What's New With FEMA:

What to Know Before the Next One Hits

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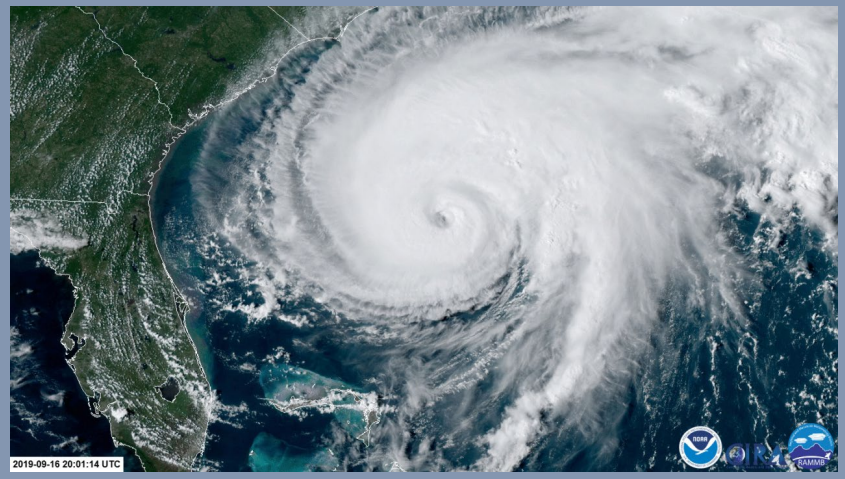
Outline of Presentation

1. 2024 FEMA Appeal Trends
2. Chevron Deference Overturned: How it Impacts FEMA Interpretations
3. What is on the Horizon with the Proposed Version 5 of the Public Assistance Program and Policy Guide
4. Questions

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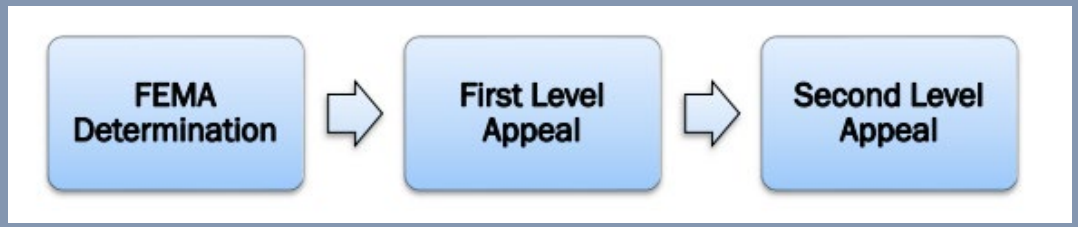
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2024 FEMA APPEAL TRENDS



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Public Assistance Appeals



- Public Assistance (PA) applicants are provided a two-tiered administrative appeal process for FEMA determinations they disagree with
  - (1) The Regional Administrator (RA) of the applicable FEMA Region decides the first level appeal.
  - (2) If the applicant chooses to second appeal that decision, then the Assistant Administrator for Recovery at FEMA Headquarters determines the Agency's final decision
- If the Applicant does not second appeal the decision within 60 days of the first appeal decision, the first appeal decision becomes the final agency decision.

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2024 FEMA Appeal Trends

Subject of Appeal	Number of Appeals
Immediate threat	**39**
Result of a declared incident	**22**
Appeals Procedural Issues	**16**
Force Account labor and equipment	**14**
Debris disposal and monitoring	2
Allowable and reasonable costs	8
Application Procedures	7
Change of Scope	3
Direct Administrative Costs	1
EHP and other compliance	3
Evacuation, medical care and sheltering	1
Financial accounting and reconciliation	5

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2024 FEMA Appeal Trends Category: "Immediate Threat"

- FEMA is authorized to provide PA funding for "Emergency Work"
- Emergency Work, which is work that must be done immediately to
  - Save lives;
  - Protect public health and safety;
  - Protect improved property; or
  - Eliminate or lessen an **immediate threat of additional damage**.

- **"Immediate threat"** is the threat of additional damage or destruction from an incident that can reasonably be expected to occur within 5 years of the declared incident

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2024 FEMA Appeal Trends Category: "Immediate Threat"

- The deadline to complete Emergency Work is **6 months** from the declaration date unless an extension is authorized.
- FEMA **considers the urgency** with which the Applicant proceeds with work when evaluating eligibility.
- The Applicant **should not delay** in following its normal policies and procedures when taking actions to address threats to life, public health and safety, and improved property.

