

THE UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS

In the Matter of
The City of Corpus Christi, Texas
Project 64688
FEMA-4332-DR-TX

Request for Arbitration

The City of Corpus Christi, Texas (the “City”) files this Request for Arbitration respectfully requesting that the Civilian Board of Contract Appeals (“CBCA”) direct the Federal Emergency Management Agency (“FEMA”) to confirm the eligibility of \$2,620,053.00 in Public Assistance funding to restore the Packery Channel (“Facility”) to its pre-disaster condition under Project 64688, Project Worksheet (“PW”) 04514, in response to damage caused by Hurricane Harvey.

Note that the amount in dispute is within FEMA’s estimated total Project costs. FEMA determined that the total reasonable costs to restore the Facility to its pre-disaster condition under PW 04514 is \$15,033,311.00. The actual Project costs, even when factoring in the \$2,620,053.00 requested here, totals \$14,979,102.30. The fact that the amount at issue is within FEMA’s estimated Project costs confirms that the requested funding is reasonable and that the costs were foreseeable as a part of the Project scope of work.

I. Statement of Authority

The CBCA has authority to arbitrate this matter under § 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (“Stafford Act”) as amended by § 1219 of the Disaster Recovery Reform Act of 2018 (the “DRRA”).¹ Pursuant to this authority, recipients of FEMA Public Assistance funding may request arbitration by the CBCA for disputes of more than \$500,000 for any disaster that occurred after January 1, 2016.² A recipient may submit a request for arbitration after the completion of the first appeal at any time before the FEMA Administrator has issued a final agency determination.³

¹ 42 U.S.C.A. § 5189a(d) (2018).

² DRRA § 1219 (2018).

³ *Id.*

This dispute arises from FEMA’s denial of \$2,620,053.00 in eligible disaster assistance to repair damage to the Facility caused by Hurricane Harvey, which was declared a major disaster on August 25, 2017.⁴ On May 28, 2023, FEMA issued a Determination Memorandum (“DM”) denying the costs at issue.⁵ Pursuant to 44 C.F.R. § 206.206, on July 24, 2023, the City timely appealed FEMA’s DM,⁶ and the Texas Division of Emergency Management (“TDEM”) transmitted the City’s Appeal with its support to FEMA on July 26, 2023.⁷ In a First Appeal Decision, dated February 6, 2024, FEMA again denied the costs at issue.⁸ The City now files this Request for Arbitration within 60 days of receipt of FEMA’s First Appeal Determination.

Pursuant to § 423 of the Stafford Act, as amended by § 1219 of the DRRRA, the City has satisfied all of the prerequisites to filing this Request for Arbitration and the CBCA has authority to arbitrate this dispute.

II. Applicant’s Counsel

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III. The Packery Channel

⁴ See Disaster Declaration, *Texas Hurricane Harvey*, DR-4332-TX, <https://www.fema.gov/disaster/4332>.

⁵ Exhibit 1, FEMA Eligibility Determination Memorandum for PW 04514 (May 28, 2023) [hereinafter “FEMA DM”].

⁶ Exhibit 2, City’s First Appeal of FEMA’s DM for PW 04514 (July 24, 2023) [hereinafter “City’s First Appeal”].

⁷ Exhibit 3, TDEM’s Transmission of the City’s First Appeal (July 26, 2023).

⁸ Exhibit 4, FEMA First Appeal Determination re PW 04514 (Feb. 6, 2024) [hereinafter “FEMA First Appeal Determination”].

The Packery Channel, built in 2006, is an approximately 250-foot-wide by 5,500-foot-long tidal inlet separating Padre Island from Mustang Island and connecting Corpus Christi Bay to the Gulf of Mexico.



Figure 1 - Overhead View of Packery Channel



Figure 2 - Map View of Packery Channel

The armored-slope tidal channel and its associated structures, including two steel-reinforced sidewalks spanning the distance of the Facility, were primarily built for channel alignment, protection against shoreline erosion, and for the benefit of fish and wildlife.

A. Hurricane Harvey Significantly Damaged the Packery Channel

Hurricane Harvey – the first major hurricane to impact the United States since Hurricane Wilma in 2005 – made landfall as a Category 4 storm on August 25, 2017, in Rockport, Texas, just thirty miles from the City.

The storm was devastating for southeast Texas, dropping more than 40 inches of rain in many areas and causing unprecedented flooding that inundated hundreds of thousands of homes, displaced more than 30,000 people, and prompted more than 17,000 rescues.⁹ Statewide, the event resulted in 68 direct fatalities, the largest number from a landfalling hurricane in Texas since 1919.¹⁰ Hurricane Harvey became the largest flooding event in Texas history and the “second costliest hurricane in American history with 125 billion dollars in damage.”¹¹

The City, located on the Gulf of Mexico, was particularly susceptible to Hurricane Harvey’s storm surge, which caused significant damage to City infrastructure, including the Packery Channel.

Soon after the event, the City engaged HDR – an architectural, engineering, and consulting firm specializing in coastal engineering and disaster response services – to assess damages at the Packery Channel. On August 31, 2017, HDR made its first site visit to document post-storm conditions at the Facility.

To efficiently identify disaster damages, HDR divided the Facility into four characteristic channel reaches,¹² as depicted below.

⁹ See Harris County Flood Control District, Immediate Report—Final, Hurricane Harvey—Storm and Flood Information, at 2-3 (June 4, 2018), <https://www.hcfc.org/Portals/62/Harvey/immediate-flood-report-final-hurricane-harvey-2017.pdf>; see also National Oceanic and Atmospheric Administration, *On August 26, 2017, Hurricane Harvey Slammed into Texas* (August 25, 2020) <https://www.nesdis.noaa.gov/content/day-2017-hurricane-harvey-slammed-texas#:~:text=Harvey%20is%20considered%20the%20wettest,prompted%20more%20than%2017%2C000%20rescues>.

¹⁰ *Id.* at NOAA Article *On August 26, 2017, Hurricane Harvey Slammed into Texas*.

¹¹ *Id.* at Harris County Flood Control District, Immediate Report, at 2.

¹² Exhibit 5, HDR Post-Storm Damage Assessment and Repair Recommendations, Packery Channel Jetty Slope Protection and Appurtenances (Mar. 27, 2018) [hereinafter “HDR Damage Assessment Report”].



Figure 3 - Damage Assessment Methodology for Packery Channel

Reach 1 is comprised of 10-ton granite blocks that line both jetties extending out into the Gulf of Mexico. Reach 2 includes smaller armor stone riprap (1-3 tons) that lines the inner section of the jetties. Reach 3 consists of articulating concrete-block mattresses (“ABM”), located between the inner ends of the jetties and the SH361 bridge. An ABM is a system of cable-reinforced concrete blocks that fit together like a puzzle to protect the bank from coastal events and erosion. Reach 4 is made up of approximately 315 feet of unprotected shoreline along the north side of the channel between the boat ramp parking lot and the SH361 bridge.

