



December 6, 2023

Mr. Robert J. Fenton, Jr., Regional Administrator
Federal Emergency Management Agency, Region IX
U.S. Department of Homeland Security
1111 Broadway, Suite 1200
Oakland, California 94607-4052

Subject: First Appeal – Project Number 165078
FEMA-4558-DR-CA, August 2020 Wildfires
Cal OES ID: 053-00000 FEMA ID: 053-99053-00
Subrecipient: Monterey County
Cal OES Log: COR-001775 FEMA Log: None

Dear Mr. Fenton:

On October 24, 2023, the California Governor's Office of Emergency Services (Cal OES) received the enclosed letter dated October 19, 2023, from Monterey County (Subrecipient) (Enclosure 1). This letter appeals the Federal Emergency Management Agency's (FEMA) determination to deny Public Assistance (PA) funding of \$1,503,924.62 for Project Number (PN) 165078, due to FEMA's inability to perform Environmental and Historic Preservation (EHP) reviews prior to the completion of work on culverts and roads in Monterey County along Cachagua Road (Enclosure 2).

FEMA's Determination Memorandum (DM) was signed on August 21, 2023, and was received via Certified Mail by the Subrecipient on September 11, 2023 (Enclosure 2). In accordance with Title 44 of the Code of Federal Regulations (44 CFR) § 206.206(c)(1), the Subrecipient's first appeal for PN 165078 was submitted within 60 days of the received date in Grants Portal.

Background

On August 22, 2020, a major disaster declaration for FEMA-4558-DR-CA, August 2020 Wildfires (DR-4558), was declared because of wildfires that caused severe damage in areas of the State of California between August 14, 2020, and September 26, 2020. The Subrecipient utilized force account labor, force account equipment, and contract services with Granite Construction to restore and maintain emergency and public access through the work completed to culverts and roads along Cachagua Road (Enclosure 3).



The Subrecipient requested funding through the FEMA PA program for a total project cost of \$1,503,924.62 (Enclosure 4). FEMA denied the Subrecipient's request for PA funding because the Subrecipient did not give FEMA EHP the opportunity to consult with the United States Fish and Wildlife Service (USFWS) to discuss protections for the California Tiger Salamander and the California Red-Legged Frog prior to the completion of work.

Analysis

Monterey County completed work on culverts and roads along Cachagua Road, with areas of work indicated by Mile Post (MP) 1.5 through 7.6 (Enclosure 5). According to the Grants Portal project information, "Cachagua Road is a two-lane asphalt paved [road] maintained by Monterey County. The road is narrow, winding, and has several culvert crossings. It connects Carmel Valley Road with Tassajara Road" (Enclosure 4).

To be considered waters under federal jurisdiction, the waters must be relatively permanent, standing, or continuously flowing. During the timeframe the road repairs and culvert replacements were made, the Subrecipient reported dry conditions at drainages and dry and charred flora and fauna around the areas of work (Enclosure 5). United States Geological Survey (USGS) Topographic Maps illustrate that no blue line, or jurisdictional streams occurred within the project area that would signify intermittent or perennial watercourses for which the United States Army Corps of Engineers (USACE) consultation would have been required (Enclosure 6).

The Subrecipient began work as quickly as possible on August 18, 2020, and DR-4558 was declared on August 22, 2020. The work was finished by May 31, 2021 (Enclosure 4, Page 7). Work was performed within the existing Cachagua Road prism, and the replaced culverts were located to capture stormwater runoff to carry water in ephemeral drainages from one side of the road to the other beneath the roadway. Where required, some culverts were upsized to allow for increased flow capacity in accordance with current Monterey County codes and standards and California Department of Transportation specifications (Enclosure 7).

The Subrecipient stated in its appeal letter,

The work was performed in an exigent manner to restore access for residents...The record will demonstrate that the circumstances were exigent – within weeks of work completion, atmospheric river rainfall events impacted the Monterey County region. These burned areas released substantial amounts of mudflows and debris flows from these denuded and hydrophobic soils. The culverts and associated work

abated the debris flow impacts and prevented property owners from becoming landlocked and trapped (Enclosure 1).

The Subrecipient began work under exigent circumstances. FEMA's EHP review and consultation with the USFWS regarding the California Tiger Salamander and California Red-Legged Frog in advance of the work being performed was infeasible. The exigent approach to addressing the wildfire impacts was supported by the California Department of Forestry and Fire Protection (CAL FIRE) and Department of Conservation Carmel and River Fire Wildfire Emergency Response Team (WERT) Report in which multiple Cachagua Road culverts were identified as Values at Risk (VAR's) resulting from the August 2020 Wildfires (Enclosure 8).

