA) (citing 5 U.S.C. § 706(2)(A)); see Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996); Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986) (proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review); see also Cabinet Mountains Wilderness v. Peterson, 222 U.S. App. D.C. 228, 685 F.2d 678 (D.C. Cir. 1982); Am. Canoe Ass'n v. United States EPA, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999).

The APA standard for review of FEMA's public assistance decisions has been explained by the 9th Circuit when reviewing a decision by FEMA to deobligate certain costs from a PA grant:

> Under the APA, we may set aside agency action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The standard is a narrow one, and the reviewing court may not substitute its judgment for that of the agency. However, the agency must

> articulate a rational connection between the facts found and the conclusions made. Also, we must give substantial deference to an agency's interpretation of its own regulations.

Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Fed. Emergency Mgmt. Agency, 371 F.3d 701, 706 (9th Cir. 2004) (internal citations omitted). See also Graham v. Federal Emergency Management Agency, 149 F.3d 997, 1007 (9th Cir. 1998) (applying APA and arbitrary and capricious standard where decision is not discretionary).

DISCUSSION AND ANALYSIS

A major disaster is by definition an event for which Federal assistance is necessary "to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby." See 42 U.S.C. § 5122(2). Federal assistance under the Stafford Act includes "repair, restoration, and replacement" of disaster-damaged facilities on the basis of the design of such facilities as they existed immediately prior to the major disaster event. See 42 USC § 5172 (e) (1). Eligibility is also limited to facilities for which an applicant is legally responsible to make repairs. See 44 C.F.R. § 206.223(a)(3). Furthermore, FEMA PA assistance is not available when another Federal agency has specific authority to restore a damaged facility. See 44 C.F.R. § 206.226(a)(1).

Work to restore damaged facilities must be required as a result of the declared disaster event. See 42 U.S.C. § 5172 (a); see also 44 C.F.R. § 206.223(a)(1). "Damage that results from a cause other than the designated event or from pre-disaster damage is not eligible." Public Assistence Guide, FEMA 322 (1999) at 23. Work required to correct pre-disaster deferred maintenance

conditions is not eligible. Id. at 27. It is the applicant's responsibility to demonstrate that damage is disaster-related. Id. at 27.

Legal Responsibility

The Applicant's Request included additional information related to its maintenance responsibilities for the Cameron Loop and East Fork channels. See Applicant Exhibit "Revised Statutes exhibiting powers of the West Cameron Port Commission." The Applicant acknowledged that prior documentation submitted to FEMA was inadequate. See Applicant Exhibit "Applicant Information and Statement of Dispute" at 4. After careful review of the submitted documentation, FEMA concurs that the Applicant has legal responsibility to maintain both the Cameroon Loop and the East Fork facilities. See Applicant Exhibit "Revised Statutes exhibiting powers of the West Cameron Port Commission."[7]

No Evidence of Disaster-Related Sedimentation of the East Fork Channel

The Applicant has failed to provide documentation to support the claim that Hurricane Rita has damaged the East Fork Channel. FEMA PA funding is limited to repair, restoration, or replacement of facilities damaged by a declared event. See 42 U.S.C. 5172(a)(1)(A); see also 44 C.F.R. § 206.226. It is the Applicant's responsibility to show that damage is disaster-related. See Public Assistance Guide, FEMA 322 (1999) at 27. Therefore, FEMA's denial of funding for work related to removal of sediment in the East Fork Channel was reasonable, appropriate, and in accordance with law.

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[7] While the USACE has jurisdiction over 1.1 miles of the northern portion of the Cameroon Loop, its authority is limited to dimensions of -12' MLG (Datum Mean Low Gulf) used by USACE. A datum is a reference system used to compare elevations at various places (here it's the Gulf of Mexico at Calcasieu Pass, to a certain height) x 200'. The Applicant has improved this facility to the -25' MLG level. As a practical matter, this means that the Applicant has legal responsibility to maintain dredging of both the Cameron Loop and East Fork Channels. See Applicant Exhibit "1999 Dept. of the Army Corps permit and approval letter". The USACE confirmed the Applicant's legal responsibility to maintain the Cameron Loop and East Fork in a November 4, 2009 email. See Exhibit 6.

