UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA *ex rel.* COREY J. DELAHOUSSAYE Plaintiff/Relator,	**CIVIL ACTION NO.: _____**
	FILED *IN CAMERA* AND UNDER SEAL
v.	
STATE OF LOUISIANA GOVERNORS OFFICE OF HOMELAND SECURITY AND EMERGENCY PREPAREDNESS LIVINGSTON PARISH A. SHELBY EASTERLY III ALVIN FAIRBURN AND ASSOCIATES PROFESSIONAL ENGINEERING CONSULTANTS) CORPORATION INTERNATIONAL EQUIPMENT DISTRIBUTORS BAROWKA AND BONURA ENGINEERS AND CONSULTING MCLIN AND ASSOCIATES WENDELL ANTHONY Defendants,	**FALSE CLAIMS ACT** **FEMA FRAUD**
	DEMAND FOR JURY TRIAL
	JUDGE: _____

TO BE FILED UNDER SEAL PURSUANT TO 31 U.S.C. §3730 (b)(2)

COMPLAINT PURSUANT TO 31 U.S.C. §§ 3729-3732
OF THE FEDERAL FALSE CLAIMS ACT
AND
18 U.S.C. § 1040 FRAUD IN CONNECTION WITH A MAJOR DISASTER OR EMERGENCY BENEFITS
18 U.S.C. § 286 CONSPIRACY TO DEFRAUD THE GOVERNMENT WITH RESPECT TO CLAIMS
18 U.S.C. § 371 CONSPIRACY TO DEFRAUD THE UNITED STATES

I. PRELIMINARY STATEMENT

1. This is a civil action to recover damages and civil penalties on behalf of the United States of America brought by Plaintiff/Relator, Corey Delahoussaye ("Delahoussaye" or "Plaintiff/Relator") against State of Louisiana Governors Office of Homeland Security and Emergency Preparedness ("GOHSEP"), Livingston Parish ("Livingston"), A. Shelby Easterly

("Easterly"), Alvin Fairburn and Associates ("AFA"), International Distributors Incorporated ("IED"), Professional Engineering Consultants ("PEC"), Barowka and Bonura Engineers and Consultants, LLC ("BBEC"), McLin and Associates ("McLin") and Wendell Anthony coreydcunder Federal False Claims Act , 31 U.S.C §3729, *et seq*, as amended ("FCA").

2. As amended, the FCA enables the United States to recover losses sustained as a result of fraud and to provide a private cause of action for the protection of employees who act in furtherance of the purpose of the FCA. Congress enacted these provisions after finding that fraud in federal programs and procurement is pervasive and that the FCA, through its private cause of action provision, is the primary means by which fraud against the government is discovered and remedied.

3. Based on these provisions, Plaintiff/Relator seeks to recover damages and civil penalties arising from Defendants' presentation of false claims to the United States Government for reimbursement before the Civilian Board of Contract Appeals in connection with its hurricane Gustav debris removal and monitoring services request.

4. Plaintiff/Relator has direct and independent knowledge of the following conduct that violated the False Claims Act.

5. As alleged more specifically below, Defendants' knowingly engaged in fraudulent and/or reckless practices in order to receive reimbursements from FEMA for unnecessary debris removal services due to a natural disaster.

6. From July of 2009 to present day, Delahoussaye has been suspicious of, and investigated Defendants' monitoring, debris removal, billing and other practices. At times, Delahoussaye reported questionable reimbursement activities, which he believes was illegal and unnecessary. In turn, Delahoussaye has been singled out for criticism, media scrutiny,

harassment and even improper criminal prosecution. Ultimately, Delahoussaye has been seen as a threat and major participant in FEMA's decision for denial of funding, and unprecedented win before the CBCA.

7. Mr. Delahoussaye worked with the FBI and EPA regarding irregularities in the submission of invoices and billing request by the contractors pertaining to debris removal work and monitoring.

8. Mr. Delahoussaye was a FBI and EPA informant used to gather information against the defendants. Although Mr. Delahoussaye was not privy to the details of the investigation, he provided documentation, audios, videos and various reports to support his claim of FEMA fraud and improper billing practices.

9. In December of 2013, Delahoussaye met with FEMA attorney Linda Litke to review and provide information regarding a request for arbitration filed by Defendants.

10. Delahoussaye was contracted with FEMA to provide evidence and documentation to support FEMA's claims before the CBCA. The final verdict was in favor of FEMA.

II. PARTIES

11. Corey Delahoussaye "(Delahoussaye") is a citizen of the United States and a resident of the State of Louisiana.

12. Defendant Louisiana Governors Office of Homeland Security and Emergency Preparedness ("GOHSEP") is a covered government agency under the direction of the Governor.

13. Defendant Livingston Parish, Louisiana ("Livingston") by and through its Council and Parish President, Luther Layton Ricks.

14. Defendant A. Shelby Easterly III ("Easterly"), is a attorney and is registered to do and doing business in the State of Louisiana.

15. Defendant Alvin Fairburn and Associates ("AFA") is corporation registered to do and doing business in the state of Louisiana.

16. Defendant Professional Engineering Consultants ("PEC") is a corporation registered to do and doing business in the state of Louisiana.

17. Defendant International Equipment Distributors ("IED") is a corporation registered to do and doing business in the state of Louisiana.

18. Defendant Barowka and Bonura Engineers and Consultants, LLC ("BBEC") is a corporation registered to do and doing business in the state of Louisiana.

19. Defendant McLin and Associates ("McLin") is a corporation registered to do and doing business in the state of Louisiana.

20. Wendell Anthony ("Anthony") is a person doing business and registered to do business in the state of Louisiana.

III. JURISDICTION AND VENUE

21. This court has subject matter jurisdiction to adjudicate this action, pursuant to 28 U.S.C. §1331, because the claims arise under the False Claims Act, 31 U.S.C. § 3730 (h).

22. The Court has personal jurisdiction over Defendants' pursuant to 31 U.S.C. § 3732 & 3732(a) because Defendants' are transacting and has transacted business in this District.

23. Venue is proper in this district pursuant to 31 U.S.C. § 3732 and 28 U.S.C. & 1391 because Defendants' resides and/or transacts business in this District.

24. This court has subject matter jurisdiction to adjudicate this action, pursuant to 18 U.S.C. §1040, because the claims arise under Title 18 Crimes and Criminal Procedure, Part I. Crimes, Chapter 47 Fraud and False Statements, 18 U.S.C. §1040 Fraud in connection with major disaster or emergency benefits.

IV. THE FALSE CLAIMS ACT

25. The False Claims Act ("FCA"), 31 U.S.C. §3729, provides, in pertinent part, that any person who knowingly presents (or causes to be presented) a false or fraudulent claim for payment or approval to an officer of the United States Government is liable to the United States Government for civil penalties, plus three times the amount of damages which the Government sustains because of the act of that person.

26. For purposes of the FCA, the term "knowing" and "knowingly" meant that a person, with respect to information: (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information. No proof of specific intent is required for the purpose of a false or fraudulent claim. See 31 U.S.C. § 3729(b)

V. CRIMES AND CRIMINAL PROCEDURE

27. 18 U.S.C. § 1040 is described as Fraud in connection with major disaster or emergency benefits.

28. Whoever, in circumstance described in subsection (b) of this section, knowingly (i) falsifies, conceals, or covers up by trick, scheme, or device any material fact; or (ii) makes any materially false, fictions, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same contain any materially false, fictions, or fraudulent statement or representation.

29. In any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191), or in connection with any procurement of property

or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, shall be fined under this title, imprisoned not more than 30 years, or both.

30. 18 U.S.C. § 1040(b)(2) the benefit is transported in the mail at any point in the authorization, transportation, transmission, transfer, disbursement, or payment of that benefit; or

31. 18 U.S.C. § 1040(b)(3) A circumstance described in this subsection is any instance where the benefit is a record, voucher, payment, money, or thing of value of the Untied States, or of any department or agency thereof.

32. 18 U.S.C. § 1040(c), the term "benefit" means any record, voucher, payment, money or thing of value, good, service, right, or privilege provided by the United States, a State or local government, or other entity.

33. Federal law contains several statutes that outlaw defrauding the United States. Two of the most commonly prosecuted are 18 U.S.C. 286, which outlaws conspiracy to defraud the United States through the submission of a false claim, and 18 U.S.C. 371, which in addition to conspiracies to violate federal law, outlaws conspiracies to defraud the United States of property or by obstructing the performance of its agencies. Section 371 has an overt act requirement; [1]section 286 does not. [2]The general principles of federal conspiracy law apply to both.[3]

34. The elements of conspiracy to defraud the United States under 18 U.S.C. 371 are (1) an agreement of two or more persons; (2) to defraud the United States; and (3) an overt act in

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[1] *United States v. Calderon*, 578 F.3d 78, 89 (1st Cir. 2009); see also *United States v. Franklin*, 561 F.3d 632, 402 (5th Cir. 2009); *United States v. Brown*, 587 F.3d 1082, 1089 (11th Cir. 2009).

[2] *United States v. Saybolt*, 577 F.3d 195, 202 (3d Cir. 2009); *United States v. Dedman*, 527 F.3d 577, 594 n.7 (6th Cir. 2008); *United States v. Lanier*, 920 F.2d 887, 892 (11th Cir. 1991).

[3] See generally Goldstein, *Conspiracy to Defraud the United States*, 68 YALE LAW JOURNAL 405 (1958)

furtherance of the conspiracy committed by one of the conspirators.[4] The "fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government"[5] by "deceit, craft or trickery, or at least by means that are dishonest."[6] The plot must be directed against the United States or some federal entity; a scheme to defraud the recipient of federal funds is not sufficient.[7] The scheme may be designed to deprive the United States of money or property, but it need not be so; a plot calculated to frustrate the functions of an entity of the United States will suffice.[8]

35. In contrast, a second federal statute, 18 U.S.C. 286, condemns conspiracies to defraud the United States of money or property through submission of a false claim.[9] The elements of a section 286 violation are that "the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; (2) the claim was false, fictitious, or fraudulent; (3) the defendant knew or was deliberately ignorant of the claim's falsity, fictitiousness, or fraudulence; (4) the defendant knew of the conspiracy and

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[4] *United States v. Root*, 585 F.3d 145, 157 (3d Cir. 2009); *United States v. World Wide Moving, N.V.*, 411 F.3d 502, 516 (4th Cir. 2005).

[5] *Tanner v. United States*, 483 U.S. 107, 128 (1987), citing, *Dennis v. United States*, 384 U.S. 855, 861 (1966); *Glasser v. United States*, 315 U.S. 60, 66 (1942); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); and *Haas v. Henkel*, 216 U.S. 462, 479 (1910).

