

PUBLICATION

FEMA's 60-Day Appeal Deadlines Now Strictly Enforced Against Applicants and State Grantees

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Applicants for federal disaster assistance under the various programs administered by the Federal Emergency Management Agency (FEMA) are not without recourse when FEMA denies or determines to later take back (deobligate) funding. Applicants, however, should be mindful of the agency's heightened enforcement of appeals deadlines. Recently, FEMA issued a number of decisions demonstrating strict enforcement, against applicants, of both the 60-day deadline for filing of appeals and the 60-day deadline for State grantees to forward the appeals to FEMA. At the same time, FEMA continues to struggle with compliance with its own 90-day deadline.

Under the Stafford Act, applicants have a statutory "right of appeal" of "any decision regarding eligibility for, from, or amount of assistance" provided under the Act, but this right should be exercised "within 60 days after the date on which the applicant for such assistance has been notified of the award or denial of award." FEMA's regulations require that an applicant file its appeal through the State grantee and that, within 60 days of receipt, the grantee then "review and forward" the applicant's appeal to FEMA with a recommendation. Within 90 days of receipt of the appeal from the grantee, this same regulation requires FEMA to decide the appeal or request further information/seek additional technical assistance.

Historically, FEMA seems to have considered compliance with the applicable deadlines liberally, especially in the days and years following truly catastrophic disasters. However, those days of leniency may be a thing of the past. Here are some examples, all from the last six months, of how FEMA's strict enforcement of deadlines affected applicants' federal disaster assistance funding.

- FEMA emphasized two missed deadlines in a second appeal decision issued in May 2017 regarding costs incurred following a tornado that struck Massachusetts in 2011: the applicant's first appeal was 16 months late, and the State's transmission of the second appeal was nine months late. FEMA stressed, "FEMA is precluded by the Stafford Act and regulation from entertaining the Grantee's request to extend the appeal filing deadline, all issues on appeal are untimely." Although FEMA appears to have also missed its 90-day response deadline by several months, FEMA denied the appeal based in part on timeliness issues.
- In May 2017, FEMA denied a second appeal of costs related to flooding in Iowa in 2011, noting that, although the applicant/grantee's first appeal was received timely, the second appeal was filed **eight days** late. In its decision, issued approximately six weeks beyond the 90-day response deadline, FEMA cited the applicant/grantee's eight-day delay as support for its denial.
- In an appeal for restoration costs required after Hurricane Wilma hit Florida in 2005, the applicant timely filed its first appeal, but the State grantee was nine months late in forwarding the appeal to FEMA. FEMA denied the applicant's timely filed *second* appeal in a decision issued in June 2017, stating, "Because the first appeal failed to comply with the requirements of 44 C.F.R. § 206.206(c), the Applicant's first appeal was untimely and its appeal rights lapsed. Therefore, this appeal is denied." FEMA asserted it had no choice:

Failure by either the applicant or the grantee to comply with [the deadline] requirements renders the appeal untimely and the Applicant's appeal rights lapse. *Neither the Stafford Act, nor FEMA's regulations, authorize FEMA to grant time extensions for filing appeals.*

- In a second decision for the same Florida applicant also regarding costs incurred following Hurricane Wilma, the applicant timely filed its second appeal with the grantee; however, the grantee was late in forwarding the appeal to FEMA. FEMA denied this appeal, noting also that Stafford Act Section 301, which provides FEMA the authority to waive administrative conditions when failure to comply is a result of the disaster, did not apply.

FEMA appears to have considered the merits of the applicants' appeals in the first two examples and notes substantive issues in addition to those associated with timeliness. However, the merits discussion appears to have been immaterial to the outcome given FEMA's assertion that "FEMA is precluded by the Stafford Act and regulation" from extending the time to file appeals. Indeed, in the latter two examples, FEMA does not even appear to have considered the merits – the timeliness issues hence killed any chance of recovery.

The appeal filing deadline has also proved troublesome when the date an appeal is "received" is unclear. FEMA has taken a number of different positions on when the 60-day appeal (and 30-day arbitration) deadline begins to run:

- from receipt of an unobligated draft project worksheet (PW),
- receipt of an courtesy copy of the PW direct from FEMA staff, or
- receipt of a formal letter from the State transmitting the determination and advising applicants of their appeal (and arbitration) rights [We believe this to be the correct one].

Therefore, applicants should be mindful and consistently document receipt of all determinations.

While FEMA's strict enforcement of an *applicant's* 60-day appeal deadline is supportable by both the Stafford Act and FEMA's regulations, we do not find similar support for FEMA's conclusion that it cannot consider appeals if *the State* fails to forward the appeal timely. There is no statutory provision imposing this deadline; the statute does not even contemplate the State grantee's role in the appeal process. Further, the regulatory language specifying the deadline applicable to the State grantee is different from that specifying the applicant's deadline: "Appellants *must* file within 60 days" versus the "grantee will review and forward ... within 60 days." If FEMA has no discretion to extend the deadline for grantees to forward appeals – as FEMA has asserted in its recent decisions – what does that say about FEMA's failure to decide appeals, or to request additional information, within 90 days of receipt? The regulation uses identical language ("will") for FEMA's and the grantees' deadlines.

Recommended Course of Action

If an applicant wants to preserve its appeal rights, *it must file an appeal within 60 days* of receipt of FEMA's determination. If the applicant is unsure of the deadline, *file early*. Applicants should consistently document receipt of all determinations. Finally, ensure that the State grantee complies with its deadline so that FEMA receives your *timely filed* appeal.

If you have questions about the information covered by this alert please contact Ernest B. Abbott, Wendy Huff Ellard, Michelle F. Zaltsberg or a member of our Disaster Recovery and Government Services Team.