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2024 FEMA Appeal Trends Category: "Immediate Threat"

Appeals Denied (COVID)

- Ellis County - purchase of $197,935.00 ambulance, "necessary to respond to increased demands on its services resulting from the pandemic"
  - "The extended period of time (19 months) that elapsed between placing the order for the ambulance and receiving it does not support the Applicant's assertion that the ambulance was an immediate need to respond to the pandemic."
- Catalina Island Medical Center – lease costs of $730,000 to move physical therapy office to a temporary off-site facility to comply with a County Health Order
  - "while the Applicant claims that it was unable to continue to operate the physical therapy services in the hospital due to the County Health Order, it did not move to the renovated temporary facility until July 2021, which was more than one year after the issuance of the County Health order. Once the Applicant opened the temporary facility, it did not regularly assess the ongoing and projected need for the leased space as related to COVID-19"

2024 FEMA Appeal Trends Category: "Immediate Threat"

Terminology

Integral ground refers to only the ground necessary to physically support a facility.

Integral ground may be natural or improved ground upon which an eligible facility is located and that is essential to support the structural integrity and utility of the facility.

Appeal Denied

- City of Yonkers (Disaster: Hurricane Ida)
  - Applicant sought funding for emergency stabilization of slope failures at three locations located in the backyards of private residential properties, with the failure occurring in close proximity to the homes and stretching down the wooded hillside. In support thereof, Applicant submitted an engineer's proposal to install a retaining wall and soil nails to stabilize the slopes in the amount of $5,209,560.00
  - Notably, FEMA approved $21,239.72 for temporary stabilization measures of the slopes that included installing tarps and caution fences.
  - Applicant requested a time extension to construct the proposed slope stabilization work and FEMA approved a time extension until March 5, 2023 for emergency work only.
  - Subsequently, FEMA denied $5,209,560.00 in estimated costs, finding that the work constituted permanent repairs intended to restore the slopes back to predisaster design in accordance with applicable codes and standards rather than eligible emergency protective measures, and therefore ineligible for PA.
  - FEMA also noted that the permanent slope stabilization work was not eligible under FEMA's policy applicable to integral ground.

2024 FEMA Appeal Trends Category: "Immediate Threat"

Compare: Appeal Granted

Los Angeles County (Disaster: Wildfires)

- Funding for FAL & FAE for post-fire debris flow investigations, mapping and reporting
- First Appeal: FEMA found that the Applicant did not conduct the post-fire debris flow mapping as an immediate response to or in anticipation of the declared incident, but rather it was carried out prospectively in case of a possible future threat (flood risk) separate from the declared incident (wildfire)
- Second Appeal:
  - The Applicant provided a document prepared by FEMA, *Flood Risks Increase after Fires*, which explains that the debris flow risk remains significantly higher after a fire until vegetation is restored, which can take up to five years
  - Applicant showed how it utilized the debris flow mapping to determine the locations where temporary barriers were necessary to protect life and property from debris flows based on the level of threat identified by said maps.
  - Applicant also notified homeowners of the potential impact of debris flow based on the threat identified during the debris flow mapping process, and conducted outreach, including informational campaigns on risks, and advising them of ways to mitigate threats to their home
  - Thus, eligibility is not precluded because the measures addressed flooding rather than fire.
  - Additionally, FEMA notes that the Applicant acted urgently in response to the potential threat.

2024 FEMA Appeal Trends Category: "Result of Declared Incident"

Wayne County, Mississippi (Hurricane Ida)

- Applicant sought funding for repairs, and hazard mitigation (HM) measures for damaged roads & culverts
- "It is the applicant's responsibility to demonstrate that claimed damage was caused directly by the incident, and where pre-existing damage exists, to distinguish that damage from the disaster-related damage."
- On appeal, Applicant attached a 120-page document itemizing its budget expenditures for, among other things: (1) maintenance employee payroll; (2) equipment repair and maintenance; (3) road repair materials (e.g., culverts, asphalt, aggregate, and other supplies); and (4) contracted services, including repairs and maintenance of bridges and roads.
- Applicant argued that the budget information demonstrated the commitment of "considerable resources for road and bridge maintenance and repair on an annual basis"
- FEMA focused on the fact that the Applicant did not provide documentation demonstrating the predisaster condition of its roads and culverts to assist in order to distinguish pre-existing damage from damage caused by the disaster.
- Post-disaster photographs alone do not substantiate the Applicant's assertion that the claimed damage was caused by the disaster.

2024 FEMA Appeal Trends Category: "Appeals Procedural Issues"

- Uptick in denials on procedural non-compliance further illustrates that FEMA is unforgiving on deadlines, with no excuses for late filing or forwarding of appeals.
- Failure to comply with procedural deadlines will be fatal to the appeal.
- When in doubt – file and forward early.