[6] *Glasser v. United States*, 315 U.S. at 66; *Hammerschmidt v. United States*, 265 U.S. at 188; *United States v. Stewart*, 590 F.3d 93, 109 (2d Cir. 2009)("In order to establish a conspiracy-to-defraud offense under 18 U.S.C. §371 ... a reasonable jury must have been able to conclude beyond a reasonable doubt (1) that the defendants entered into an (continued...)

[7] *Tanner v. United States*, *Tanner v. United States*, 483 U.S. 107, 128-32 (1987); *United States v. Mendez*, 528 F.3d. 811, 814-15 (11th Cir. 2008).

[8] *Hammerschmidt v. United States*, 265 U.S. at 188 ("It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation"); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996)(This provision not only reaches schemes which deprive the government of money or property, but also is designed to protect the integrity of the United States and its agencies"); *United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995)("If the government's evidence showed that Dean conspired to impair the functioning of the Department of Housing and Urban Development, no other form of injury to the Federal Government need be established for the conspiracy to fall under §371").

[9] Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious, or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both," 18 U.S.C. 286.

intended to join it; and (5) the defendant voluntarily participated in the conspiracy."[10] Conviction does not require proof of an overt act in furtherance of the conspiracy.[11]

36. Conspiracy is a crime, which begins with a scheme and may continue on until its objective is achieved or abandoned.[12] The liability of individual conspirators continues on from the time they joined the plot until it ends or until they withdraw.[13] The want of an individual's continued active participation is no defense as long as the underlying conspiracy lives and he has not withdrawn.[14] An individual who claims to have withdrawn bears the burden of establishing either that he took some action to make his departure clear to his co-conspirators or that he disclosed the scheme to the authorities.[15] As a general rule, overt acts of concealment do not extend the life of the conspiracy beyond the date of the accomplishment of its main objectives.[16] On the other hand, the rule does not apply when concealment is one of the main objectives of the

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[10] *United States v. Dedman*, 527 F.3d 577, 593-94 (6th Cir. 2008). At least one other circuit also includes a materiality requirement, *i.e.*, the false, fictitious, or fraudulent assertion must be one which naturally have a material effect on the government's decision to pay or deny the claim, *United States v. Saybolt*, 577 F.3d 195, 201-204 (3d Cir. 2009).

[11] *United States v. Saybolt*, 577 F.3d 195, 202 (3d Cir. 2009); *United States v. Dedman*, 527 F.3d 577, 594 n.7 (6th Cir. 2008); *United States v. Lanier*, 920 F.2d 887, 892 (11th Cir. 1991).

[12] *United States v. Payne*, 591 F.3d 46, 69 (2d Cir. 2010)("Conspiracy is a continuing offense ... one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course"); *United States v. Caldwell*, 589 F.3d 1323, 1330 (10th Cir. 2009)

[13] *United States v. Hodge*, 594 F.3d 614, 619 (8th Cir. 2010); *United States v. Caldwell*, 589 F.3d at 1330; *United States v. Egbert*, 562 F.3d 1092, 1098 (10th Cir. 2009).

[14] *United States v. Hodge*, 594 F.3d at 619; *United States v. Mangual-Santiago*, 562 F.3d 411, 423 (1st Cir. 2009); *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008).

[15] *United States v. Gonzalez*, 596 F.3d 1228, 1234 (10th Cir. 2010)("The defense of termination by withdrawal requires that the defendant show that he or she has done some act to disavow or defeat the purpose of the conspiracy. Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal"); *United States v. Spotted Elk*, 548 F.3d 641, 673 (8th Cir. 2008)("To withdraw from a conspiracy at common law, a conspirator must show not only that he ceased activities in furtherance of the conspiracy, but also that he either made a 'clean breast' to the government or else communicated the fact of withdrawal to his co-conspirators in a manner reasonably calculated to reach them"); *United States v. Eppolito*, 543 F.3d at 49.

[16] *United States v. Bornman*, 559 F.3d 150, 153 (3d Cir. 2009), citing *Grunewald v. United States*, 353 U.S. 391, 413 (1957); *United States v. Turner*, 548 F.3d 1094, 1097 (D.C. Cir. 2008).

conspiracy.[17] All documentation to support the alleged crimes are part of *See* Exhibit 263 – PowerPoint Livingston Parish Elements of Crimes.

VI. BACKGOURND

37. Livingston Parish filed a Request for Arbitration on November 8, 2013, (Exhibits in possession of Relator), Exhibit 264 - Request for Arbitration, seeking $59,183,143.00 related to two FEMA eligibility determinations for Hurricane Gustav: 1) FEMA's determination to fund only a portion of leaner and hanger tree debris ("leaners and hangers") throughout the Parish; and 2) FEMA's denial of funding for removal of waterway wet debris ("wet debris" or "waterway debris") allegedly located in drainage areas, wetlands, and other property throughout the Parish.

38. FEMA asserted it correctly denied additional funding for both the Parish's leaner and hanger work and wet debris removal claimed. Accordingly, the Parish is ineligible for any additional funding for the $59,183,143.00 claimed. FEMA's denial of portions of the leaner and hanger debris work claimed by the Parish is correct and based on the following arguments: 1) work performed by the Parish could not be established as resulting from Hurricane Gustav pursuant to 44 C.F.R. § 206.223(a)(1); 2) work claimed was not the legal responsibility of the Parish as required by 44 C.F.R. § 206.223(a)(3); 3) work claimed was not an immediate threat to life or property as required by 44 C.F.R § 206.224; 4) work claimed was not sufficiently documented as required by 44 C.F.R. Part 13 and FEMA policy; 5) the Parish failed to meet the procurement requirements set forth under 44 C.F.R. § 13.36, Louisiana law, and the Parish's own Home Charter Rule when obtaining its debris monitor contract; and 6) Livingston Parish's misleading and inaccurate statements demonstrate a misunderstanding of FEMA's review of the Parish's debris work.

[17] *United States v. Upton*, 559 F.3d 3, 10 (1st Cir. 2009); *United States v. Weaver*, 507 F.3d 178, 185-86 (3d cir. 2007)

39. FEMA's denial of funding for the Parish's requested wet debris work was also correct and based on the following arguments: 1) the work is not a direct result of the Hurricane Gustav disaster event pursuant to 44 C.F.R. § 206.223(a)(1); 2) the Parish failed to demonstrate that it had legal responsibility for the wet debris work claimed pursuant to 44 C.F.R. § 206.223(a)(3); 3) the Parish failed to demonstrate that the denied work was necessary to save lives, protect health and safety, or to protect improved property pursuant to 44 C.F.R § 206.224; 4) FEMA is prohibited from reimbursing the Parish for wet debris removal (PWs 055090 and 05594), because the parish violated federal environmental laws and failed to obtain required federal permits; 5) the Parish failed to provide information for FEMA's Historic Preservation review, thus precluding FEMA's review; 6) The Parish's claims for wet debris removal work and monitoring (PWs 05590, 05591, 05593 and 05594) is not eligible for FEMA Public Assistance, because the contracts for debris removal and monitoring were not properly procured and costs were unreasonable; 7) the Parish failed to complete the waterway debris removal work and FEMA is not authorized to reimburse for projects that are incomplete (44 CFR 206.204 (d)(2)). The parish has filed several appeals and FEMA stood firm in denying claims because the parish failed to demonstrate eligibility and compliance set by FEMA. The Defendants repeatedly violated the laws of the land in an attempt to benefit from its fruits.

VII. APPLICABLE LAW

The Stafford Act

40. FEMA, a component agency of the United States Department of Homeland Security, is responsible for administering and coordinating the federal government's response to Presidentially-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"). *See* 42 U.S.C. §§ 5121 et seq. The Stafford Act is

triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." *See*, 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared area. *See* 42 U.S.C. § 5170. The State of Louisiana is the Grantee for all FEMA Public Assistance delivered in the state. *See*, 44 C.F.R. § 206.201(e). The disaster declaration for Hurricane Gustav included Livingston Parish, where the wet debris and leaner and hanger work is located. *See* 44 C.F.R. § 206.201. *See, (Exhibits in possession of Relator)*, Exhibit 1- FEMA-1786-DR, Louisiana, Disaster Declaration.

Public Assistance Regulations

41. Among other types of assistance available under the Stafford Act, FEMA may provide grants for Public Assistance ("PA") to state governments or Indian tribal governments ("Grantees"). *See* 44 C.F.R. §§ 206.201, 206.205. Grantees are accountable for the use of funds provided by FEMA and are responsible for disbursing the grant funds to eligible Applicants, also known as subgrantees, including state and local governments and their political subdivisions. *See* 44 C.F.R. § 206.222.

42. To be eligible for financial assistance, an item of work must be the result of the emergency or major disaster; be located within the designated area of a major disaster or emergency declaration; and be the legal responsibility of an eligible applicant. *See* 44 C.F.R. § 206.223(a). 44 C.F.R. § 206.226(a) further provides that disaster assistance is not available when another federal agency has specific authority to restore facilities damaged or destroyed by an event which is declared a major disaster.

43. Under Section 403 of the Stafford Act, FEMA is authorized to "provide assistance essential to meeting immediate threats to life and property resulting from a major disaster,"

including financial assistance to state or local governments carrying out emergency services. *See* 42 U.S.C. § 5170b(a) and § 5170b(a)(4). FEMA categorizes "essential assistance" as "emergency work" under the PA program. Emergency work includes debris removal and protective measures for the purpose of eliminating or reducing an immediate threat to life, public health or safety or to eliminate or reduce an immediate hazard that threatens significant damage to improved property or private property. *Id.*

44. Subject to certain regulations, states may request such emergency work be performed directly by a federal agency, such as the U.S. Army Corps of Engineers (the "USACE") or the U.S. Coast Guard. FEMA may provide assistance for this work through "mission assignments" ("MA"). *See* 44 C.F.R. § 206.208. Alternatively, subgrantees may perform the work directly or through the use of contractors. *Id.*

45. A subgrantee's authorized local representative is responsible for representing the subgrantee and for ensuring that all disaster eligible work has been identified and submitted to FEMA. *See* 44 C.F.R. § 206.202(d). Eligible costs are recorded by FEMA personnel on Project Worksheets, or PWs. *See* 44 C.F.R. § 206.202(d). After PW completion, FEMA reviews the PW in order to make determinations on whether to approve funding for eligible costs. *Id.* Thereafter, FEMA may make federal disaster assistance funds available (i.e., "obligate" the funds) based on the final PW. *See* 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the state and/or subgrantee to pay federal disaster assistance and does not create any right to receive any such federal funds. *See* 44 C.F.R. § 206.202(d). Rather, a PW establishes the scope of work and provides cost estimates, based on submitted costs by the subgrantee. *See id.*; 44 C.F.R. § 206.202(e); *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635 (3rd Cir. 1998)

(providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States.)