The majority of the damages to the Facility, including those at issue in this Arbitration, were located in Reaches 3 and 4, and therefore these sites will be the focus of this Brief.¹³

Hurricane Harvey damaged a significant portion of Reach 3 components, including the stone block revetment, the entirety of the concrete walkway on the south side of the channel, storm drain outfalls, and ancillary supporting appurtenances, including post-and-

¹³ See Exhibit 6, Email from City Director of Engineering Jeffrey Edmonds to Public Assistance Group Supervisor Richard Cain (July 7, 2021) (withdrawing displaced granite jetty blocks and displaced rock rip rap from Reaches 1 and 2 from Project).

cable barriers.¹⁴ The approximate locations of damages identified in Reach 3 are pictured below.



Figure 4 - Damage Locations within Reach 3

In Reach 3, HDR observed damages to the ABM revetment “due to scour of the channel and erosion of foundation material from under the ABMs” as a result of Hurricane Harvey’s storm surge.¹⁵

¹⁴ Exhibit 5, HDR Damage Assessment Report, at 7-9.

¹⁵ *Id.* at 7.



Figure 5 - Damages to ABM in Reach 3

Erosion of underlying materials also resulted in the failure of the concrete walkway located on the south side of the channel.¹⁶



Figure 6 - Damages to Sidewalk in Reach 3

Damages identified in Reach 4 were similar to those in Reach 3. HDR determined that erosion as a result of Hurricane Harvey damaged an underground water transfer pipeline located in Reach 4 and caused “bank retreat in this area and partial undermining of approximately 160 LF of ABM revetment along the west side of the parking lot.”¹⁷

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 12-13.



Figure 7 - Damages to ABM in Reach 4

All of the damages to the Facility, including those discussed above, are included in HDR's "Post-Storm Damage Assessment and Repair Recommendations" Report, included with this Request as Exhibit 5.¹⁸

Critical to the issue here, the Facility components, i.e., the stone revetment, riprap, and underlying fill, work together as a system to protect against erosion and other hazards. HDR included statements in its Damage Assessment Report indicating that the damages caused by Hurricane Harvey – particularly the damages to the Facility's ABM, which protected against erosion – left Facility components in Reach 3 vulnerable to additional erosion and scour that would continue "until the bank protection is repaired."¹⁹ Just as critical, HDR did not identify any temporary measures the City could take to protect against erosion other than restoring the Facility to its pre-disaster design and capacity.

On March 1, 2018, FEMA Public Assistance and Hazard Mitigation staff inspected the Facility. FEMA's Site Inspection Report reiterated the damages caused by Hurricane

¹⁸ HDR identified and characterized damages through "aerial photography, site observations, review of record drawings from the original project construction, and survey data provided by the City of Corpus Christi." *Id.* at 1.

¹⁹ *Id.* at 7. Indeed, the HDR Damage Assessment Report states that "additional damage to the concrete walkway along the south side of the channel was observed after HDR's initial site visit on August 31, 2017," indicating continued damage as a result of Hurricane Harvey's impact on the Facility.

Harvey's storm surge previously identified by HDR.²⁰ It was also noted in the Site Inspection Report that there were special considerations for the Project, namely that sea turtles and piper plovers – both endangered species – were known to be in the work area.²¹

The Mitigation Site Inspection Report similarly confirmed the damages previously identified by HDR, concluding that:

In this area it appears significant sand has eroded from beneath the revetment to partially undermine the concrete walkway. The south side of Packery Channel and extends westward from the beginning of the articulated block mat to the more significant rip-rap section (the rip-rap is from a previous repair) at the first bend in the shoreline (this bend is across the channel from the boat ramp). This entire section sustained significant erosion and has visibly lost material from beneath the concrete walkway. One approximately 50-ft long section of the walkway has already collapsed. This area poses a safety hazard. We recommend closing this area to the public. There are additional damages to the walkway, revetment, and jetty that should be evaluated in more detail with survey data.²²

The Hazard Mitigation Report also echoed HDR's conclusion that the City's pre-disaster repair methodology of placing riprap on damaged sections of the ABM may be effective when the damage is more localized, but "removal and replacement of the damaged ABMs is recommended for the more widespread damage caused by Harvey."²³ Similar to both HDR's Damage Assessment Report and FEMA's Site Inspection Report, there was no indication in the Mitigation Site Inspection Report that temporary measures were available to prevent erosion while FEMA reviewed the Project for eligibility.

²⁰ Exhibit 7, FEMA Site Inspection Report prepared by James Egan (Inspection occurred on Mar. 1, 2018) [hereinafter "FEMA Site Inspection Report by James Egan"].

²¹ *Id.* at 3.

²² Exhibit 8, FEMA Mitigation Site Inspection Report prepared by Lawrence S. Crowley, at 1 (Inspection occurred on Mar. 1, 2018).

²³ *Id.* at 10.

B. FEMA Delayed the Project by Deferring its Federal Authority

Over the next twenty months, the City worked closely with FEMA and TDEM to develop the DDD and an estimated cost to restore the Facility to its pre-disaster design and function.²⁴ Based on communications between FEMA, the City, and City affiliates, it appeared that FEMA understood that Hurricane Harvey’s damage was progressive. The City’s Packery Channel monitoring team at Texas A&M Corpus Christi (“TAMU-CC”) provided FEMA with “erosion reports before and after Hurricane Harvey” that were “vital in providing FEMA with the information . . . needed to build our case to get the project funded *to the point of where it is today*.”²⁵ The reports provided by TAMU-CC were also “used to address the various areas of concern needed to produce our reports on the issues of the sand erosion loss” and were “instrumental in giving FEMA the direction needed to address the areas of concern to what materials would be better used to control the soil erosion surrounding the channel to prevent future damages . . . [through] proper erosion control measures.”²⁶

Despite the above affirmation, and FEMA’s acknowledgement of the “urgency of getting this project obligated,” the Project failed to make significant progress through 2019 as FEMA personnel familiar with the Project were cycled out and those new to the Project were cycled in.²⁷ Nonetheless, in 2019 the City moved forward with bidding out the Project so that construction work could begin immediately after FEMA approved the scope of work and performed its required EHP reviews.²⁸

²⁴ See Exhibit 9, Email from Mitigation Specialist Lawrence Crowley (June 12, 2018); Exhibit 10, Correspondence from FEMA PDMG Silvia Henry to Jeffrey Edmonds (Nov. 14, 2018); Exhibit 11, Email correspondences between City and FEMA personnel between March 8 and March 11, 2019 (discussing meeting needed to define Project work areas); Exhibit 12, Emails between FEMA CTR Robert Arbo and Jeffrey Edmonds (Oct. 23, 2019).