Sedimentation of the Cameron Loop Channel is Not Disaster-Related

The Applicant claims that Hurricane Rita deposited sediment in the Cameroon Loop channel. See Applicant Exhibit "Applicant Information and Statement of Dispute." FEMA engaged a coastal specialist to review the Applicant's claim of disaster-related sedimentation. See Exhibit 7. The specialist analyzed hydrographic survey data collected by the USACE for the Cameron Loop in 2002, 2003, 2006, and 2008, and information provided by the Applicant's engineer, to determine changes in sediment levels in the channel. See Exhibits 8a-8d, and Exhibit 9; see also Applicant Exhibit "Cameron Loop Soundings." The coastal specialist concluded that "there is no indication of unusual sedimentation occurring in the Cameron Loop channel as a direct result of Hurricane Rita." See Exhibit 9 at "Executive Summary."

The change analysis methodology that the coastal specialist used involved the preparation and comparison of color contour maps using USACE data gathered for each hydrographic survey. The specialist used industry-standard computer software to model the channel floor contours by comparing sets of survey data for horizontal position and vertical elevation, and then estimated (through statistical interpolation) the elevations between the data points. The contour maps depict channel depth variations with different color shades. Id. at Figure 2.

The specialist compared the color contour maps for each of the hydrographic surveys. The comparison included mathematical calculation of channel surface elevation changes between hydrographic survey data gathered in 2002, 2003, 2006, and 2008. The mathematical calculations produced data that could be mapped to depict in graphic format sediment

accumulation or loss from the channel bed and side slopes throughout the Cameron Loop channel.

The maps show that the channel was approximately similar in terms of both width and depth through time from 2002 to 2008; only minor differences between the four surveys are apparent. Id. at Figure 2. The maps show no significant accumulation of sediment in the channel between the 2003 (pre-disaster) and 2006 (post-disaster) surveys. Id. at Figure 3. The most apparent change in the survey data occurred between the post- disaster 2006 and 2008 surveys, which indicate relatively widespread progressive sediment accumulation (shoaling), especially in both the southern and northern halves of the Cameron Loop. Id. at Figure 3. Shoaling averaged two to four feet in most areas, and up to six and eight feet in some areas. See id. at Figure 3.

The mathematical computation of changes in the 2002, 2003, 2006, and 2008 survey data sets also facilitated preparation of cross-section profiles of the channels. Whereas the contour maps depict channel elevation changes on a horizontal plane, cross-section profiles show channel elevation changes as viewed from a line perpendicular to the channel centerline. Id. at Figure 4. Analysis of the cross-section profiles confirm that the channel shape remained consistent, but also revealed a pattern of progressive channel shifting or migration over time. Id. at Figures 4 through 11. The coastal specialist noted that the observed pattern of changes over time is consistent with changes expected for a natural meandering channel such as the Cameron Loop. More to the point, the observed changes in cross-section shape and depth between 2003 and 2006 (the interval in which Hurricane Rita occurred) are not any larger than during any other interval (e.g., 2002-2003 and 2006-2008). Id. at Figures 4-11.

The cross-section profiles do, however, indicate shoaling in the northern and southern portions of the channel nearest the Calcasieu Ship Channel. Id. at Figure 11 and Figure 5, respectively. Relatively equal increments of sediment accumulated in the channel from one survey to the next between 2002 and 2008. In the north section of the loop in particular, the channel bed became shallower by four feet between 2002 and 2008 representing an accumulation of approximately 0.6 feet per year. Id. at Figure 11.