Eligibility of Debris Removal

46. To facilitate the processing of Public Assistance grants, FEMA has divided disaster-related work into two broad categories: emergency work and permanent work. *See, (Exhibits in possession of Relator)*, Exhibit 2 - Public Assistance Guide, FEMA 322/June 2007 at pp. 66-72. Emergency work and permanent work are further divided into seven categories. *Id.* Emergency work includes Category A debris removal and Category B emergency protective measures. *Id.* Permanent work includes Category C roads and bridges; Category D water control facilities; Category E buildings and equipment; Category F utilities; and Category G parks, recreational facilities, and other items. *Id.*

47. Relevant to the issues in this arbitration are Emergency Work under Category A Debris Removal. Within Category A Debris Removal, potentially eligible debris includes the clearance of trees and woody debris; building components or contents; sand, mud, silt, and gravel washed onto public thoroughfares or into eligible facilities; wreckage produced during conduct of emergency protective measures; and other disaster-related wreckage. *Id.*

48. To receive Public Assistance reimbursement, debris removal must first be required as the result of an emergency or major disaster event. *See* 44 C.F.R. § 206.223(a)(1). Once it is established the debris removal is a result of an emergency or major disaster event, for a subgrantee to be eligible for debris removal under 44 C.F.R. § 206.224, the following must be present:

> (a) Public interest. Upon determination that debris removal is in the public interest, the Regional Administrator may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters. Such removal is in the public interest when it is necessary to:

> (1) Eliminate immediate threats to life, public health, and safety; or
> (2) Eliminate immediate threats of significant damage to improved public or private property; or
> (3) Ensure economic recovery of the affected community to the benefit of the community-at-large….

See 44 C.F.R. § 206.224(a).

Other Federal Agencies

49. For certain types of work, disaster assistance is the responsibility of a federal agency other than FEMA. *See* 44 C.F.R. § 206.208(c)(2); *see also (Exhibits in possession of Relator),* Exhibit 3 - FEMA Public Assistance Guide, FEMA 322/July 2007 at pp. 23-26. When a request is made for Public Assistance for a facility whose repair FEMA considers to be within the authority of another federal agency, the specific federal agency with responsibility will be asked to review the request and advise FEMA whether the work is eligible under that agency's authority. *Id.* If all or part of the work "falls within the statutory authority of another federal agency, the Regional Administrator shall not approve that portion of the work. In such case, the unapproved portion of the request will be referred to the appropriate agency for action." *See* 44 C.F.R. § 206.208(c)(2); *see also* Stafford Act, § 312 ("Duplication of Benefits"), 42 U.S.C. § 5155.

Procurement

50. Grantees and subgrantees must ensure that contracts for eligible work are properly procured in accordance with federal and state law. Specifically, 44 C.F.R. § 13.36 outlines the requirements for proper procurement of contracts and states in 13.36(b) that:

> "Grantees and subgrantees will use their own procurement procedures which reflect applicable state and local laws and regulations, provided that the

> procurement conforms to applicable Federal law and the standards identified in this section."

This regulation goes on to include multiple requirements, including the requirement for procured contracts to be properly advertised. *Id.* at 13.36(d)(2). The regulations also require that procurement transactions be performed in a manner providing full and open competition except under very limited circumstances. *Id.* at 13.36(c)(1).

Allowable Costs

51. FEMA and the grantee share responsibility for making Public Assistance funding available to subgrantees. *See* 44 C.F.R. § 206.202(d)(1). FEMA makes eligibility determinations and ensures all required reviews are completed and then obligates the funding. *Id.* The grantee is responsible for disbursing these funds in accordance with its established policies and procedures. *Id.* Grant funds may only be used for "[t]he allowable costs of the grantees, sub-grantees and cost-type contractors." *See* 44 C.F.R. § 13.22(a)(1). For "each kind of organization, there is a set of federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs." *See* 44 C.F.R. § 13.22(b). The cost principal applicable to local governments such as Livingston Parish is OMB Circular A-87. OMB Circular A-87 states in pertinent Part:

> Basic Guidelines, (C)
> 1. Factors affecting allowability of costs. To be allowable under Federal awards, costs must meet the following general criteria:
>
> a. Be necessary and reasonable for proper and efficient performance and administration of Federal awards.
> b. Be allocable to Federal awards under the provisions of this Circular.
> c. Be authorized or not prohibited under State or local laws or regulations.
> d. Conform to any limitations or exclusions set forth in these principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items.

e. Be consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit.
f. Be accorded consistent treatment. A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.
g. Except as otherwise provided for in this Circular, be determined in accordance with generally accepted accounting principles.
h. Not be included as a cost or used to meet cost sharing or matching requirements of any other Federal award in either the current or a prior period, except as specifically provided by Federal law or regulation.
i. Be the net of all applicable credits.
j. Be adequately documented.

(2) Reasonable costs. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally funded. In determining reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.
b. The restraints or requirements imposed by such factors as: sound business practices; arm's length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.
c. Market prices for comparable goods or services.
d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.
e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

See, (Exhibits in possession of Relator), Exhibit 4- OMB Circular A-87 (emphasis added),

available at http://www.whitehouse.gov/ omb/ circulars_a087_2004.

Appeals and Arbitration

52. The Stafford Act authorizes appeals of PA decisions. *See* 42 U.S.C. § 5189(a). There are two levels of appeal: the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. *See* 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, established a new option for

arbitration under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607. *See* 44 C.F.R. § 206.209. Subsequently, Section 565 of Public Law 113-6 carved out an exception for arbitration of a Hurricane Gustav, DR-1786, PA determination if the application exceeded $10,000,000 and was for debris removal. *See* Consolidated and Continuing Appropriations Act, 2013, § 565, Pub. L. 113-6, 127 Stat. 381 113-6. This Arbitration Panel's decision shall constitute the final decision on the issues under dispute, is binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. *See* 44 C.F.R. § 206.209(k)(3).

VIII. STATEMENT OF FACTS

Background Facts

53. On August 29, 2008, the President of the United States signed an emergency declaration (EM-3289) for the State of Louisiana as Hurricane Gustav was approaching the Gulf Coast states. Under the declaration, the President authorized Public Assistance for emergency protective measures to save lives, protect property and public health and safety, or to lessen or avert the threat of a catastrophe in designated areas. *See, (Exhibits in possession of Relator),* Exhibit 5 – Disaster Initial Notice FEMA-3289-EM, Louisiana Emergency and Related Determinations, August 29, 2008. Livingston Parish was among the Parishes authorized to receive Federal assistance. *Id.*

54. On August 31, 2008, Livingston Parish President Mike Grimmer signed a contract with International Equipment Distributors, Inc. ("IED" or "contractor"), for debris management and removal services. *See, (Exhibits in possession of Relator)* Exhibit 6 – Annual Agreement Debris Management and Removal Services, August 31, 2008. According to the terms of the contract, IED agreed to remove "excess green waste and/or bulk refuse" from the Parish's streets,

right-of-ways, public parks and public places. *Id.* at p. 2. In addition, debris from personal/private property had to be placed on, or in, those public sites and approved by the Parish. *Id.* The contract stated that debris to be removed would be designated by a Parish official or inspector or other personnel approved by the Parish. *Id.* In addition, for vegetative and construction and demolition debris, the contract included provisions for the removal of "leaners" and "hangers".[18] *Id.* at "Fee Schedule Exhibit 6A."

55. On September 2, 2008, the President declared a Major Disaster (DR-1786) for the State of Louisiana in response to the Governor's request. *See,* Exhibit 1. The declaration authorized Public Assistance for debris removal within designated areas, including Livingston Parish. *See (Exhibits in possession of Relator), Exhibit* 8 – Disaster Declaration Map (designating Parishes for specific FEMA work categories from FEMA.gov).

56. On September 2, 2008, Christopher Guilbeaux, the Operations Section Chief for the Louisiana Governor's Office of Homeland Security and Emergency Preparedness ("GOHSEP"), sent an email to all Louisiana Parish emergency preparedness directors with guidance on debris management for Hurricane Gustav. The guidance specified that for Category A and Category B debris, all debris contracts were to be properly procured and competitively bid and costs must be reasonable. For Category A debris removal, Mr. Guilbeaux's email specified that debris was to be collected from public property and rights of way. *See, (Exhibits in possession of Relator),* Exhibit 9 – C. Guilbeaux email to LA Parish Directors, September 2, 2008.

[18] FEMA provides specific guidance as to the eligibility of hazardous trees, hanging limbs, and hazardous tree stumps (also known as "leaners" and "hangers") in its Debris Management Guide. *See Exhibit* 7 – FEMA Debris Management Guide, FEMA 325 (July 2007), at pp. 24-26.

57. On September 8, 2008, Parish President Mike Grimmer signed a contract with Professional Engineering Consultants Corporation ("PEC" or "monitor") to provide "sufficient staff to monitor the operations of the debris removal contractor." *See, (Exhibits in possession of Relator),* Exhibit 10 – Debris Management and Monitoring Services Agreement, PEC Project No. 10683, September 8, 2008. In the contract, PEC agreed, as part of the services it was to provide that "The contract monitors are necessary to assure Federal Emergency Management Agency (FEMA) emergency plan and debris removal contract requirements are met by monitoring the debris removal from public access streets, rights-of-way, and in-use Parish owned/maintained public property, monitoring the debris management sites, as well as roving debris monitors…." *Id.* at p. 1. Upon information and belief, PEC hired two subcontractors to assist: Barowka and Bonura Engineers and Consultants, LLC ("BBEC"), and McLin and Associates.

58. On September 24, 2008, the Parish applied to FEMA for Public Assistance funding. *See, (Exhibits in possession of Relator),* Exhibit 11 – Livingston Parish, Request for Public Assistance, September 24, 2008.

59. On or about September 30, 2008, Brian Fairburn, the Director of the Office of Homeland Security and Emergency Preparedness ("OHSEP") for the Parish, provided a copy of FEMA document 9579.4 SOP, "Kickoff Meeting," effective September 1999, with instructions to distribute the document to all potential Applicants within the Parish. The document is a Standard Operating Procedure manual for kickoff meetings between FEMA, the State, and potential Applicants that are held in the wake of a disaster event, to inform potential applicants of FEMA requirements for funding and related issues. The document outlines procedures for obtaining Federal assistance for disaster-related work and also covers issues associated with disaster-related work in floodplains, wetlands, and coastal high hazard areas. *See, (Exhibits in possession of*

Relator), Exhibit 12 – FEMA Public Assistance Kickoff Meeting, Standard Operating Procedure, 9579.4 SOP, September 1999.