Because the work was done under exigent circumstances, the Subrecipient was exempt from needing a Clean Water Act (CWA) § 404 permit (Enclosure 9). On April 21, 2020, the Environmental Protection Agency (EPA) released *The Navigable Waters Protection Rule: Definition of "Waters of the United States"*, recorded under Title 33 of the Code of Federal Regulations (33 CFR) § 328(III)(H), which defines dry ephemeral watercourses as not a Water of the United States, and therefore not under federal jurisdiction of USACE (Enclosure 10). On August 29, 2023, the EPA released the *Fact Sheet for the Final Rule: Amendments to the Revised Definition of "Waters of the United States"* which confirms as an exclusion from Waters of the United States, "Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water" (Enclosure 11).

On September 1, 2020, the Subrecipient filed a *Notice of Exemption* with the State of California – Department of Fish and Wildlife. The Subrecipient stated the exemption was needed because the work was an "Emergency Project to restore and protect existing roadway and drainage culverts following the Carmel Fire. The Carmel Fire is a State and Federally declared disaster" (Enclosure 12).

The Subrecipient's exemption filing was based on the California Environmental Quality Act (CEQA) § 21080(b)(3), which states projects are exempt from CEQA requirements when, "Projects undertaken, carried out, or approved by a public agency to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor..." (Enclosure 13).

Additionally, CEQA § 15269(a) states the following projects are exempt from the requirements of CEQA,

Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the California Emergency Services Act, commencing with Section 8550 of the Government Code. This includes projects that will remove, destroy, or significantly alter an historical resource when that resource represents an imminent threat to the public of bodily harm or of damage to adjacent property or when the project has received a determination by the State Office of Historic Preservation pursuant to Section 5028(b) of Public Resources Code (Enclosure 14).

The USFWS also has a policy for allowing exigent work and does not typically consider roads as a critical habitat area. In March 2017, the USFWS released a *Critical Habitat Fact Sheet* answering whether all areas designated within a mapped boundary are considered critical habitat. The fact sheet stated, "No. Our rules typically exclude developed areas such as buildings, roads, airports, parking lots, piers, and similar facilities" (Enclosure 15).

FEMA consulted with the USFWS Ventura Field Office, whose region includes Monterey County, for DR-4558 and FEMA-4569-DR-CA, September 2020 Wildfires (DR-4569) (Enclosure 16, page 5). The consultation involved establishing Avoidance and Minimization Measures (AMM's) appropriate for the 2020 Statewide Wildfires recovery activities. As a result, no AMM's for either the California Red Legged Frog or the California Tiger Salamander were identified. The need for an Endangered Species Act (ESA) § 7 consultation for the start and completion of work was not identified as a concern (Enclosure 16).

FEMA denied PA funding due to its inability to perform EHP reviews prior to the Subrecipient starting work along Cachagua Road. Work was performed under exigent circumstances. Based on CWA § 404(f) Exemptions and 33 CFR § 328(III)(H), consultation with USACE was infeasible and not federally required (Enclosures 9 and 10). Because the USFWS does not typically consider roads as critical habitat for endangered species, consultation with the USFWS prior to the start of work was not needed (Enclosure 15). Finally, as supported by USGS Topographic Maps, the work was performed around dry, ephemeral watercourses not considered Waters of the United States, therefore FEMA EHP reviews prior to the start of work were not required (Enclosures 6 and 10).

Recommendation

Based on careful analysis, documentation review, and in accordance with relevant laws, regulations, and policies, Cal OES supports the Subrecipient's appeal in the amount of \$1,503,924.62. In accordance with 44 CFR §

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206.206(c)(3), Cal OES respectfully requests a response to this appeal within 90 days from receipt of this letter.

If you require additional information regarding this correspondence, please contact Mr. Robert Larsen, State Public Assistance Officer, at (916) 600-3126 or Mr. Derick Earl, Program Manager, at (916) 767-2724.

Sincerely,



RYAN BURAS
Deputy Director, Recovery
Alternate Governor's Authorized Representative

Enclosures:

1. Monterey County 1st Appeal
2. FEMA Eligibility Determination
3. Job Order Authorization
4. Grants Portal Project Information
5. Culvert Locations and Photos
6. Culvert Locations Topographic Map
7. County Standards – Culverts
8. 2020 Carmel and River Fire – WERT Presentation
9. CWA 404(f) Exemptions
10. Navigable Waters Protection Rule
11. WOTUS Fact Sheet
12. Monterey County Notice of Exemption
13. CEQA Section 21080(b)(3)
14. CEQA Section 15269(a)
15. USFWS Critical Habitat Fact Sheet
16. USFWS Avoidance and Minimization Measures

cc: Kelsey Scanlon, Director of Emergency Management, Monterey County

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