In sum, USACE data show that sediment accumulation in the Cameron Loop channel between 2003 and 2006 (the interval during which Hurricane Rita occurred) was not significantly different from the pattern of sediment accumulation during other USACE survey intervals (2000 to 2002; 2002 to 2003; and 2006 to 2008). Id. at 14. In fact, the coastal specialist concluded that parts of the channel may have experienced a net scour during the interval during which Hurricane Rita occurred. Id. at 15. Therefore, based upon this expert information, FEMA reasonably concluded that Hurricane Rita did not "damage" or otherwise impact the function and capacity of the Cameron Loop Channel. Id. at 15. FEMA PA is limited to restoration of facilities impacted by a declared disaster. See 42 U.S.C. § 5172(a)(1)(A); 44 C.F.R. § 206.226. As such, FEMA's denial of funding to remove sediment from the Cameron Loop Cannel was reasonable, appropriate, and in accordance with law.

Grantee Submittal in Support of Applicant's Request

In its written submission in support of the Applicant's Request, the Governor's Office of Homeland Security and Emergency Preparedness ("GOHSEP" or "Grantee") indicates that "...the hydrographic surveys which FEMA used to reach its determination do not seem to

compare precisely the same points within the navigation channels. Accordingly, the Grantee is of the belief that unless there is a comparison of pre- and post-disaster soundings at the exact same points, FEMA cannot reliably conclude that the disaster had little or no effect upon the navigation channels." See Exhibit 10 at 4.

To address the above concern, the coastal specialist conducted a comprehensive comparative analysis of the USACE surveys for the entire Loop with all data that were made available. The analysis included comparison of pre and post-disaster elevations at the same locations throughout the area covered by the surveys. See Exhibit 9 at 6 -13, Figures 4 through 11.

In addition, the Grantee states that "assuming the Appeals Panel determines that the Applicant has the responsibility for maintenance dredging of the Loop Pass and East Fork, the Grantee believes that the Appeals Panel should direct FEMA to provide for a comprehensive comparison of pre- and post-disaster measurements. This could be accomplished through the recognized mechanism of creating a PW designed specifically to make comparative soundings and take core samples in order to distinguish and quantify the silt/sediment deposits resulting from the disaster." See Exhibit 10 at 4.

However, the USACE survey data collected repetitively over a number of years (2002, 2003, 2006, and 2008), already provides the best available information for pre- and post-disaster comparison of the Cameron Loop. Furthermore, the analysis by the coastal specialist determined that the repetitive survey points obtained by the USACE consistently covered the same area and had a high degree of overlap. See Exhibit 9 at 2. Therefore, collection of additional soundings

as suggested by the State would therefore not provide any further clarity on pre and post-disaster sedimentation. Id. at 3.

The State also suggests that borings be taken to determine the quantity of deposited sediment. The systematic evaluation of hydrographic data conducted by the coastal specialist has revealed that no unusual sedimentation occurred as a result of the disaster. Thus, it is unnecessary to conduct borings. Id. at 14.

Applicant's Consultant - Analysis and Conclusions

The Applicant submitted drawings of channel floor elevations of the Cameron Loop for years 2000 and 2009. See Applicant Exhibit "Cameron Loop Soundings." Regarding these drawings, the Applicant's consultant wrote: "The most recent hydrographic survey shows water bottom elevations that are greater than the pre-dredging survey performed in 1999… This is proof that the hurricanes directly impacted the water bottom of the Calcasieu Loop Pass." See Applicant Exhibit "Letter dated May 19, 2009 from engineering firm Lonnie G Harper and Associates."

FEMA does not dispute the fact that sediment has accumulated in the Cameron Loop since the Applicant last dredged the facility in 2000. However, analysis of sediment changes at survey intervals between 2002 and 2008 demonstrate no significant impact to sediment accumulation that can be directly attributed to Hurricane Rita. See Exhibit 9 at 14. Notwithstanding these findings, the FEMA coastal specialist reviewed documentation provided by the Applicant's consultant for evidence of disaster-related sediment.