60. On December 16, 2008, FEMA approved the Parish's Debris Management Plan, which allowed the Parish to participate in the Increased Federal Share Incentive component of the PA Pilot Program for an additional five percent Federal cost share. *See (Exhibits in possession of Relator)* Exhibit 13– Debris Management Plan; See, (*Exhibits in possession of Relator*), Exhibit 14 - Letter to Mark Riley, State Coordinating Officer, "Livingston Parish Debris Management Plan FEMA-1786/1792-DR-LA; FIPS# 063-99063-00", December 16, 2008. The PA Pilot Program was a statutorily created program that allowed applicants for Public Assistance to qualify for an additional five percent of funding, for applicants that had a FEMA-approved debris management plan, at least two or more pre-approved contractors, and an obligated project prior to the December 31, 2008 deadline. *See* the Department of Homeland Security Appropriations Act, 2007, § 689j, Pub. L. 109-295, 6 U.S.C. § 777. The PA Pilot Program was implemented by FEMA from June 1, 2007 to December 31, 2008.

61. Hurricane Gustav was declared as a 90/10 Federal cost share disaster; under this plan, the Parish received assistance for 95[19] percent of its debris removal costs for projects meeting the criteria above. *Id.*

Leaner and Hanger Debris Removal (PW 54 versions 0-1 and PW 166 versions 0-2)

62. From September 9, 2008, and continuing through to on or about December 18, 2008, the Parish conducted roadside debris removal operations across the Parish. *See (Exhibits in possession of Relator),* Exhibit 264- Parish Arbitration Request, at pp. 11-12.

[19] GOHSEP, as the Grantee, was responsible for the other 5% of the total 10% cost share.

63. On or about September 21, 2008, FEMA distributed guidance to the Parish on documentation requirements for establishing eligibility for removing hazardous trees (leaners), hazardous limbs (hangers), and stumps. *See, (Exhibits in possession of Relator),* Exhibit 15 – FEMA-1786-DR-LA and FEMA-1792-DR-LA, Documenting Hazardous Tree, Limb, and Stump Removal, 21 September 2008.

64. On or about October 6, 2008, Preston Gill of PEC distributed guidance to its monitors for overseeing the leaner and hanger work. The guidance specified each monitor was to take "before and after" photographs of each tree. *See, (Exhibits in possession of Relator),* Exhibit 16 – PEC Guidance to Monitors, October 6, 2008.

65. On December 24, 2008, FEMA obligated **PW 54 Version 0** to provide estimated grant funding for the costs of hauling an estimated 289,801.13 cubic yards ("CY") of roadside vegetative debris to temporary storage sites. *See, (Exhibits in possession of Relator),* Exhibit 17 - FEMA Project Worksheet 54 Version 0. At a contract price of $9.80 per CY, FEMA provided estimated grant funding in the amount of $2,836,169.71. *Id.* at page 6. FEMA also included assistance for Direct Administrative Costs totaling $56,723.39. *Id.* The period of performance covered in this PW was September 8 to November 12, 2008. *Id.* at page 4. All quantities of work in this PW were based on estimated costs of vegetative debris removal with no reference to anticipated costs for the removal of hazardous leaning trees or hanging tree limbs (otherwise known as "leaners and hangers"). *Id.*

66. On January 2, 2009, FEMA obligated **PW 166** to reimburse the Parish's claimed costs for PEC's monitoring of IED's leaner and hanger debris removal work. The period of performance for the PW was September 9 through November 30, 2008; the Parish claimed costs of $1,891,632.60 (monitoring - $1,854,541.76 + administrative costs - $37,090.84). *See,*

(Exhibits in possession of Relator), Exhibit 18 – PW 166, Debris on Citywide ROW, January 2, 2009.

67. Beginning in late March 2009, FEMA met with Parish representatives to identify documentation to substantiate Parish claims for roadside debris, including leaners and hangers. As of this time, six months after debris removal work had begun, the Parish had yet to submit to FEMA any documentation, such as invoices, to support its leaner and hanger debris removal claims. *See, (Exhibits in possession of Relator),* Exhibit 19 – Email exchange between Craig Comeaux/BBEC, Brian Fairburn/OHSEP, Jimmie McCoy/Livingston Parish, and Shannon Duplessis/FEMA , March 24 to 27, 2009; *see* also *(Exhibits in possession of Relator)* Exhibit 20 - Affidavit of Steve Gowen.

68. On or about May 28, 2009, FEMA prepared a new draft of PW 54 for $19,178,454.01. This draft PW covered estimated roadside debris, stumps, leaner and hanger removal, debris site leasing and management, debris reduction, and fill dirt for removed stumps and hauling. It included $16,610,360 for leaner and hanger removal specifically, which was less than the $16,626,340 claimed by the Parish, due to "incomplete invoicing." This draft was rejected by the Parish and GOHSEP. *See, (Exhibits in possession of Relator),* Exhibit 21 – PW 54 Version Draft, ROW Debris Removal, May 28, 2009.

69. On July 7, 2009, more than ten months after Hurricane Gustav made landfall, a meeting attended by Parish President Michael Grimmer, other representatives from the Parish, and representatives from FEMA, GOHSEP, PEC, and BBEC, Mr. Bonura from BBEC stated that they would provide right-of-way (ROW), leaner and stump debris removal data to FEMA for use in preparing a new PW 54 version 1 draft by July 13, 2009. *See, (Exhibits in possession of Relator),* Exhibit 22 - Data for Case Management File, Meeting at the Parish Offices, July 7,

2009. By this date, FEMA had still not received supporting documentation for the leaner and hanger debris removal work claimed by the Parish.

70. From early to mid-July 2009, FEMA had multiple discussions with the Parish and PEC representatives regarding the PEC invoices and the need for additional supporting documentation to support eligibility for the work claimed. *See* Exhibit 20 – Affidavit of Steve Gowen; *see also (Exhibits in possession of Relator) Exhibit* 23 – Affidavit of Jeffrey Jones.

71. On or about July 13, 2009, PEC provided FEMA 48 tree ticket packages for review with regard to its leaner and hanger debris removal work.[20] *See, (Exhibits in possession of Relator)*, Exhibit 24 – Leaners and Hangers Production Log.

72. On or about July 21, 2009, PEC provided FEMA approximately an additional 320 tree ticket packages for review. *See,* Exhibit 24.

73. In documentation submitted to FEMA, the Parish provided IED invoices totaling $16,648,185 for claimed leaner and hanger debris removal work. IED claimed to have cut 88,892 hazardous hangers and 1,349 leaning trees. *See, (Exhibits in possession of Relator),* Exhibit 25 – Livingston Parish, Louisiana, Hurricane Gustav Debris Removal, Disaster Number DR1786-LA, Spreadsheet attached to PW 54 version 1.

74. Between July 28 and September 10, 2009, in accordance with FEMA policy, FEMA reviewed a 20% sampling of leaner and hanger documentation provided by the Parish and made site visits.[21] On the basis of this review, FEMA allowed costs for only 16 percent of the

[20] According to the Parish's Arbitration Request, each tree ticket was accompanied by a daily monitoring report, photographs if available, spreadsheets prepared by IED, and IED invoices. *See* Parish's Arbitration Request, p. 12.

[21] FEMA policy guidance at FEMA DAP 9580.204 recommends a validation sample of at least 500 work items. *See, Exhibit* 26 – FEMA Disaster Assistance Fact Sheet 9580.204, Documenting and Validating Hazardous Trees, Limbs and Hangers, August 2, 2009. FEMA selected a 20 percent sample of 17,821 hangers and 290 leaning trees from the Parish's submission. *See, Exhibit* 27 – FEMA Project Worksheet 54 version 1 draft, ROW Debris Removal, August 31, 2009.

Parish's claimed costs for hangers ($2,600,333.60 of $16,252,085) and 34 percent of the claims for leaners ($134,674 of $396,100). *See* Exhibit 20 –Affidavit of Steve Gowen; *see also* Exhibit 23 – Affidavit of Jeffrey Jones; *see also (Exhibits in possession of Relator),* Exhibit 28 - Spreadsheet showing Livingston Parish Monitor Tickets, September 10, 2009. FEMA denied eligibility for $13,913,178.00 of the Parish's $16,648,185.00 claimed costs for IED leaner and hanger work. *See, (Exhibits in possession of Relator),* Exhibit 29 - Spreadsheet showing total Livingston Parish Leaner & Hanger work paid - 20 percent sample results.

75. On August 26, 2009, PEC's John Shires discussed potential FEMA concerns about PEC's leaner and hanger work with Parish President Michael Grimmer. *See, (Exhibits in possession of Relator),* Exhibit 30 – Email from John Shires/PEC to Mike Grimmer, Brandon Ellzey, Livingston Parish Debris, August 26, 2009. Mr. Shires acknowledged that after reviewing a "very small sampling," PEC had some of the same concerns as FEMA about the work. *Id.* Mr. Shires also reported the outcome of a meeting he had with FEMA's Mr. Jones regarding FEMA concerns with the Parish's leaner and hanger work and emphasized that PEC was prepared to work on the identified issues. *Id.*

76. On August 28, 2009, FEMA's Jeffery Jones emailed Parish President Michael Grimmer about the Parish's leaner and hanger submission to FEMA, in response to the August 26, 2009 email above. In this email, Jones stated "much of the leaners and hangers work did not appear to be eligible." *See (Exhibits in possession of Relator)* Exhibits 31 – Email from Jeffrey Jones to Michael Grimmer, "Re: Livingston Parish Debris," August 28, 2009. Specifically, Mr. Jones confirmed that, as Mr. Shires had written in his email, FEMA policy (FEMA 325) requires that a hanger be two inches in diameter at the break and still hanging. *Id.* However, contrary to Mr. Shires' assertion that photos that did not clearly show the hanger still hanging or that did not

show anything at the break was defensible, Mr. Jones responded: "I am not sure how that could be defended." *Id.* Mr. Jones also confirmed Mr. Shires' statement in the August 26, 2009 email where Mr. Shires stated: "many of the cuts were cut at angles, and many were cut so close to the tree that the cut diameter appears significantly larger than the actual branch." *Id.* And, in response, Mr. Jones noted, "it does not appear that a strict adherence to FEMA regulations took place." *Id.* Mr. Jones also emphasized that a further review of the tree tickets (presumably by PEC) would not be a FEMA eligible expense, as a review had already been performed at least twice. *Id.*

77. On September 10, 2009, Parish President Mike Grimmer and GOHSEP representative Freddie Gardner signed PW 54 version 1 (dated August 31, 2009). *See, (Exhibits in possession of Relator),* Exhibit 32 – PW 54 version 1 signed September 10, 2009. The PW provides assistance for hazardous stump removal, temporary storage management, debris reduction, and increases to the volume of debris hauled to temporary sites. The Parish did not dispute these costs. *Id.* Further, the PW provides assistance for $2,735,007 for eligible leaner and hanger costs. *Id.*

78. On October 13, 2009, at the request of PEC, a meeting was held and attended by Parish President Michael Grimmer along with representatives from IED, PEC, BBEC, GOHSEP and FEMA. *See, (Exhibits in possession of Relator),* Exhibit 33 – Data for Case Management File, Livingston Parish, October 13, 2009. FEMA representatives Jeffery Jones and Ronald Moore discussed issues FEMA encountered during its validation process. *Id.* At the meeting, the attendees discussed eligibility concerns about cuts less than 2 inches, cuts of dead or rotten limbs, instances of multiple tickets for one tree, and discrepancies between before and after pictures of trees. *Id.* At this meeting, FEMA representatives emphasized that specific guidance on

"Documenting Hazardous Trees, Limbs, and Stump Removal" had been distributed which identified the process to be used, which PEC/BBEC representative Craig Comeaux said he had received and that he was very familiar with it. *Id.* FEMA also pointed out to the Parish that there were several tickets with the same GPS coordinates and only one tree, and also that some of the before and after tree photos did not match, leading to FEMA's belief that the Parish contract monitors had used a single set of coordinates for multiple trees. *Id.*; *see also* Exhibit 23 - Jeffery Jones Affidavit.