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2024 FEMA Appeal Trends Category: "FAL & FAE"

- FAL & FAE denials are still going strong–
- City of Sunrise (Disaster – Hurricane Dorian)
  - Requested funding for FAL and FAE costs related to various activities, including the Leisure/Maintenance Department activities to secure paperwork, check pool levels, and transport gasoline to parks; and Utilities Department activities to test water, monitor infrastructure, and replace components, in anticipation of the storm.
  - In denying the appeal, FEMA held that the Applicant's records contain broad, generic descriptions of tasks
    - ICS-214 activity logs either list only routine activities such as personnel checking pool water levels, or do not differentiate between routine activities and potentially eligible activities. For example, one log entry simply lists printing out schedules and bagging computer and storing away paperwork as the work completed.
    - Other entries in the Utilities Department's ICS-214 activity logs do not differentiate the time spent on potentially eligible activities related to the hurricane such as planning for water removal and emergency generator start-up and securing site materials and hazardous chemicals, from routine activities such as performing plant operational activities

  - Takeaway– Documentation must be detailed and very specific.

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Chevron Deference



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Chevron Deference Overturned: *FEMA Interpretation Impacts*

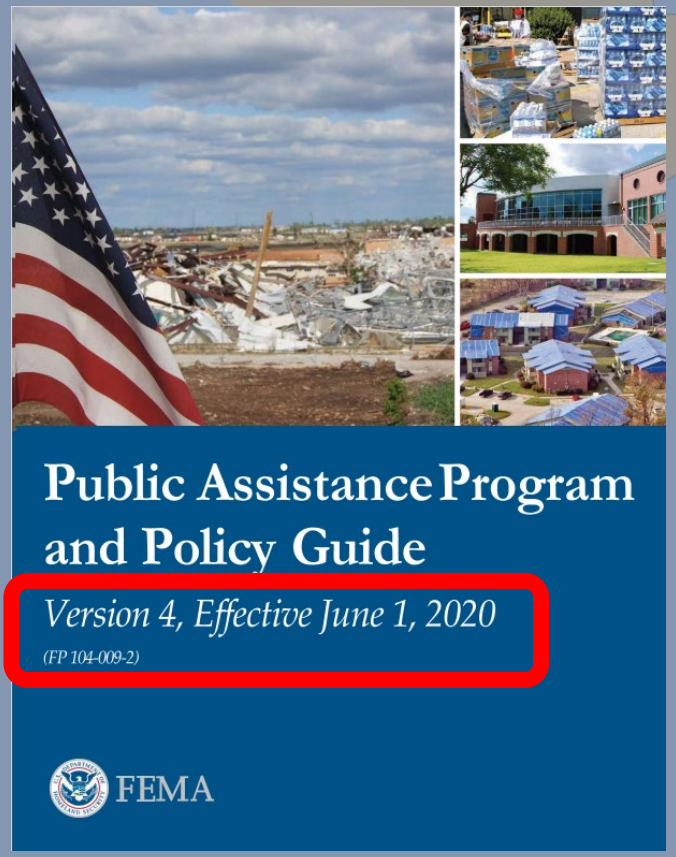
- "Chevron deference" refers to the doctrine of judicial deference given to agencies over how to interpret the statutes they administer
  - Under that doctrine, if Congress has not directly addressed the question at the center of a dispute, a court was required to uphold the agency's interpretation of the statute as long as it was reasonable.
- This year, in *Loper Bright Enterprises v. Gina Raimondo*, the USSC by a vote of 6-3, overturned the 40-year-old precedent that established Chevron deference.
- USSC held that the Constitution vests the power to interpret laws in the judiciary, not in administrative agencies.
- USSC reasoned that courts should use traditional tools of statutory interpretation to resolve ambiguities rather than relying on agency expertise