²⁵ Exhibit 13, Email from FEMA PDMG Jerry Washington (Aug. 8, 2018). Note that TAMU-CC had numerous meetings and phone calls with FEMA personnel regarding damages to the Facility caused by Hurricane Harvey.

²⁶ *Id.*

²⁷ Exhibit 14, Email from FEMA PDMG Robert Arbo (Oct. 8, 2019); *see also* Exhibit 15, Email from PDMG Robert Arbo to Sarah West (Oct. 23, 2019) (detailing FEMA delays in processing the Project).

²⁸ The City failed to receive any bids in response to its initial solicitation. The City planned to re-bid the Project before FEMA determined USACE had authority over the Facility.

However, in late 2019, FEMA stopped progression of the Project in its tracks when it signaled that the U.S. Army Corps of Engineers (“USACE”) – not FEMA – should be responsible for the Facility repairs. The City conveyed to FEMA that the 2003 Project Cooperation Agreement made it clear that USACE had no ongoing responsibility for Packery Channel after the original construction was complete,²⁹ and requests to USACE regarding repairs to damages from previous storms confirmed that USACE lacked authority to provide assistance.

Nonetheless, on January 30, 2020 – almost two and a half years after the event – FEMA informed the City that the Project was ineligible for FEMA funding as USACE was the responsible authority for the Packery Channel Restoration Project under its Public Law 84-99 Rehabilitation and Inspection Program (“RIP”). The shift in Federal authority over the Project from FEMA to USACE carried broad implications. While FEMA’s PA Program is a reimbursement program, under RIP, USACE was responsible for actually carrying out the repairs. In other words, by determining that USACE was the appropriate authority to provide assistance, FEMA took the Project out of the City’s hands.

Though the City disagreed with FEMA’s determination, between February 2020 and May 2021, the City pursued USACE assistance consistent with FEMA’s instructions. However, on May 25, 2021, USACE confirmed that the Packery Channel was not eligible for rehabilitation assistance as the purpose of the Channel was inconsistent with RIP requirements.³⁰ On the same day, FEMA obligated \$4.3 million to repair the Facility’s sidewalks, cables, and bollards – Facility components that the parties agreed were not under USACE authority.³¹

By virtue of USACE confirming its lack of authority over the Facility, FEMA determined the Facility Restoration Project eligible for FEMA PA funding. By August 11, 2021, FEMA conducted its required EHP review,³² and, on August 31, 2021 – four years after Hurricane Harvey’s impact – FEMA obligated \$10,238,745.00 to restore the Facility.³³ Upon request

²⁹ Exhibit 16, Memorandum of Agreement between USACE and the City (Mar. 25, 2003).

³⁰ Exhibit 17, PW 04514 USACE Letter (May 25, 2021).

³¹ Exhibit 18, TDEM Packery Channel Sidewalk Obligation Letter (June 2, 2021). FEMA initially obligated scope and cost for the Packery Channel Sidewalk(s) under Project 141862 on May 25, 2021. In response to TDEM’s and the Applicant’s requests, FEMA transferred the scope and cost to Project 64688.

³² Exhibit 19, Project Worksheet 04514 (Aug. 31, 2021); Exhibit 20, TDEM Packery Channel Restoration Project Obligation Letter (June 2, 2021).

³³ Exhibit 20, TDEM Packery Channel Restoration Obligation Letter (Sep. 13, 2021).

from the City, FEMA agreed to consolidate the sidewalk repair work and the larger Packery Channel Restoration Project into a single PW with an estimated total cost of \$15,033,311.00.³⁴

After conducting a second competitive bid process, the City awarded a contract to Callan Marine, Ltd. (“Callan”) to restore the Facility, and the Project commenced on January 10, 2022.

C. The City Requests a Scope Amendment

Soon after the work commenced, Callan and its subcontractor performed a follow-up survey which revealed “additional details regarding the low areas that were not included on (*sic*) survey at time of bid.”³⁵ Based on the result of the survey and inspection, on April 14, 2022, the City and Callan requested that HDR update its Facility construction design with the new survey data.

On June 16, 2022, Callan submitted a cost proposal for a change order for the additional repairs needed to the Facility’s revetment, sidewalks, and storm drain outfalls because of ongoing erosion that exacerbated damages caused by Hurricane Harvey.³⁶ On July 15, 2022, HDR evaluated Callan’s Change Order Request and determined that the increase in volume of bedding stone requested was consistent with HDR’s calculations.³⁷ The Change Order of \$2,620,053.00 became part of the Contract on August 12, 2022.³⁸

On January 18, 2023, the City submitted to TDEM a scope amendment request for \$2,620,053.00 in additional funding to account for the necessary work included in Callan’s Change Order.³⁹ Though the City’s Scope Amendment Request cited the impact of continued erosion on the Facility as a result of FEMA’s delays, the Request was meant to cover an increase in the extent of Hurricane Harvey-related damages.

³⁴ Exhibit 21, PW Consolidation Request Letter from TDEM (Feb. 15, 2022); Exhibit 22, Consolidated Project Worksheet (May 12, 2022).

³⁵ Exhibit 23, Callan Request for Information regarding additional work for Packery Channel Project, including surveys performed by Callan subcontractor T. Baker Smith (Mar. 29, 2022).

³⁶ Exhibit 24, Packery Channel Project Change Order #1 Cost Proposal (June 16, 2022).

³⁷ Exhibit 25, HDR Evaluation of Callan Change Order Proposal (July 15, 2022).

³⁸ Exhibit 26, Change Order and Transmission Letter (Aug. 12, 2022).

³⁹ Exhibit 27, City Change Order Amendment Request (Jan. 18, 2023).

Based on FEMA’s prior obligation of funding for this Project, it appears as if FEMA contemplated that Hurricane Harvey’s damages would worsen until the Project repairs were completed. Indeed, FEMA’s Project Estimate of \$15,033,311.00 exceeded the actual costs the City will incur to restore the Facility to its pre-disaster condition, inclusive of the Change Order Request that is the subject of this Arbitration. On February 23, 2023, TDEM submitted with its support the Change Order Request to FEMA for review.⁴⁰

D. FEMA’s Determination and First Appeal Decision

On May 28, 2023, FEMA issued a DM denying the City’s request for a Project scope amendment and increase in Project costs, concluding that the additional damage was not disaster-related, but instead was “a result of the Applicant’s failure to protect the Facility from further damage.”⁴¹

The City timely appealed FEMA’s DM arguing that Hurricane Harvey caused the damages at issue and “there was no stop-gap, temporary solution available that was technically feasible or environmentally compliant” to protect against erosion after the event.⁴² Rather, the only way the City could protect the Facility against erosion was to perform the construction work as designed.⁴³ However, the City pointed out that, in accordance with FEMA guidance, it could not start this work until FEMA performed its required EHP, which finally took place approximately four years after the event.⁴⁴

In its First Appeal Decision, FEMA narrowed the issue to “whether the additional damage to the Facility was a direct result of the declared incident, not whether the Subrecipient complied with FEMA regulations regarding the EHP process.”⁴⁵ FEMA maintained its position that the damages were not disaster-related, but instead were caused by the City’s failure to protect the Facility after the storm.