79. Also on October 13, 2009, FEMA obligated PW 54 version 1 for $7,625,573 for debris removal on citywide rights of way. *See, (Exhibits in possession of Relator),* Exhibit 34 – Project Worksheet 54 version 1, October 13, 2009.

80. In November 2009, the Parish and GOHSEP asserted that FEMA's "sampling" was not truly random as it included only tree tickets with photographs. At GOHSEP's request, FEMA reviewed a sample of 3,221 hanging limbs and 477 leaning trees randomly selected by GOHSEP. FEMA reviewed the GOHSEP sample and determined 13 percent of the hangers and 19 percent of the leaners were eligible. As FEMA had already obligated a PW for a *higher* eligible percentage (16 percent versus 13 percent for hangers and 34 percent versus 19 percent for leaners), GOHSEP opted to reimburse the Parish at the higher FEMA sample percentage rate. *See, (Exhibits in possession of Relator),* Exhibit 35 – FEMA Response to Second Appeal of PW 54 version 1, Second Appeal Analysis, January 6, 2012, p. 2; *see also* Exhibit 23 - Jeffrey Jones Affidavit.

81. In November 2009, Parish President, Mike Grimmer, requested that the Louisiana Legislative Auditor ("LLA") examine the Parish's debris removal and monitoring contracts and

work performed in response to Hurricane Gustav. *See, (Exhibits in possession of Relator),* Exhibit 36 - Mike Grimmer Affidavit.

82. On December 9, 2009, the Parish filed its first appeal of PW 54 version 1 with GOHSEP.[22] The appeal identified approximately $19 million in dispute for the Parish's leaner and hanger debris removal claims. *See, (Exhibits in possession of Relator),* Exhibit 37, p.2 - Livingston Parish First Appeal, December 9, 2009.

83. On or about January 4, 2010, FEMA obligated PW 166 version 2[23] to reduce eligible monitoring costs by $352,919.46. The reduction was based on the results of FEMA's 20 percent validation, PEC's failure to adequately document eligibility, and to disallow ineligible work. *See, (Exhibits in possession of Relator),* Exhibit 38 – FEMA PW 166 version 2 ROW Debris Monitoring, January 4, 2010.

84. On January 27, 2010, the LLA's John L. Morehead, Assistant Legislative Auditor and Director of Recovery Assistance, wrote to Mark DeBosier, GOHSEP's Deputy Director of Disaster Recovery, regarding the results of the LLA's review of Livingston Parish leaners and hangers claim that had been requested by GOHSEP. *See, (Exhibits in possession of Relator),* Exhibit 39 – Letter from John L. Morehead to Mark DeBoiser (Jan. 27, 2010). Mr. Morehead reported the documentation submitted by the Parish claimed a total of $16,623,620 in costs for the removal of 88,756 hangers and 1,345 leaners. *Id.* For the review, the LLA selected a "statistically valid random sample of GPS locations" from the documentation the Parish had submitted regarding PW 54. *Id.* The sample was provided to FEMA, which determined the

[22] Pursuant to 44 C.F.R. § 206.206, the Subgrantee files its appeal with the Grantee who then forwards the appeal to FEMA.

[23] PW 166 version 1 was documented to adjust the increased federal cost share from 75 percent to 90 percent.

eligibility of the represented work. *Id.* Using IED cost rates, the review found eligible work totaled $2,963,858 (Upper Limit) and ineligible work $14,177,000 (Upper Limit). *Id.*

85. On January 28, 2010, Mark DeBosier, GOHSEP's Deputy Director of its Disaster Recovery Division, emailed Shelby Easterly, an attorney representing the Parish, and Parish President Michael Grimmer, to provide a summary of the status of payments for the Parish' debris work that had been written and/or obligated by FEMA. *See, (Exhibits in possession of Relator),* Exhibit 40 – Email from Mark DeBosier to Shelby Easterly and Michael Grimmer, "FW: Debris Payment Status – Hurricane Gustav"(Jan. 28, 2010). DeBosier informed the Parish that GOHSEP would approve a reimbursement payment of $2,963,858 for the leaners and hangers work based upon the results of the LLA sampling described in the previous paragraph, less any previous payments, subject to review of any procurement documentation. *Id.* DeBosier also requested documentation regarding procurement of the various debris services contracts involved. *Id.*

86. On February 10, 2010, the Parish filed a first supplement to its first appeal, which provided additional information on IED's leaner and hanger invoices. The supplement asserts that the additional information substantiated the Parish's claim for $16,626,340 for the claimed work. *See, (Exhibits in possession of Relator),* Exhibit 41, p.1 – Livingston Parish Supplement to First Appeal, February 10, 2010.

87. On or about February 11, 2010, GOHSEP forwarded the Parish's first appeal of PW 54 version 1 to FEMA. GOHSEP also provided its own analysis, which alleged that FEMA had relied primarily on photographs of each cut to establish eligibility. GOHSEP concluded this requirement is not supported by FEMA policy and that FEMA had not applied such a standard to

other applicants. *See, (Exhibits in possession of Relator),* Exhibit 42 – GOHSEP Submission of Parish First Appeal to FEMA Regional Administrator, February 11, 2010.

88. On February 22, 2010, the Parish submitted a second supplement to its first appeal, including additional invoice documentation. In addition, the Parish stated that it had validated 89% of its contractor's work as eligible and attached a spreadsheet showing $14,716,645 as the amount of the costs for the alleged "validated," eligible work. *See, (Exhibits in possession of Relator),* Exhibit 43 – Livingston Parish Second Supplement to First Appeal, February 22, 2010.

89. On or about April 1, 2010, the Parish filed a first appeal of PW 166, disputing FEMA's reduction of eligible funding for claimed costs for monitoring by PEC of the leaner and hanger debris removal completed by IED. The Parish requested that FEMA reinstate eligibility for $350,801.55 and increase the overall eligible funding by an additional $594,374.41. *See, (Exhibits in possession of Relator),* Exhibit 44 – Livingston Parish First Appeal of PW 166 version 2, April 1, 2010.

90. On April 28, 2010, the LLA issued a compliance audit of the Parish's debris removal operations. *See, (Exhibits in possession of Relator),* Exhibit 45 – LLA Livingston Parish Council Compliance Audit Issued April 28, 2010. The focus of the audit was on the Parish's leaners and hangers and the Parish's rights-of-ways and debris removal and monitoring contracts and the associated work performed, as compared to FEMA's guidance. *Id.* at p.4. The LLA audit identified a number of issues with PEC's documentation including; limbs that appeared not to be cut; measurements that were incorrect; cuts that did not meet FEMA size criteria; hanging limbs cut from leaning trees; and, trees that appear to have limbs cut that did not meet FEMA hanger criteria. *Id.* at p. 5. The LLA also noted, "Our sample documentation provided by PEC contained no evidence that PEC's monitors recorded eligibility determinations." *Id.* at p.6. The audit also

found that "because PEC issued load tickets for all debris, regardless of the eligibility, the additional charges for the transportation and the disposal of ineligible debris may not be reimbursable to the parish." *Id.* at p. 7. But, "[s]ince the transportation and disposal charges are billed on a cubic yard basis, [the LLA was] unable to quantify the amount of the transportation and disposal charges that relate to the leaner and hanger debris removal charges discussed...." *Id.* In addition, the audit also noted a difference between PEC's own understanding of its role in the debris removal process, versus what was required of it by its contract terms and with what was understood by the Parish and IED. The LLA noted that according to PEC's contract terms, the primary function of the loading site monitors was to issue debris load tickets for eligible debris cleared, *id.* at p.5, and that debris to be removed by IED was to be designated by the Parish's official, inspector or other personnel approved by the Parish, *id.* at 6. The LLA found that Parish President Michael Grimmer and Parish OESP Director Brian Fairburn said that PEC was the Parish's representative regarding debris removal. *Id.* However, the LLA also found that in the documentation provided to it by PEC, there was no evidence that PEC's debris monitors had recorded eligibility determinations. *Id.* And, in fact, PEC's president Tony Arikol stated in a letter to the LLA that the monitors' documentation was processed in PEC's office and compared to IED invoices, with questionable items to be discussed with FEMA and only eligible costs submitted to the Parish for payment. *Id.* The LLA concluded that "[g]iven PEC's statement that all work was documented and eligibility determinations were not made in the field, we could not rely on the accuracy of the tree tickets." *Id.* at p. 6. And, as a result, the LLA examined the photos for each tree ticket. *Id.* The LLA performed its own review of photos for each tree ticket in a sample totaling $45,900. Based on its review, seven percent of the LLA sample was determined to be consistent with FEMA guidance. *Id.*

91. On August 12, 2010, the Parish submitted a Request for Reimbursement (RRF) Form to GOHSEP requesting reimbursement for $13,891,332.40 for work performed under PW 54 version 1. The RRF included 10 IED invoices. *See, (Exhibits in possession of Relator),* Exhibit 46 – Parish RRF PW 54, August 12, 2010.

92. On September 10, 2010, FEMA denied the Parish's request for full reimbursement for its leaner and hanger work. The appeal concluded FEMA had reviewed all documentation submitted by the Parish and that FEMA had conducted site visits to further substantiate its validation results. *See, (Exhibits in possession of Relator),* Exhibit 47, at p.2 – FEMA Response to First Appeal PW 54, September 10, 2010. FEMA also partially approved the Parish's appeal, however, for an additional five percent cost share under the PA Pilot Program for the work deemed eligible by FEMA related to the amendment of PW 54. *Id.*

93. On or about November 15, 2010, the Parish filed a second appeal of FEMA's determination of PW 54 version 1 with GOHSEP. *See, (Exhibits in possession of Relator),* Exhibit 48 – Parish's Second Appeal of FEMA Determinations Affecting Livingston Parish Debris Removal Reimbursement, Declaration No. FEMA-LA-1786 PW No. 54v1, filed with GOHSEP.