Drawings and plan views of the Cameron Loop channel submitted in May 2009 show profiles along the channel centerline and typical post-dredging cross-section profiles perpendicular to the channel centerline. See Exhibit 9 at 13; see also Applicant Exhibit "Cameron Loop Soundings." The coastal specialist reviewed the 2000 cross-sections and compared them to the 2002 cross-sections prepared with USACE survey data. The comparison demonstrates that substantial sedimentation observed in the north and south portions of the channel as of the 2002 USACE survey occurred after dredging in 2000. See Exhibit 9, Section 3, Paragraph 3.

Further, review of depth soundings over the six year period (2002 to 2008) revealed no substantial increases in sediment deposits for the interval during which the disaster occurred. Id. at Figures 4 through 11. Consequently, the analysis of soundings shows the following: 1) substantial accumulation of sediment by 2002; 2) sedimentation continued through 2008 with no maintenance performed by the Applicant; and 3) there is no correlation between the disaster and the Cameron Loop channel's historical sedimentation patterns. See Exhibit 9 at 14-15.

Public Assistance eligibility is limited to work necessary to repair, restore, or replace facilities damaged by a declared event. See 42 U.S.C. 5172(a)(1)(A); see also 44 C.F.R. § 206.226. It is the Applicant's responsibility to show that damage is disaster-related. Public Assistance Guide, FEMA 322 (1999) at 27. Analysis of data submitted by the Applicant does not support a conclusion that Hurricane Rita damaged or otherwise impeded functionality of either the Cameron Loop or East Fork channels. Rather, analysis of the Applicant's data in context of the USACE survey data provides further support that FEMA's denial of PW 4659 was reasonable, appropriate, and in accordance with law.

Applicant's "Statement of Dispute"

The Applicant's Statement of Dispute admits that sedimentation and shoaling are more prevalent in recent years because of the re-routed tidal interchange:

> The inception of the Calcasieu River Ship Channel in 1940 was to provide direct access to the Port of Lake Charles but it resulted in an isolated portion of 3.3 miles of the old River the Cameron Loop. Initial dredging was not necessary as the River was self scouring due to natural current. When the Loop became segregated, siltation and shoaling were more prevalent because of the re-routed tidal interchange.
> See Applicant Exhibit "Applicant Information and Statement of Dispute" at 1.

This statement, which is reinforced by analysis of the USACE survey data documenting sedimentation accumulation at two separate intervals after dredging in 2000 and before Hurricane Rita, indicates that sedimentation is an ongoing issue in the channel, which requires routine maintenance to ensure continued functionality at the pre-disaster design capacity. See Exhibit 9 Section 3 Paragraph 4. Removal of sedimentation attributable to lack of maintenance is not eligible for PA assistance. See Public Assistance Guide, FEMA 322 (1999) at 26-27; see also 44 C.F.R. § 206.223(e). As such, FEMA's denial of funding to remove sediment from the Cameron Loop and East Fork channels was reasonable, appropriate, and in accordance with law.

Debris Removal Eligibility

The Applicant incorrectly asserts that, although FEMA prepared PW 4659 as permanent work to restore the facility to pre-disaster function and capacity, the removal of sediment from the Cameroon Loop and East Fork facilities also meets FEMA eligibility criteria for emergency debris removal. See Applicant Exhibit "Applicant Information and Statement of Dispute."

FEMA may authorize funding to remove debris from public and privately owned land and waters following a Presidential disaster declaration. See 42 U.S.C. § 5173. The regulations implementing this provision establish the requirement that disaster-related debris removal must be necessary to:

- Eliminate immediate threats to life, public health, and safety;
- Eliminate immediate threats of significant damage to improved public or private property; or
- Ensure economic recovery of the affected community to the benefit of the community-at-large. See 44 C.F.R. § 206.224(a).