In its First Appeal Decision, FEMA did not address the City’s argument that no such temporary measures were available, or that the construction project could not begin

⁴⁰ Exhibit 28, TDEM Submission of Change Order Request to FEMA (Feb. 23, 2023).

⁴¹ Exhibit 1, FEMA DM, at 5.

⁴² Exhibit 2, City’s First Appeal, at 5.

⁴³ *Id.*

⁴⁴ *Id.* at 2-4.

⁴⁵ Exhibit 4, FEMA First Appeal Determination, at 3. Interestingly, the only reason that EHP compliance was not an issue was because the City made a conscious decision to delay construction until FEMA completed its EHP review.

before FEMA’s EHP review. FEMA also ignored the impacts on the Project that resulted from its four-year delay in approving the Facility as eligible for FEMA Public Assistance. Lastly, FEMA inexplicably determined that, because the City agreed to the PW scope of work in August of 2021 and May 2022, it had “in effect acknowledged no deterioration to the Facility from erosion.”⁴⁶ That is, of course, incorrect. The only thing the City’s agreement on the SOW in PW 04514 indicates is their eagerness to start construction on a Project almost five years after the event.

The sole issue presented in this Arbitration Request is whether the increase in the extent of the Hurricane Harvey damages is eligible for FEMA Public Assistance funding, which the Administrative Record confirms.

IV. The Facility’s Damages were a Result of Hurricane Harvey

An eligible public facility is one that a State, Territorial, Tribal, or local government owns or has legal responsibility for maintaining, including any “flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development or airport facility” and any “other public building, structure, or system, including those used for educational, recreational, or cultural purposes.”⁴⁷

FEMA provides Public Assistance funding for work to restore damaged eligible facilities to their pre-disaster design, function, and capacity in accordance with applicable codes and standards.⁴⁸ FEMA defines “pre-disaster design” as the size or capacity of a facility as originally constructed or subsequently modified.⁴⁹

In order to establish eligibility for the permanent repair of a facility, an applicant must show that the work is:

- required as a result of the declared incident;
- located within the designated area; and

⁴⁶ *Id.*

⁴⁷ See Public Assistance Program and Policy Guide, FP 104-009-2, at 15 (Apr. 2018) [hereinafter PAPPG]; see also Stafford Act § 102(10), 42 U.S.C. § 5122, and 44 C.F.R. § 206.221(h).

⁴⁸ See 44 CFR § 206.201(j); see also PAPPG at 84.

⁴⁹ PAPPG at 84.

- the legal responsibility of an eligible Applicant.⁵⁰

Here, the Packery Channel is an eligible facility within a disaster-designated area for which the City is legally responsible to repair. However, FEMA asserts that the City has not satisfied the first prong to establish eligibility, i.e., that the work at issue is required as a result of Hurricane Harvey. The Administrative Record, however, demonstrates that the damages at issue were disaster-related.

Ultimately, the City worked diligently with FEMA throughout the process and ensured that FEMA understood three key facts: (1) the damage caused by Hurricane Harvey left the Facility susceptible to additional erosion-related damages; (2) there were not temporary solutions available to prevent continued erosion; and (3) the City would comply with FEMA guidance by ensuring that FEMA’s EHP review occurred before work began. Accordingly, the damages at issue in this Arbitration Request were both foreseeable and anticipated until the Facility was restored to its pre-disaster condition.⁵¹ The erosion damages are therefore a direct result of Hurricane Harvey and eligible for PA funding.

A. The Erosion Damages Occurred as a Result of Hurricane Harvey

Neither FEMA policy nor applicable regulations describe when work is “required as the result of the emergency or major disaster event.” Prior Arbitration Panels have interpreted this requirement to mean “cause and effect [for any damage claimed] must be established.”⁵² Another Panel further clarified that being the result of the disaster means being “tied to the disaster without an intervening or disallowing cause, such as improper maintenance or pre- or post-existing conditions that would serve to disqualify the repair of the damage from public assistance.”⁵³ This is more or less the definition of “proximate cause” cited in Federal Appeals and Supreme Court cases, i.e., “an act or omission which,

⁵⁰ *Id.* at 19.

⁵¹ In 2019, after FEMA was in receipt of HDR’s Damage Assessment Report and its Preliminary Design Report (discussed below), FEMA acknowledged the “urgency of getting this project obligated,” presumably because it was aware of the increase in the extent of Hurricane Harvey damages. See Exhibit 14, Email from FEMA PDMG Robert Arbo.

⁵² *In the Matter of City of Kenner*, CBCA 4086-FEMA, at 2 (Feb. 5, 2015).

⁵³ *In the Matter of Jackson County Engineer*, CBCA 7296-FEMA, at 2 (June 10, 2022).

in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.”⁵⁴

The above interpretations are consistent with limitations on FEMA’s provision of Public Assistance funding, including that FEMA will not provide Public Assistance funding for damages caused by deterioration, deferred maintenance, the Applicant’s failure to take measures to protect a facility from further damage, or negligence.⁵⁵ As the panel held in its decision *In the Matter of Jackson County Engineer*, the above causes of damage would constitute “an intervening or disallowing cause . . . that would serve to disqualify the repair of the damage from public assistance.”⁵⁶

Here, FEMA’s position is that the City’s alleged failure to protect the Facility after the event was essentially an intervening cause that disqualifies the damage at issue from being eligible for Public Assistance funding. Documentation in the Administrative Record refutes such a conclusion.

The full extent of damages to Facilities like the Packery Channel often do not have the same type of immediate cause-and-effect result that is evident from damage caused by declared disasters to other types of facilities. That said, FEMA does not require that the damage manifest itself immediately after an event. Rather, “FEMA will recognize ***damage that occurs after the close of the incident period*** if it is shown to have ***resulted directly from events that occurred during the incident period.***”⁵⁷

That is what occurred here. In its Damage Assessment Report, HDR noted that the Packery Channel operates as a system, and “as a general rule, once damage has begun as it has at Packery, these type of structures no longer are able to work as a system and are more prone to additional and more significant damage in future events.”⁵⁸

HDR identified disaster-related damages that compromised the Facility. The HDR Damage Assessment Report states that damage to the walkway was “occurring in a progressive manner as the damaged ABM has left the walkway vulnerable to undermining from waves

⁵⁴ *Wolf v. Fauquier Cnty. Bd. of Supervisors*, 555 F.3d 311, 321 (4th Cir. 2009).

⁵⁵ See 44 CFR 206.223(e); See also PAPPG at 19-20.

⁵⁶ *In the Matter of Jackson County Engineer*, CBCA 7296-FEMA, at 2 (June 10, 2022).