94. On November 19, 2010, FEMA provided its first appeal response for PW 166 version 2 to GOHSEP which reinstated eligibility for $350,802 of the funds denied for the Parish's monitoring costs. FEMA requested additional documentation from the Parish to evaluate its claim for the additional $594,375 claimed. *See, (Exhibits in possession of Relator),* Exhibit 49 – FEMA Response to Parish's First Appeal of PW 166 version 2, November 19, 2010.

95. On January 12, 2011, GOHSEP forwarded the Parish's second appeal of FEMA's determination on PW 54. *See, (Exhibits in possession of Relator),* Exhibit 50 – GOHSEP Submission of Parish Second Appeal of PW 54 to FEMA HQ, January 12, 2011.

96. On May 5, 2011, FEMA obligated PW 166 version 3 to reinstate eligibility for $350,801.55 of monitoring costs for the Parish. *See, (Exhibits in possession of Relator),* Exhibit 51– FEMA PW 166 version 3, ROW Debris Monitoring, November 30, 2010.

97. By May 2011, FEMA obligated a total of $11,111,678.96 for 16 PWs for FEMA Category A Debris Removal work for Livingston Parish. All of this work involved roadside debris and leaners and hangers; no assistance was provided for the removal of waterway debris. FEMA obligated a total of $11,560,390.52 for all FEMA categories of assistance for the Parish for Hurricane Gustav. The total FEMA assistance for all applicants Parish-wide was $21,337,912.91. *See, (Exhibits in possession of Relator),* Exhibit 52 - Spreadsheet summary of Livingston Parish FEMA funding received for Hurricane Gustav.

98. On September 12, 2011, A. Shelby Easterly submitted to GOHSEP and the office Livingston parish president Mike Grimmer a letter stating, "I am submitting copy of the amended electronic data submitted for the second appeal related to drains." This submission of information and substitution was an attempt to supply FEMA with misleading information regarding the maintenance of drains throughout the parish. *See (Exhibits in possession of Relator)* Exhibit 266.

99. On January 6, 2012, FEMA denied the Parish's second appeal of PW 54, covering the leaner and hanger work. *See, (Exhibits in possession of Relator),* Exhibit 53 – FEMA Response to Second Appeal, January 6, 2012. In its response, FEMA explained its sampling and review methodology and emphasized that FEMA had not considered any items ineligible due to lack of photographs. *Id.* at p.3. FEMA also explained its eligibility calculations and a validation

results spreadsheet it had used to document its findings. *Id.* at pp. 4-5. FEMA determined that its methodology to review the Parish's documentation had been appropriate and accurate and found that the Parish's contractor completed ineligible debris removal work. *Id.* at p.5.

100. On or about November 1, 2012, the Parish requested FEMA undertake a reconsideration of its second appeal decision on PW 54.[24] *See, (Exhibits in possession of Relator),* Exhibit 54 – Parish Request for Reconsideration of Second Appeal Decision on PW 54.

101. On January 24, 2013, GOHSEP also submitted a request for a reconsideration of FEMA's second appeal decision on PW 54. *See, (Exhibits in possession of Relator),* Exhibit 55 – GOHSEP, Request for Reconsideration of Second Appeal Determination – Grantee's Comments, Project Worksheet 54 Amendment 1, January 24, 2013.

Waterway Debris Removal (Project Worksheets 05590, 05591, 05593 and 05594

102. On August 31, 2008, shortly before Hurricane Gustav arrived in Louisiana, Livingston Parish recorded its receipt of a letter from the U.S. Army Corps of Engineers (the "USACE") describing emergency permitting procedures for work covered by Section 10 of the Rivers and Harbors Act of 1899; 33 U.S.C. § 403; Section 404 of the Clean Water Act, 33 U.S.C. § 1344; and Section 103 of the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. § 1413. *See, (Exhibits in possession of Relator),* Exhibit 56 – USACE Letter, Emergency Permit Procedures for the States of Louisiana and Mississippi within the Boundaries of the Mississippi Valley Division. The letter stated, "[E]mergency procedures are being initiated for authorization in wake of Hurricane Gustav." *Id.* at ¶ 2. The letter also stated that the USACE had

[24] Under 44 C.F.R. § 206.206, second appeal decisions are final and there are no other provisions under the Federal regulations for reconsideration of second appeal decisions. Occasionally, subgrantees will submit a request for reconsideration, although FEMA's consideration of such a request is not mandated by Federal regulation. However, as this Panel is aware, Section 565 of Public Law 113-6 carved out an exception for arbitration of a Hurricane Gustav, DR-1786, PA determination if the application exceeded $10,000,000 and was for debris removal. Consolidated and Continuing Appropriations Act, 2013, § 565, Pub. L. 113-6, 127 Stat. 381 113-6.

contacted the local offices for federal and local environmental agencies regarding the emergency permitting procedure, including, among others, the EPA; the U.S. Fish and Wildlife Service; the Louisiana Department of Natural Resources, Office of Coastal Management and Restoration; the Louisiana State Historic Preservation Office; and the National Marine Fisheries Service. *Id.* at ¶ 4. The letter specifically emphasized that use of the emergency permitting procedure is allowed if "**[b]efore work commences**, the applicant [] obtain[s] approval under this Emergency Permit. USACE will determine whether or not the proposed work is an emergency situation based on the information the applicant provides. No work may proceed until this determination is made by the USACE and the applicant is notified." *Id.* at ¶ 5 (emphasis in original).

103. By September 18, 2008, the Parish and the U.S. Department of Agriculture's National Resources Conservation Service ("NRCS") had initiated a discussion about the Parish's eligibility for NRCS' Emergency Wetlands Protection ("EWP") Program, which could provide assistance for the costs of removal of eligible debris from ditches and streams.[25] NRCS representative, Sam Willis, provided an example of a formal request for participation in the EWP to the Parish's Chief Administrative Officer Will Clark. The sample request provided by Mr. Willis stated, "We request Federal assistance under Section 216, Public Law 516, to restore damages sustained in Livingston Parish, Louisiana by Hurricane Gustav that occurred on Monday, September 1, 2008. This work is needed to safeguard lives and property from an imminent hazard of flooding." In addition, the form language of the sample request also would have applicants certify that, "[w]e understand, as sponsors of an Emergency Watershed Protection project that our responsibilities will include acquiring land rights and any permits needed to

[25] The objective of the NRCS EWP is to assist applicants by relieving imminent hazards to life and property from floods and products of erosion created by natural disasters that cause sudden impairment of a watershed. *See* FEMA Policy 9524.3.

construct, and if required, to operate and maintain the proposed measures." *See, (Exhibits in possession of Relator),* Exhibit 57 – Email from Sam Willis, NRCS, to Will Clark/Parish, "Emergency Watershed Protection (EWP)," September 18, 2008.

104. On September 23, 2008, the NRCS-Livingston Parish dialogue continued via email. In an email to Mr. Willis of the NRCS, Parish Chief Administrative Officer Will Clark estimated that the Parish would be requesting NRCS assistance for 125-175 miles of "light/medium debris" to be removed. *See, (Exhibits in possession of Relator),* Exhibit 58 – Email Exchange between Sam Willis/NRCS and Will Clark/ Parish, September 23, 2008.

105. On September 25, 2008, the Parish entered into Cooperative Endeavor Agreements ("CEAs") with each of the Gravity Drainage Districts ("GDDs" or "Districts") Nos. 1, 2, and 5, respectively.[26] *See, (Exhibits in possession of Relator),* Exhibit 59 – Cooperative Endeavor Agreements, Livingston Parish with GDDs Nos. 1, 2, and 5, September 25, 2008. Under the terms of these Agreements, the Parish authorized its contractor, IED, to remove all debris located within each GDD. *See id.*, Art. II, § A (for each CEA). The Parish delegated to each District the authority to direct the execution of the debris removal services within each District's boundaries. *Id.* The CEAs also provided that each GDD was to reimburse the Parish for the costs of debris removal by IED and each GDD agreed "to further bear any portion of the costs associated with work performed within its boundaries under the debris removal agreement which is declared ineligible for reimbursement." *See id.* at § B (for each respective CEA).

106. Also on September 25, 2008, Parish President Michael Grimmer signed Contract Addendum 1 to the original, August 31, 2008 IED contract to add work items for debris removal from ditches and canals in the Parish (the "waterway debris removal"). *See, (Exhibits in*

[26] Under the Louisiana State Constitution, Article 14, Section 14 (C), the state and its political subdivisions or political corporations may engage in cooperative endeavors with each other for a public purpose.

possession of Relator), Exhibit 60, at § I – Contract Addendum 1 to Debris Removal Agreement between IED, Inc. and Livingston Parish, September 25, 2008. In the Addendum, the contractor agreed to "comply with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency Regulations (40 CFR part 15)." *Id.* at ¶ 3. Under the section entitled, "Scope of Ditch and Canal work," the Addendum required the contractor to remove "all eligible storm-generated debris encountered, identified, and approved by the authorized jurisdiction." *Id.* at § I (A)(1)(a). The Addendum also included prices per linear foot ("LF") and the stipulation that no work order would be issued in an amount less than 100 contiguous LF. *Id.* at § I(A).

107. On September 26, 2008, Parish President Michael Grimmer signed a contract with Alvin Fairburn & Associates, LLC ("AFA"), for "Debris Removal Monitoring at Livingston Parish Canals and ditches related to Hurricane Gustav." *See, (Exhibits in possession of Relator),* Exhibit 61, at p.1 – Debris Management and Monitoring Services Agreement, Livingston Parish Debris Management and Monitoring Services for Cleaning of Drainage Canals and Ditches, September 26, 2008. Under Section 2, entitled "Services," the contract states that "contract monitors are necessary to ensure a Federal Emergency Management Agency (FEMA) emergency plan and debris removal contract requirements are met by monitoring the debris removal from Drainage canals and ditches which are located in the Parish of Livingston and owned/maintained public drainage canals and ditches, monitoring the debris management sites, as well as roving debris monitors, to assure that the debris management plan and contracts are effectively and efficiently implemented." *Id.* at p. 1. The contract also provided that "[t]he primary function of the Loading Site Monitors is to issue debris tickets for eligible debris cleared and to provide

documentation as required by FEMA reimbursement requirements." *Id.* at p. 2. AFA was the monitor for the Parish's waterways debris removal work inside of the GDDs. *See (Exhibits in possession of Relator)* Exhibit 264- Request for Arbitration, at p. 86.