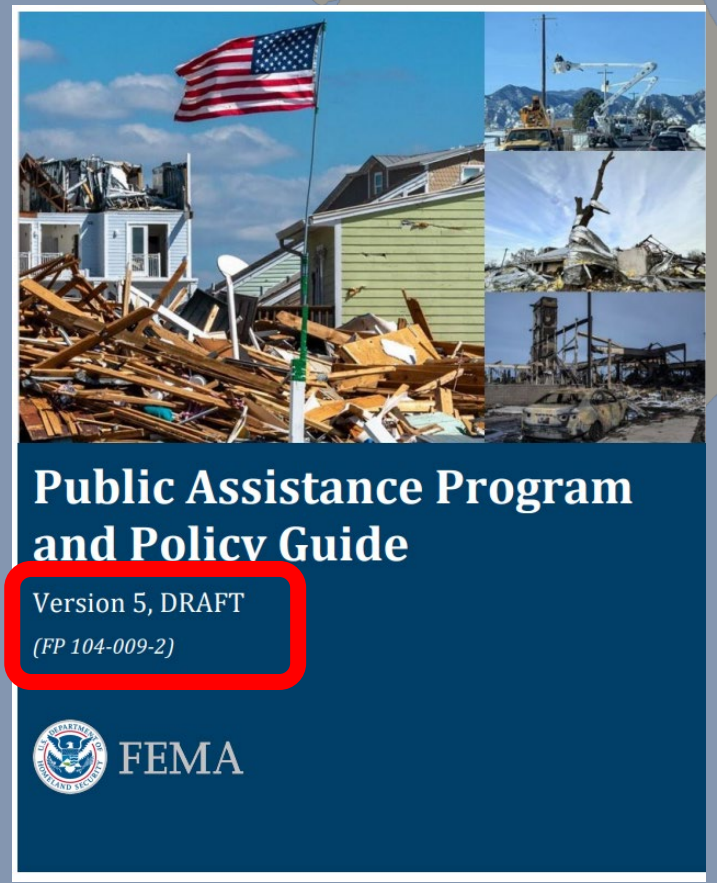
Chevron Deference Overturned: *FEMA Interpretation Impacts*

- FEMA's regulations and funding decisions historically have had limited review.
- Relief has instead been restricted to the agency's administrative appeal process or, for some claims, to the arbitration process implemented under the Civilian Board of Contract Appeals.
- After the US Supreme Court decision in Loper Bright v. Raimondo, judicial review may emerge as a new option.
  - Importantly though, as it relates to regulations established by FEMA in relation to its grant programs, the Court did acknowledge the continuing limitations to judicial review where Congress has conferred discretionary authority on an agency (such as FEMA)
  - FEMA's discretionary authority will still provide significant protection against Administrative Procedure Act (APA) claims brought against the agency.
- Nevertheless, applicants now have a stronger foundation to argue against FEMA's statutory interpretations and even its decision-making

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Proposed Version 5 of the Public Assistance Program and Policy Guide





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Proposed Version 5 of the Public Assistance Program and Policy Guide

- FEMA's Public Assistance Program Policy Guide (PAPPG) contains consolidated Public Assistance (PA) Program policies and procedural requirements for the entire program delivery life cycle.
- The PAPPG provides comprehensive PA policy to use when evaluating eligibility
- Version 4, has an effective date of June 1, 2020
- PAPPG version 5 was published in the Federal Register for a sixty (60) day comment period beginning June 18, 2024 and ending August 19, 2024.
- FEMA has published a Summary of Changes for the proposed Version 5, with a stated goal of being "clearer, more equitable, more resilience-forward, and more supportive of readiness efforts."

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Proposed Version 5 of the Public Assistance Program and Policy Guide

Highlights of Major Changes:

- Establishes the appeal process and deadlines for a Governor or Tribal Chief Executive to challenge FEMA's denial of a declaration of emergency, a type of assistance, or physical locations where FEMA assistance can be used.
- FEMA clarifies that a recipient will not receive PA funding until after the application for assistance is completed with all documentation required to accompany it.
- The proposed draft provides further detail on the arbitration process before the Civilian Board of Contract Appeals that can be taken in lieu of a second appeal under certain circumstances and the costs for that process.
- Provided additional means of proof to demonstrate legal responsibility for facility work.

Proposed Version 5 of the Public Assistance Program and Policy Guide

- Clarifies FEMA's stance on discrepancies in competitive procurements:

"If an applicant does not comply with federal procurement requirements, FEMA applies an appropriate remedy in accordance with its authorities. FEMA has determined an appropriate remedy under these circumstances is to either deny all costs associated with the contract or, if sufficient information is provided to substantiate a reasonable amount for the eligible work completed, FEMA may reimburse the portion of the costs it determines are reasonable and allowable based on all available information and documentation provided. For more information please refer to Chapter 6: Reasonable Cost Analysis. In addition to monetary remedies, FEMA may also take non-monetary actions against the applicant as authorized by 2 C.F.R. §§ 200.207 and 200.338."

Page 64, *PAPPG version 5* draft.

The Importance of Following the Requirements of the PAPPG

“If an applicant fails to furnish adequate documentation to establish their eligibility, FEMA is unable to grant PA funding for the related work. The reimbursement of assistance is guided by legal authorities set forth in statutes and regulations, which also specifies obligatory criteria that must be fulfilled. The PAPPG underscores the mandatory nature of certain requirements through use of terms like "must" or "required," signifying their legally binding nature. Non-compliance with these stipulations places the applicant's PA funding in jeopardy. It is therefore essential for applicants to diligently adhere to these guidelines to ensure FEMA's assistance.”

Page 16, PAPPG version 5 draft.

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Questions?

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