⁵⁷ FEMA Second Appeal Analysis, *City of Napa*, FEMA-4193 (Jul. 16, 2018) (citing to FEMA’s prior Public Assistance Guide, FEMA 322 (June 2007)); see also FEMA Second Appeal Analysis, *Town of Perrysburg*, FEMA 4180 (May 12, 2023).

⁵⁸ Exhibit 5, HDR Damage Assessment Report, at 4-5.

during higher tides.”⁵⁹ HDR also noted in its Damage Assessment Report that “progressive damage to the walkway should be expected to continue until the bank protection is repaired.”⁶⁰ Indeed, after a follow-up site visit in March of 2018, HDR determined that disaster damage had increased, resulting in 750 linear feet of requiring replacement.⁶¹

After a follow-up site visit on August 28, 2018, HDR developed its Preliminary Design Report. Therein, HDR concluded that “although no additional damage elements were identified during the updated assessment, the extent of damage has increased along the ABMs and concrete walkway along the south bank in Reach 3.”⁶² The increase in damage was specific to the components initially identified as disaster-damaged and therefore susceptible to ongoing damage, including the revetment, walkway, and storm drain outfalls.⁶³ The non-disaster damaged components of the Packery Channel were relatively unaffected by erosion.⁶⁴

This dichotomy demonstrates that the damages at issue were caused by Hurricane Harvey. Those Facility components that were not initially impacted by the event did not experience erosion damages. On the other hand, Hurricane Harvey’s initial impact during the incident period to the Facility components discussed throughout this Request set off a natural and continuous sequence of events that caused the damages at issue, which would not have occurred but for the event.

B. Stop-Gap Solutions and Temporary Measures were not Available to Protect the Facility before Permanent Work could Begin

FEMA’s position in its First Appeal Decision is that the “Facility was unprotected from ongoing erosion for an extended post-disaster period” and therefore the City cannot show the damages at issue were caused by the event.⁶⁵ In other words, FEMA claims that the

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Exhibit 29, HDR Preliminary Design Report, at 3 (Nov. 26, 2018). The Preliminary Design Report reiterated that “progressive damage to the bank and walkway is expected to continue until the bank protection is repaired.”

⁶³ Exhibit 30, Declaration from HDR Coastal Lead, Daniel Heilman, at 4 (Apr. 3, 2024) [hereinafter “Declaration from Daniel Heilman”].

⁶⁴ *Id.*

⁶⁵ Exhibit 4, FEMA First Appeal Determination, at 3.

City's lack of temporary protective measures at the Facility after the event was an intervening cause that disqualifies it from receiving Public Assistance funding.

FEMA does not provide PA funding for damages caused by deterioration, deferred maintenance, the failure to take measures to protect a facility from further damage, or negligence.⁶⁶ However, the actions or inactions of an applicant after an event must be considered in the context of what a reasonably prudent person would do under similar circumstances.⁶⁷

As FEMA has confirmed on previous occasions, “the issue of negligence often arises when an applicant fails to take *prudent* measures to protect a facility from further damage.”⁶⁸ Along those lines, damage attributed to an applicant's actions or inactions “if unavoidable, may not necessarily be negligence.”⁶⁹

Here, the City acted prudently after the disaster. Any argument that the City failed to protect the Facility after the storm presupposes that available measures were available. However, there was no stop-gap, temporary solution available to stop erosion that was technically feasible or environmentally compliant, especially considering the extent of Hurricane Harvey's damages.⁷⁰

As HDR noted in its Damage Assessment Report, the City has previously repaired localized damages to the ABM by placing riprap over the damaged sections, as shown below.⁷¹

⁶⁶ PAPPG at 19-20.

⁶⁷ See FEMA Second Appeal Analysis, *City of Port Arthur*, FEMA-1606-DR-TX (Oct. 14, 2008); *In the Matter of Forrest County Board of Supervisors*, CBCA 1772-FEMA (Mar. 3, 2010).

⁶⁸ FEMA Second Appeal Analysis, *Town of Perrysburg*, FEMA 4180 (May 12, 2023) (emphasis added).

⁶⁹ *Id.*

⁷⁰ Exhibit 30, Declaration from HDR Coastal Lead, Daniel Heilman, at 4-5; see also Exhibit 31, Declaration from Jeff Edmonds, P.E., City's Director of Engineering (July 24, 2023) [hereinafter “Declaration from Jeff Edmonds”].

⁷¹ Exhibit 5, HDR Damage Assessment Report, at 11.



Figure 8 - Previous Repairs Using Riprap

However, HDR also noted that “although this previous repair method was relatively effective, removal and replacement of the damaged ABMs is recommended for the more widespread damage caused by Harvey.”⁷² Given the significant damages (as pictured below and throughout this Request), simply placing riprap was not feasible under the circumstances. Indeed, the damage photos below make it abundantly clear that the City could not have simply placed riprap on the below damages to protect against erosion.

⁷² *Id.* at 10-11.



Figure 9 - Disaster Damages

Daniel Heilman, the Professional Engineer with HDR that both inspected the Facility and prepared the Damage Assessment Report confirmed that with the extent of Hurricane Harvey damage at the Facility, “any protective layer placed on top of damaged components were likely to fail because they would not have addressed the foundation erosion that occurred below water which caused components to fail in the first place.”⁷³ Mr. Heilman similarly confirmed that lightweight geotextile matting was not feasible for this type of facility and for this extent of damage.⁷⁴ Ultimately, Mr. Heilman concluded that “there were no rapidly deployable temporary measures available to the City after the storm.”⁷⁵

This is consistent with the Declaration provided by the City’s Director of Engineering, Jeff Edmonds, attesting to the fact that a temporary protective measure that may work for other facilities (like a blue tarp temporary roof) “does not exist for a complicated slope revetment restoration project for a waterway channel system.”⁷⁶ Such a “quick fix” option that was both technically feasible and permissible was not available.⁷⁷

To support its position that the City should have taken measures after the event to protect the Facility, FEMA cites Second Appeal Analysis for the City of Port Aransas. There, FEMA

⁷³ Exhibit 30, Declaration from Daniel Heilman, at 4-5; *see also* Exhibit 29, HDR Preliminary Design Report, at 5 (describing the foundation erosion damages caused by the event).

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 3-4.

⁷⁶ Exhibit 31, Declaration from Jeff Edmonds, at 1.