108. On October 13, 2008, Jimmy Hopkins, Assistant Manager of GDD No. 5 and George McCallum, AFA representing GDD No. 5, advised Sam Willis, a local U.S. NRCS representative, not to survey four locations (Middle Colyell No. 3, Middle Colyell No. 4, West Colyell No. 3, and West Colyell No.4) within GDD No. 5. Mr. Willis was informed by the GDD representatives that the District had already cleaned these locations using "in-house resources" or would do so in the near future. *See, (Exhibits in possession of Relator),* Exhibit 62 – Affidavit of George Reid McCallum, June 2, 2010, p. 2, ¶ 6.

109. On October 24, 2008, Brian Fairburn, the Parish's OHSEP Director, requested GOHSEP assistance to obtain federal funding for its waterway debris removal operation. *See, (Exhibits in possession of Relator),* Exhibit 63 – Letter from Brian Fairburn, Director Office of Homeland Security and Emergency Preparedness, Livingston Parish, to GOHSEP, "RE: Drainage Canal Debris Removal," October 24, 2008. In the letter, Mr. Fairburn noted that different agencies may have overlapping jurisdiction, including FEMA, the NRCS and the USACE. *Id.*

110. On October 30, 2008, the Parish formally applied to the NRCS for assistance and acknowledged that it would be the Parish's responsibility to acquire any land rights, access and permits needed. *See, (Exhibits in possession of Relator),* Exhibit 64 – Letter from Parish President Michael Grimmer to Kevin Norton, NRCS from Will Clark, Chief Administrative Officer, Livingston Parish, "RE: NRCS Assistance through Emergency Watershed Protection," October 30, 2008.

111. On November 1, 2008, GOHSEP representative Freddie Gardner requested that Brian Fairburn, the Parish's OHSEP Director, provide FEMA with information about drainage canals and storm-generated debris for FEMA to make site visits for eligibility determinations. Mr. Gardner also requested that Mr. Fairburn schedule site visits for representatives from FEMA and GOHSEP to view these locations. *See, (Exhibits in possession of Relator),* Exhibit 65 – Gardner email to Fairburn, November 1, 2009.

112. On November 4, 2008, the NRCS acknowledged receipt of the Parish's request for assistance. The NRCS informed the Parish that its teams were currently determining the eligibility of "exigency" sites in Livingston Parish. The NRCS defined these as sites "that demand immediate action to avoid potential loss of life or property." The NRCS further informed the Parish that its teams were preparing Damage Survey Reports ("DSRs"), cost estimates, and contracts for repair work. Once its survey of "exigency" situations was completed, the NRCS stated it would return to the Parish to assess "non-exigency" situations. *See, (Exhibits in possession of Relator),* Exhibit 66 – Letter to Will Clark, Livingston Parish, from Kevin Norton, NRCS re: EWP, November 4, 2008.

113. On November 24, 2008, Parish Council Chairman Jimmie McCoy signed Contract Addendum 2 with IED to increase prices per Linear Foot ("LF") for waterway debris removal from wetlands or otherwise inaccessible areas that would require amphibious or other special machinery for access. *See, (Exhibits in possession of Relator),* Exhibit 67 – Contract Addendum 2, Debris Removal Agreement between IED, Inc. and Livingston Parish, November 24, 2008. According to IED's Contract Addendum 2, all related work orders and tickets to which the increased fee applied, would contain the designation "Canal Work Wetlands Fee Applies." *Id.* at § I(A)(1)(b). The contract addendum also noted that project monitors would use the following

definition as determination criteria: "Wetlands – For regulatory purposes under the Clean Water Act, the term wetland means 'those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.'" *Id.* at § I(A)(1)(b)(i). The copy provided to FEMA does not have an IED signature. *See* Exhibit 67.

114. On or about November 25, 2008, FEMA's Jeffrey Jones; Michael Francis, a representative for the USACE and Freddie Gardner of GOHSEP went on a site visit to West Colyell Creek. According to Mr. Jones' notes of the visit, the USACE had informed FEMA earlier that same week that the Parish's contractors were cutting large roads to access debris from West Colyell Creek. *See, (Exhibits in possession of Relator),* Exhibit 68 – Jeffrey Jones, Meeting Notes, November 25, 2008. Mr. Jones noted that at the location, the group observed a road being cut along the stream bank, which was at least 1 mile long and over 30 feet wide. *Id.* Mr. Jones also noted that the group did not see any FEMA eligible debris in the creek or at the site. *Id.* As a result, Mr. Jones set up a meeting for the following day to speak about the work taking place and what was eligible for FEMA funding. *Id.* Prior to this incident, FEMA was unaware that these extensive claims for waterway debris removal work were being performed by the Parish. *See* Exhibit 23 – Jeffrey Jones' Affidavit.

115. On or about November 25, 2008, FEMA's Jeffery Jones and GOHSEP's Freddie Gardner met with representatives of the Louisiana Governor's Office, the Parish's Council, its contractors, and GOHSEP. *See, (Exhibits in possession of Relator),* Exhibit 69 – FEMA Transcript of November 25, 2008 Meeting; *See, (Exhibits in possession of Relator),* Exhibit 70 - Full Audio of November 25, 2008 Meeting; *see also* Exhibit 68-Jeffrey Jones, Meeting Notes,

November 25, 2008; Exhibit 23-Jeffrey Jones Affidavit.[27] The Parish was represented by Jimmie McCoy, Parish Council Chairman; Brian Fairburn, Director of OHSEP; and Jimmy Hopkins, of Gravity Drainage District No. 5. *Id.* At the meeting, Mr. Gardner and Mr. Jones set forth FEMA's criteria for eligibility, with Mr. Jones and Mr. Gardner emphasizing that only if debris was an immediate threat and was storm-generated could FEMA be involved; otherwise, the work would be under the purview of the NCRS. *See* Exhibit 69, at pp. 2-3, 18:50 to 20:20 – FEMA Transcript. Mr. Jones and Mr. Gardner also emphasized that it would be difficult to justify that debris removal for a long stretch of waterway was an immediate threat; rather, "the immediate threat should be a pile here, a pile there." *Id.* at p. 7, 40:58 (Jeffrey Jones). Also at the meeting, Mr. Jones, Mr. Gardner, and David Templet, a local environmental consultant, explained the Parish's need to obtain federal permits from the USACE and other Federal agencies prior to undertaking such work. *Id.* at pp. 8-9, 45:19 – 48:02. Mr. McCoy and Mr. Fairburn disputed this requirement and stated the Parish's intention not to obtain such permits. *Id.* at 45:07 to 47:49.

116. From late November 2008 to February 2009, the NRCS informed the Parish as to the status of its EWP assessments on what waterways it deemed eligible for assistance from the NRCS and offered the Parish an increase in the cost share for the assistance. *See, e.g.*, Exhibits 71 – Emails between Wendall Meaux, NRCS and Sam Willis, NRCS, Subject: Livingston Parish, November 26, 2008; Letter from Kevin Norton, State Conservationist to Will Clark, Parish Chief

[27] The Parish also included a copy of a transcript and selected audio clips of the November 25, 2008 (also referenced as being on November 26, 2008) meeting in its Appendix to its Arbitration Request. *See, e.g.*, Parish's Arbitration Req., at pp. 36-37 & 98-99. For the Panel's reference, FEMA is including the full audio of the November 25, 2008 meeting in its electronic Exhibit s, as Exhibit 70. In addition, FEMA has also included its own transcript of the meeting as Exhibit 69, which differs from the Parish's transcript in certain aspects. For example, the Parish's transcript and audio clips do not include the last 20 minutes of the meeting, which are represented in FEMA's transcript and full audio.

Administrative Officer, December 24, 2008 (on increase in cost share); Email from Sam Willis, NRCS to Will Clark, Livingston Parish, Subject: EWP Assistance, January 29, 2009.

117. In March 2009, the NRCS informed the Parish of the results of its survey of 22 sites for EWP eligibility. The NRCS determined 14 sites were ineligible, as these represented "no threat to life or property – no imminent threat." Eight additional sites were still in final review. *See, (Exhibits in possession of Relator),* Exhibit 72 – Letter from E.J. Giering, State Conservation Engineer to Will Clark, Chief Administrator Officer, March 4, 2009. These DSRs were signed by the Parish. *See, (Exhibits in possession of Relator),* Exhibit 73 – Email from Sam Willis to Kris Davis, NRCS, Subject: Livingston, March 11, 2009.

118. On March 24, 2009, John Shires of PEC, emailed Brian Fairburn, Director of OHSEP, a proposed letter to IED regarding delays in removing debris, from the "cleaning of the drainage canals." *See, (Exhibits in possession of Relator),* Exhibit 74 – Shires email to Fairburn, Re: letter to IED, March 24, 2009. In the email, Mr. Shires noted, "Initially, in order to expedite the cleaning of drainage canals it was agreed that the debris would be piled along the bank of the canal to be removed at a later date." *Id.* However, "[t]o date, only approximately 3200 cubic yards of debris has been load[sic] from the banks of the canals where it had been left to TDSRS [Temporary Debris Storage and Reduction Sites]." *Id.* Mr. Shires was concerned that not only did the delay cause PEC markings regarding eligibility to fade, but Mr. Shires also noted that this constituted "incomplete" work under IED's contract, for work associated with the "Wetlands Fee." *Id.* Mr. Shires informed IED "We cannot recommend payment for incomplete work." *Id.*

119. On April 8, 2009, a NRCS representative indicated the Parish needed to decide what method of contracting it would use to complete NRCS work. The representative reported a Parish decision was needed by April 13, 2009, or "we will allocate the money to another

sponsor." *See, (Exhibits in possession of Relator),* Exhibit 75 – Email from Kris Davis to Sam Willis; Subject: Livingston Parish, April 8, 2009. Upon information and belief, the Parish did not respond to the NRCS by the April 13, 2009 deadline.

120. On April 10, 2009, FEMA obligated PWs for Gravity Drainage Districts Nos. 1 and 2, respectively. FEMA obligated PW 01024 for GDD 2 for $242,369.46 for the removal of 10,316 cubic yards (CY) from the GDD No.2 drainage system throughout its jurisdiction. PW 01048 was obligated for $231,055.63 for GDD No. 1 to remove vegetative debris from the GDD drainage system and culverts from September 3 to October 29, 2008. Both GDDs used their own, not the Parish's, force account labor, equipment, and materials to perform this work. *See, (Exhibits in possession of Relator),* Exhibit 76 – FEMA PWs 01024 and 01048, April 19, 2009.

121. On April 25, 2009, FEMA drafted a version of PW 54 to make assistance eligible for the estimated costs of debris removal from inside the Gravity Drainage Districts. The Parish requested assistance for $32,511,434 for waterway debris work claimed from November 17, 2008 to April 26, 2009. The PW also included $8,952,288.37 in funding for leaners and hangers plus Direct Administrative Costs. Parish President Michael Grimmer declined to sign the PW and refused the FEMA assistance. *See, (Exhibits in possession of Relator),* Exhibit 77 - PW 54 Draft; *see also* Exhibit 36 - Mike Grimmer Affidavit.