However, as discussed above, the Applicant has failed to establish that the cause of sedimentation within the Cameron Loop channel is disaster-related. Further, the Applicant has not provided evidence of disaster-related sedimentation of the East Fork channel. Notwithstanding the fact that the cause of sedimentation with the Cameron Loop channel is not disaster-related, FEMA reviewed the Applicant's claim that it has met FEMA's debris removal eligibility criteria, and concludes that such action is not eligible as debris removal.

Immediate Threat to Life, Health and Safety

The Applicant maintains that "sediment and debris deposited in the channel serves as an immediate threat to the safe harborage of vessels and those present on the vessel." See Applicant Exhibit "Applicant Information and Statement of Dispute." The Applicant has not provided any evidence of disaster-related sedimentation of the East Fork channel. Further, analysis of USACE survey data for the Cameron Loop channel does not support a conclusion that the disaster caused

sedimentation of the channel. See Exhibit 9 at 15. Thus, to the extent that any immediate threat does exist, such a threat was not caused by the disaster.

Immediate Threat of Significant Damage to Improved Property

The Applicant also maintains that "businesses along the Southern part of the Loop have closed down operations and relocated due to the siltation." However, economic loss occasioned by business closures does not establish the existence of immediate threat of significant damage to improved property. Furthermore, to the extent an immediate threat does exist, this threat is not related to the disaster. Furthermore, the Applicant has not maintained its facilities since last dredged in 1999-2000. See Applicant Exhibit "1999 Department of the Army Corps permit and approval letter." Insofar as any supposed threat does exist, it is attributable to the Applicant's failure to maintain (i.e. dredge) the subject facilities.

Economic Recovery of the Affected Community

The Applicant maintains that businesses along the Southern part of the Loop have closed down operations and relocated due to siltation, and indicates that tax revenue from the Cameron Loop represents a significant portion of the "Parish's tax base, pre-Rita." See id. However, the applicant presents no information as to how the removal of silt from the Cameron Loop will ensure the economic recovery of the affected community. Furthermore, as discussed throughout this response, sedimentation of the Cameron Loop is not related to Hurricane Rita. Therefore, any impact of channel sedimentation on economic conditions in adjacent communities is not disaster-related.

CONCLUSION AND RECOMMENDATION

Sedimentation accumulation in the Cameron Loop and East Fork navigation channels is natural and recurring and routine maintenance is required to ensure these facilities function to their pre-disaster design capacity. FEMA has demonstrated herein that sedimentation of the Cameron Loop channel is not disaster-related. Furthermore, the Applicant has provided no evidence of disaster-related sedimentation in the East Fork channel. As such, work to remove sediment in either channel is not eligible for assistance under the Public Assistance program. FEMA therefore, respectfully requests this Panel find in favor of FEMA and deny the Applicant's request for funding to dredge the Cameron Loop and East Fork navigation channels.

Respectfully submitted on this 30th day of November 2009 by,

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LIST OF EXHIBITS

Exhibit 1 – Applicant Request for Arbitration

Exhibit 2 – Project Worksheet 4659 Version 0

Exhibit 3 – Presidential Disaster Declaration of Disaster 1607 Louisiana

Exhibit 4 – Applicant Letter Request for 1st Appeal dated April 7, 2009

Exhibit 5 – Letter FEMA denial letter of 1st appeal dated July 29, 2009

Exhibit 6 – E-mail response from USACE dated Nov. 04, 2009

Exhibit 7 – Biography, Philip D. Osborne, Ph. D.

Exhibit 8a – USACE Hydrographic Survey May 20, 2002

Exhibit 8b – USACE Hydrographic Survey March 18, 2003

Exhibit 8c – USACE Hydrographic Survey March 28, 2006

Exhibit 8d – USACE Hydrographic Survey December 3, 2008

Exhibit 9 – Technical Memorandum by Coastal Specialist, Golder Associates

Exhibit 10 – GOHSEP response to arbitration