⁷⁷ *Id.* at 2.

also FEMA denied Public Assistance funding for Port Aransas after determining that “the claimed additional land erosion damages . . . resulted from the Applicant’s failure to take preventative measures to protect the Facility from further damage and not as a direct result of the declared disaster.”⁷⁸ However, the facts for Port Aransas are different than those here. In Port Aransas’ case, it had temporary measures available to protect against erosion, a temporary sheet piling bulkhead, which FEMA found were not timely implemented.⁷⁹

Here, the City’s experienced coastal engineering consultant “evaluated alternative repair measures such as riprap, concrete blocks, and bulkheads” but concluded that “none of these could have been implemented expeditiously.”⁸⁰ The availability of temporary measures to stop erosion must be considered in determining whether the City acted prudently after the disaster.⁸¹

The City submits that the Panel should consider the circumstances here akin to how FEMA generally views applicants’ mold remediation efforts after a storm, i.e., if there is appropriate justification why measures were not taken to protect a facility after an event, or why measures taken were insufficient to prevent further damage, the repair work should still be eligible.⁸²

Such is the case here. Aside from putting up fences around the Facility and otherwise restricting access to protect the public health and safety, there were no temporary measures the City could take to protect the Facility against erosion.⁸³ Without such available temporary measures, the City’s actions after the event cannot be categorized as

⁷⁸ FEMA Second Appeal Analysis, *City of Port Aransas*, FEMA 4332 (Apr. 10, 2023).

⁷⁹ *Id.*

⁸⁰ Exhibit 30, Declaration from Daniel Heilman, at 5.

⁸¹ *See In the Matter of Forrest County Board of Supervisors*, CBCA 1772-FEMA (Mar. 3, 2010) (rejecting FEMA’s argument that the Board should have taken similar measures as another applicant to prevent mold growth. The Panel determined that FEMA’s position must be rejected because there was no evidence the Board had either the opportunity or means to carry out the same measures.).

⁸² PAPPG at 83.

⁸³ In its First Appeal Decision, FEMA did not address this argument or offer insight on what the City could have done differently after the event.

an “intervening or disallowing cause . . . that would serve to disqualify the repair of the damage from public assistance.”⁸⁴

Accordingly, the record establishes a sufficient connection between the erosion damage and Hurricane Harvey’s impact “without a disqualifying cause . . . within the meaning and application of regulations and guidelines.”⁸⁵

C. The Work could not be Performed before FEMA’s EHP Review without Jeopardizing Funding

The City’s decision to delay construction until FEMA performed its required EHP reviews also cannot be considered an intervening cause that would preclude the erosion damages from being “disaster related.” The only way the City could protect the Facility was by executing the Project as designed, and the only way the City could do that without jeopardizing funding was to first obtain FEMA approval.

As discussed above, no temporary measures were available to protect the Facility in the over four years it took FEMA to approve the Facility as eligible – a point FEMA does not address in its First Appeal Decision.

FEMA also fails to reconcile how the City could have moved forward with permanent construction work to protect the Facility without jeopardizing FEMA funding for the entire Project.

FEMA informs applicants of EHP requirements through issuance of a “Greensheet” at or near the time the applicant and FEMA first meet to discuss disaster damages.⁸⁶ FEMA must consider a range of federal statutes, regulations and Executive Orders related to EHP when providing PA funding. Before the City could move forward with permanent work to restore the Facility to its pre-disaster design and capacity, FEMA was “required to consult with Federal, State, Territorial, and Tribal government resource agencies” which may include “the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) for impacts to federally-listed threatened and endangered species; and the SHPO or THPO for impacts to historic properties.”⁸⁷

⁸⁴ *In the Matter of Jackson County Engineer*, CBCA 7296-FEMA, at 2 (June 10, 2022).

⁸⁵ *Id.*

⁸⁶ Exhibit 32, FEMA Environmental Greensheet for Hurricane Harvey (FEMA 4332-DR-TX) [hereinafter “FEMA Greensheet”].

⁸⁷ PAPPG at 86.

Further, the National Environmental Policy Act (NEPA) requires all federal agencies to consider the environmental impact of a proposed action as well as whether any alternatives exist, prior to obligating funds and beginning work. According to FEMA, the most common problem associated with NEPA reviews is when an applicant “begins project implementation before FEMA has completed NEPA review,” and in such cases, “funding will be denied, except in very limited imminent threat emergency situations.”⁸⁸

In all, there are over thirty federal laws and executive orders for which FEMA must ensure compliance before it can provide PA funding. Some of these laws are listed below.

- National Environmental Policy Act
- Endangered Species Act
- Rivers and Harbors Act
- Clean Air Act
- Migratory Bird Treaty Act
- Magnuson-Stevens Fishery Conservation and Management Act
- National Marine Sanctuaries Act
- Farmland Protection Policy Act
- Resource Conservation and Recovery Act
- National Historic Preservation Act
- Clean Water Act
- Safe Drinking Water Act
- Coastal Barrier Resources Act
- Bald and Golden Eagle Protection Act
- Marine Mammal Protection Act
- Coastal Zone Management Act
- Wild and Scenic Rivers Act
- Comprehensive Environmental Response, Compensation and Liability Act

⁸⁸ FEMA Guidance, *Possible Consequences of Not Following National Environmental Policy Act Process* (Jul. 1, 2020) (available at <https://www.fema.gov/emergency-managers/practitioners/environmental-historic/assessments/consequences-nepa>).

- Executive Order 11988, Floodplain
- Executive Order 12898, Environmental Justice
- Executive Order 11990, Protection of Wetlands
- Executive Order 13122, Invasive Species

Project review for compliance with the above laws was required before FEMA could approve funding and before the City could commence work at the Facility “since the review may identify steps to be taken or conditions to be met before the project can be implemented.”⁸⁹ The PAPPG echoes this sentiment, stating that “FEMA generally cannot conduct consultation with resource agencies after the Applicant initiates work on a project because those agencies lose the ability to consider alternatives that would avoid, minimize, or mitigate adverse effects to the environment or historic properties.”⁹⁰

FEMA takes its EHP duties very seriously. FEMA’s PAPPG states multiple times that “when an applicant initiates or completes work on a project before FEMA is able to conduct the necessary EHP compliance review, the work generally is not eligible for PA funding” and the applicant “will jeopardize PA funding for the entire project.”⁹¹ FEMA’s Greensheet applicable to Hurricane Harvey similarly states:

Applicant has several compliance responsibilities which may be required before funding can be approved or work can proceed. Failure to comply with applicable Federal, State, and local environmental and historic preservation laws could delay or jeopardize potential funding.⁹²

While the PAPPG encourages applicants not to delay in following its normal policies and procedures when taking actions to address threats to life, public health and safety, and improved property, taking actions that fall outside of emergency work – even if necessary to protect property – before FEMA can perform its EHP reviews will jeopardize funding.

To restore the Packery Channel to its pre-disaster condition, the City performed significant work in an area that encroaches on the habitat of two endangered species, sea turtles and

⁸⁹ FEMA Second Appeal Analysis, *Kershaw County*, FEMA 4241 (Sep. 21, 2020).

⁹⁰ PAPPG at 86.

⁹¹ *Id.* at 85, 86, 108, and 136.

⁹² Exhibit 32, FEMA Greensheet, at 1.

piper plovers, as confirmed by FEMA in its Site Inspection Report.⁹³ Accordingly, the work required consultation with the U.S. Fish and Wildlife Service (“USFWS”) to ensure compliance with the Endangered Species Act. The restoration work also required, in part, a NEPA review and permitting under Section 408, Section 10 of the Rivers and Harbors Act, and Section 404 of the Clean Water Act.⁹⁴

FEMA has denied funding for entire projects when an applicant failed to adhere to EHP requirements similar to those listed above while performing work to address similar damages to those at issue.

For instance, FEMA denied all PA assistance for Hutchinson County to repair, in part, erosion of base and subbase materials, soil embankments, and supporting riprap associated with the Harvey Wall Bridge.⁹⁵ FEMA found that “excavation of an adjacent area as a source for material for the project (the ‘borrow pit’), creation of an access road to the borrow pit, and excavation and grading in the floodplain” were not covered under the State Programmatic Allowances, and violated several Federal laws and Executive Orders. On Second Appeal, FEMA upheld its decision, concluding “the Applicant commenced and completed the repair work on the Facility without affording FEMA the opportunity to perform its required EHP review” and “FEMA cannot provide PA funding to projects that do not comply with Federal EHP laws.”⁹⁶

In FEMA Second Appeal Analysis for the Grand River Dam Authority, FEMA found that the Authority dredged and removed sediment from the Kerr Dam stilling basin “before receiving a report from habitat specialists regarding potential impacts to an endangered species.”⁹⁷ The Authority argued that it performed the work prior to FEMA performing its required EHP reviews “because of the pressing need to prevent additional dam foundation damage.”⁹⁸ FEMA found that the urgency of the project “does not excuse the Applicant from complying with regulatory requirements for EHP reviews,” including consultation with “the USFWS prior to beginning any work associated with the federal

⁹³ Exhibit 7, FEMA Site Inspection Report by James Egan, at 3.

⁹⁴ Exhibit 29, HDR Preliminary Design Report, at 26-31.

⁹⁵ FEMA Second Appeal Analysis, *Hutchinson County*, FEMA 4469 (June 29, 2022).

⁹⁶ *Id.*

⁹⁷ FEMA Second Appeal Analysis, *Grand River Dam Authority*, FEMA 4177 (Dec. 20, 2019).

⁹⁸ *Id.*

grant.”⁹⁹ Therefore, FEMA denied all funding associated with the Authority’s sediment removal work.¹⁰⁰

The CBCA similarly recently upheld a FEMA determination that an applicant’s repair work was ineligible because “the required EHP reviews were not completed before the project commenced.”¹⁰¹ There have been several additional FEMA Second Appeals and Arbitrations before the CBCA where the decision rested on whether the applicant complied with FEMA’s EHP requirements, and in each case where the applicant failed to do so, the project funding was denied.¹⁰²

Because readily deployable temporary measures were not available to combat erosion, the only way to protect the Facility was to carry out the permanent work as designed. The City could not execute the Project without jeopardizing Project funding until FEMA completed its EHP review, including consulting with various Federal agencies like USACE and USFWS. The City “adhered strictly to FEMA policy,” as corroborated by Congressman Michael Cloud and United States Senators John Cornyn and Ted Cruz,¹⁰³ by waiting until FEMA performed its EHP review to begin the work—in fact, it would have been irresponsible if it had not.¹⁰⁴

FEMA has caused delays throughout the life of this Project, but the City remained patient so that FEMA could perform its regulatory duties. Between August 2017 and December 2019, FEMA and the City worked together to ensure all documentation was provided to

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *In the Matter of Startex-Jackson-Wellford-Duncan Water District*, CBCA 7416-FEMA (Nov. 9, 2022).

¹⁰² FEMA Second Appeal Analysis, *Town of Fairfield*, DR-4087 (Mar. 31, 2021); FEMA Second Appeal Analysis, *City of Ardmore*, FEMA 4222 (June 7, 2023); FEMA Second Appeal Analysis, *FL Department of Environmental Protection*, DR-4399 (July 24, 2023); *In the Matter of De Luz Community Services District*, CBCA 7199-FEMA (Jan. 26, 2022); *In the Matter of Collier County, Florida*, CBCA 7651-FEMA (Apr. 19, 2023).

¹⁰³ Exhibit 33, Support Letter from Congressman Michael Cloud and US Senators John Cornyn and Ted Cruz (Sep. 12, 2023).

¹⁰⁴ FEMA Guidance, *Possible Consequences of Not Following National Environmental Policy Act Process* (FEMA cautions that “a negative perception of FEMA and the applicant can occur when the public finds that the agency neglected to consider the environment, is in violation of environmental law or unable to mitigate the community’s suffering because they neglected to follow the process.” The City protected both its and FEMA’s reputation by delaying the Project until FEMA could perform its required EHP reviews.

support eligibility of the Facility and to facilitate the required EHP reviews so work could commence. In January 2020, however, FEMA deferred its authority to USACE, which took the Project out of the City’s hands. The City pursued USACE assistance as FEMA directed, but USACE confirmed in May of 2021 that FEMA, in fact, was the appropriate agency to provide assistance for the Facility. FEMA eventually determined that the Facility was eligible for PA funding, and, four years after the storm, it proceeded to perform the EHP review that must be carried out before work can begin. Despite advising applicants that work cannot be performed before this EHP review without jeopardizing FEMA funding, FEMA has declined to pay for the costs that could have been avoided if not for its delay. This is improper.¹⁰⁵ The City submits that it should not be punished for its compliance with FEMA requirements.

D. The Erosion Damages did not Occur after Project Obligation

Contrary to FEMA’s position in the First Appeal Determination, the City’s execution of PW 04514 on August 31, 2021 and again on May 20, 2022 (when the projects were combined) was not an acknowledgement that the Facility was not being impacted by erosion or any indication that erosion only started impacting the Facility after FEMA obligated the funding.

FEMA guidance recognizes that changes to scopes of work initially agreed upon are appropriate when an applicant “discovers damage not visible during the site inspection” or when “the applicant discovers hidden damage during the course of completing previously approved work.”¹⁰⁶ When this occurs, FEMA advises that applicants “should engage the Recipient and FEMA as soon as it identifies a change to the SOW to allow FEMA time to review changes for eligibility and EHP compliance requirements prior to commencement of work.”¹⁰⁷ More specifically, a change to the project worksheet “requires a written request from the Applicant to the Recipient, including detailed justification and documentation to support the eligibility of the requested revision.”¹⁰⁸ As

¹⁰⁵ The CBCA has previously sided with an applicant when FEMA’s delay contributed to higher costs. *See In the Matter of Virgin Islands Hous. Fin. Auth.*, CBCA 7610 (June 28, 2023) (The Panel found that the applicant’s “storage and security costs were incurred directly as a result of FEMA’s delayed approval of the reimbursement for the excess materials,” and therefore the costs were eligible.)

¹⁰⁶ PAPPG at 137.

¹⁰⁷ *Id.* at 136-137.

¹⁰⁸ *Id.* at 137.

FEMA notes, “if the request involves previously unreported damage, the Applicant must also provide documentation demonstrating how the incident caused the damage.”¹⁰⁹

The City followed these rules. HDR’s Damage Assessment Report and Preliminary Design Report both identified that the damages to the Facility caused by Hurricane Harvey as progressive, and upon follow-up inspection in 2018, HDR indeed identified an increase in the extent of damage caused by the event.¹¹⁰ When construction commenced in January 2022, the City’s contractor, Callan, performed a survey to ensure the scope of work was accurate. When the survey indicated additional material fill was required to restore the Facility to its pre-disaster design, Callan prepared a cost proposal that was analyzed by the City’s engineer representative, HDR, in July of 2022.¹¹¹ The Change Order was not effective until August 12, 2022.¹¹² Upon confirming the updated scope of work and commencing actual construction services, the City submitted to TDEM a Scope Amendment Request on January 18, 2023, which was forwarded to FEMA on February 23, 2023.¹¹³

As such, the full detail of the required fill to restore the Facility to its pre-disaster condition was not available until *after FEMA’s final obligation on May 20, 2022*. Nonetheless, the progressive nature of the disaster damages was apparent in 2017 and communicated to FEMA as such. There is therefore nothing in the Administrative Record to indicate that the extent of erosion damages caused by Hurricane Harvey only appeared after FEMA obligated Project funding in May of 2022.

¹⁰⁹ *Id.*

¹¹⁰ See Exhibits 5 and 29, HDR’s Damage Assessment Report and Preliminary Design Report, respectively.

¹¹¹ See Exhibits 24 and 25, Project Change Order #1 Cost Proposal and HDR’s Evaluation of the Change Order Proposal, respectively.

¹¹² Exhibit 26, Change Order and Transmission Letter (Aug. 12, 2022).

¹¹³ Exhibits 27 and 28, City’s Change Order Amendment Request and TDEM’s Submission of Change Order Request to FEMA, respectively.

V. Conclusion

Through this Request for Arbitration and attached exhibits, the City has demonstrated that the damages at issue resulted from Hurricane Harvey, and no intervening cause precludes the provision of FEMA Public Assistance requested here.

The City has provided engineering reports from an experienced coastal engineering firm, HDR, that confirmed that Hurricane Harvey significantly impacted the Facility, and that as time went by, *the extent of this damage* was increasing. The City also established through the above-referenced engineering reports and Declarations from the City's Director of Engineering and HDR's Professional Engineer that there were no temporary solutions available to prevent continued erosion. Lastly, the City acted prudently by awaiting FEMA's EHP reviews before commencing construction work so as not to jeopardize Project funding. The City should not be penalized for doing so, especially considering the numerous decisions in which FEMA has denied funding as a result of non-compliance with EHP requirements.

The amount requested – \$2,620,053.00 – is necessary to return the Facility to its pre-disaster condition. The amount at issue is not only reasonable, but it appears that the costs were also foreseeable. The total project costs, even with the Change Order, is still within FEMA's estimated total project cost of \$15,033,311.00.

The City requests that the Panel direct FEMA to confirm the damages at issue are eligible for Public Assistance funding, and that the Federal funds already obligated for this Project, inclusive of the \$2,620,053.00 at issue, be made available to the City to ensure this vital channel can be fully restored.

Respectfully:



Peter Zanoni
City of Corpus Christi Manager



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Berkowitz, PC
*Outside Counsel to the City of Corpus
Christi*

List of Exhibits

Exhibit 1	FEMA Eligibility Determination Memorandum for PW 04514 (May 28, 2023)
Exhibit 2	City's First Appeal of FEMA's DM for PW 04514 (July 24, 2023)
Exhibit 3	TDEM's Transmission of the City's First Appeal (July 27, 2023)
Exhibit 4	FEMA First Appeal Determination for PW 04514 (Feb. 6, 2024)
Exhibit 5	HDR Post-Storm Damage Assessment and Repair Recommendations, Packery Channel Jetty Slope Protection and Appurtenances (Mar. 27, 2018)
Exhibit 6	Email from City Director of Engineering Jeffrey Edmonds to Public Assistance Group Supervisor Richard Cain (July 7, 2021)
Exhibit 7	FEMA Site Inspection Report prepared by James Egan (Inspection occurred on Mar. 1, 2018)
Exhibit 8	FEMA Mitigation Site Inspection Report prepared by Lawrence S. Crowley (Inspection occurred on Mar. 1, 2018)
Exhibit 9	Email from Mitigation Specialist Lawrence Crowley (June 12, 2018)
Exhibit 10	Correspondence from FEMA PDMG Silvia Henry to Jeffrey Edmonds (Nov. 14, 2018)
Exhibit 11	Email correspondences between City and FEMA personnel between March 8 and March 11, 2019

Exhibit 12	Emails between FEMA CTR Robert Arbo and Jeffrey Edmonds (Oct. 23, 2019)
Exhibit 13	Email from FEMA PDMG Jerry Washington (Aug. 8, 2018)
Exhibit 14	Email from FEMA PDMG Robert Arbo (Oct. 8, 2019)
Exhibit 15	Email from PDMG Robert Arbo to Sarah West (Oct. 23, 2019)
Exhibit 16	Memorandum of Agreement between USACE and the City (Mar. 25, 2003)
Exhibit 17	PW 04514 USACE Letter (May 25, 2021)
Exhibit 18	TDEM Packery Channel Sidewalk Obligation Letter (June 2, 2021)
Exhibit 19	Project Worksheet 04514 (Aug. 31, 2021)
Exhibit 20	TDEM Packery Channel Restoration Obligation Letter (Sep. 13, 2021)
Exhibit 21	PW Consolidation Request Letter from TDEM (Feb. 15, 2022)
Exhibit 22	Consolidated Project Worksheet (May 12, 2022)
Exhibit 23	Callan Request for Information regarding additional work for Packery Channel Project, including surveys performed by Callan subcontractor T. Baker Smith (Mar. 29, 2022)
Exhibit 24	Packery Channel Project Change Order #1 Cost Proposal (June 16, 2022)

Exhibit 25	HDR Evaluation of Callan Change Order Proposal (July 15, 2022).
Exhibit 26	Change Order and Transmission Letter (Aug. 12, 2022)
Exhibit 27	City Change Order Amendment Request (Jan. 18, 2023)
Exhibit 28	TDEM Submission of Change Order Request to FEMA (Feb. 23, 2023)
Exhibit 29	HDR Preliminary Design Report (Nov. 26, 2018)
Exhibit 30	Declaration from HDR Coastal Lead, Daniel Heilman (Apr. 3, 2024).
Exhibit 31	Declaration from Jeff Edmonds, P.E., City’s Director of Engineering (July 24, 2023)
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