122. On May 8, 2009, Jeff Bonura, PEC/BBEC contract monitor, sent an email to the Parish's Chief Administrative Officer, Will Clark, recommending that all work on the Parish waterway debris project be suspended. *See, (Exhibits in possession of Relator),* Exhibit 78 – Email from Jeff Bonura to Will Clark, Jimmie McCoy, "Hazardous Debris Removal from Parish Waterways," May 8, 2009. The monitor requested that all work be halted pending the monitor's further review of the project; the monitor's concerns were focused upon waterway debris removal

both in the Gravity Drainage Districts and outside the Districts. *See, (Exhibits in possession of Relator),* Exhibit 79 – Email from Jeff Bonura to Will Clark, Jimmie McCoy, Subject: Hazardous Debris Removal from Parish Waterways, May 8, 2009.

123. On May 14, 2009, Parish President Michael Grimmer suspended all debris removal operations in the Parish. *See* Exhibit 36 - Mike Grimmer Affidavit. The roadside debris and leaners and hangers work was completed by this time. *Id.; see also* Exhibit 34 - PW 54 version 1 (with supporting documentation, including invoices).

124. On May 22, 2009, six months after the debris removal work had begun, PEC/BBEC contract monitor Jeff Bonura requested information from a USACE representative about permitting requirements for waterway debris work. Reference is made to a "nation-wide permit" and a draft letter from the Parish. *See, (Exhibits in possession of Relator),* Exhibit 80 – Email Jeff Bonura to Robert Heffner; Subject: Livingston Parish Debris Removal, May 22, 2009.

125. On June 1, 2009, USACE representative, Robert Heffner, responded to Mr. Bonura's May 22, 2009 email and indicated that more "operational details" were required. Specifically, the USACE required information regarding the type of equipment to be used; how and where debris would be disposed of; and, ingress and egress locations. The USACE representative inquired as to whether FEMA or the NRCS was involved in the project and noted the USACE had processed hundreds of streams throughout the State based on NRCS damage survey reports. *See, (Exhibits in possession of Relator),* Exhibit 81 – Email from Robert Heffner to Jeff Bonura; Subject: Livingston Parish Debris Removal, June 1, 2009.

126. On June 3, 2009, PEC's John Shires, the Parish's contract monitor, sent a letter to IED, the Parish's debris contractor, informing IED of its responsibility under its contract with the Parish to obtain all necessary approvals from local, state, and federal agencies to complete

waterway debris removal prior to resuming work. *See, (Exhibits in possession of Relator),* Exhibit 82 – Letter from John Shires, PEC to IED, Inc., "RE: Debris Removal from Waterways in Livingston Parish – Permitting Requirement," June 3, 2009.

127. On June 5, 2009, Bia Carambat of PEC informed Jeff Bonura of BBEC, that the total cost of the debris work in the Parish would be $65,881,562.90. The PEC representative also stated a comparison of IED's invoices with PEC records showed only a 0.5 percent discrepancy. *See, (Exhibits in possession of Relator),* Exhibit 83 – Email from Bia Carambat to Jeff Bonura, "Livingston Parish Debris – PW Status Report," June 5, 2009.

128. On or about June 9, 2009, John Shires of PEC sent a letter to Parish President, Michael Grimmer, addressing the issue of estimated costs for all debris removal work in the Parish. *See (Exhibits in possession of Relator)* Exhibit 84 – Letter from John Shires, of PEC to Mike Grimmer, Livingston Parish President, Subject: Livingston Parish Debris Removal Project – Project Costs, June 8, 2009. The monitor estimated the total project cost would now be $92,348,590, nearly thirty million more than the PEC estimate from Bia Carambat, PEC, *just five days earlier*. *Id.* The letter provided cost estimates for each portion of the project: roadside debris including leaners and hangers; waterway debris inside the Drainage Districts; waterway debris outside the Districts; and monitoring for each portion of the project. *Id.* Mr. Shires also noted that the waterway debris work was incomplete and that PEC/BBEC was currently reviewing and reconciling IED invoices for roadside debris in preparation for submission of this work to FEMA. *Id.* Mr. Shires also noted that all roadside debris work had been completed by December 31, 2008, which was six months prior to this June, 2009 estimate. *Id.*

129. Also on June 9, 2009, Brian Fairburn, the Parish's Director of OHSEP, provided Smith Day, an attorney for IED, with a copy of an email received from a Weyerhaeuser

Company[28] representative. The Weyerhaeuser email documented charges from damages to Weyerhaeuser property within the Parish caused by IED contractors. *See, (Exhibits in possession of Relator),* Exhibit 85 – Fairburn Email to Day, IED, June 9, 2009.

130. On June 16, 2009, John Shires, PEC, directed another letter to IED recommending IED focus on obtaining permits for those waterways already or partially completed. PEC expressed a concern that debris left on banks could reenter these waterways creating new blockages. *See, (Exhibits in possession of Relator),* Exhibit 86– Letter from John Shires to IED, Inc. Re: Debris Removal from Waterways in Livingston Parish Permitting Requirements, June 16, 2009.

131. On or about June 22, 2009, John Shires, of PEC, sent another letter to Parish President Michael Grimmer identifying outstanding issues requiring resolution prior to any Parish decision to resume debris operations in the field. *See, (Exhibits in possession of Relator),* Exhibit 87 – Letter from John Shires to Mike Grimmer, "Livingston Parish Debris Removal Project," June 22, 2009. Among these issues were a failure to obtain permits for wetlands work from the USACE, obtaining rights-of-entry for access to waterways via private property for all contractors, and contract procurement and cost problems. *Id.* Mr. Shires also noted issues with debris contract pay items. *Id.* Specifically, Mr. Shires noted that "[t]he current contract addendums related to canal debris removal include a 'per foot' unit cost for cleaning, with a minimum quantity of 100 linear feet … the pay item suggests that FEMA will be required to reimburse the Parish the cleaning of possibly ineligible footage of a canal." *Id.* The Parish was encouraged to work with the NRCS on those waterways deemed eligible for NRCS assistance. *Id.* PEC also recommended the Parish re-compete contracts for the waterway debris removal. *Id.*

[28] The Weyerhaeuser Corporation is a commercial company that is a private owner of commercial timberland within Livingston Parish.

132. On July 13, 2009, FEMA's Jeffrey Jones and Ronald Moore met with the Parish President Mike Grimmer, his chief of staff, a Parish financial advisor, GOHSEP representatives, and the Parish's contractors, to discuss the waterway debris removal project. *See, (Exhibits in possession of Relator),* Exhibit 88 – Data for Case Management File, Livingston Parish, Meeting at the Parish Office, July 7, 2009. PEC/BBEC's Jeff Bonura asserted it was IED's responsibility to obtain all permits for the work. *Id.* Parish President Michael Grimmer also reported he had been told that AFA, the Parish's monitor for work inside the Gravity Districts, had not been told to separate eligible from ineligible debris, that a monitor had been paid $20,000 to "make debris eligible," and several Parish residents were complaining that their trees were being taken as timber. *Id.* The Parish President observed, "it appeared there were many things done illegally." *Id.*

133. On July 13, 2009, the USACE issued a Cease and Desist Order to Livingston Parish and IED for a violation of Section 10 of the Rivers and Harbors Act of 1899 (RHA) and Section 301 of the Clean Water Act. Both the Parish and IED were warned to cease all unauthorized activity. *See, (Exhibits in possession of Relator),* Exhibit 89 – Letter from Department of the Army Corps of Engineers to Smith Day, IED, Inc. July 13, 2009.

134. From mid-July to mid-October 2009, an experienced debris team from FEMA conducted a 100 percent validation of the Parish's waterway debris operations. The team reviewed approximately 425 miles of streams cleaned by the Parish's contractor. *See, (Exhibits in possession of Relator),* Exhibit 90 – FEMA First Appeal Response for Waterway Debris Removal and Debris Monitoring, page 1, May 13, 2011; *see also (Exhibits in possession of Relator)* Exhibit 91– Examples of FEMA Stream/Waterways Eligibility Summary Report, various dates; *(Exhibits in possession of Relator)* Exhibit 92 – Survey Methodology.

135. On July 23, 2009, Tre' Wharton, C-K Associates, LLC,[29] emailed IED's Tom Carnes and IED's Smith Day in regard to the USACE's Cease and Desist letter. Among Wharton's comments is his recollection of a meeting at which IED "was told not to worry about permits." *See, (Exhibits in possession of Relator),* Exhibit 93 – Wharton email to Carnes, Day re: USACE Cease and Desist order, July 23, 2009.

136. On August 3, 2009, the USACE informed Tre' Wharton, C-K Associates, LLC, that IED's work on Wax Ditch violated Section 301 of the Clean Water Act. The USACE determined this location was not a wetland subject to the USACE jurisdiction, but that IED's deposition of fill material into Wax Ditch required a Department of the Army permit, which IED had failed to obtain. *See, (Exhibits in possession of Relator),* Exhibit 94 - USACE Letter to Wharton, August 3, 2009. On November 30, 2009, IED invoiced the Parish $27,304 for work performed along Wax Canal. *See, (Exhibits in possession of Relator),* Exhibit 95 – IED Invoice No. 4313, November 30, 2009.

137. On August 6, 2009, Tre' Wharton, a project manager for C-K Associates, LLC, explained in a letter to the USACE why the Parish had failed to obtain Department of the Army permits before conducting the waterway debris removal operation. Mr. Wharton stated Parish representatives had informed IED that the Parish's contract monitors would handle all communications with the USACE. This information was provided in response to the USACE's investigation of the Parish's Violation No. MVN-2009-000094-SK. *See, (Exhibits in possession of Relator),* Exhibit 96 – Letter from Tre' Wharton to USACE, "Violation, Livingston Parish," August 6, 2009.

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138. On August 21, 2009, the NRCS prepared a spreadsheet showing 32 DSRs prepared with eight locations within the Parish eligible for assistance. All sites were classified "non-exigency." The NRCS cost estimate for the work totaled $1,054,295. *See, (Exhibits in possession of Relator),* Exhibit 97 – NRCS, EWP Hurricane Gustav/Ike, August 21, 2009.

139. On August 26, 2009, a NRCS representative indicated an assessment of channels of five complete DSRs had been performed and determined no debris had been removed. The representative questioned the Parish's continued interest in the project. *See, (Exhibits in possession of Relator),* Exhibit 98 – Email from Sam Willis to Edmund Giering, Subject: Livingston Parish DSRs – Status, August 26, 2009.

140. On August 28 and 29, 2009, FEMA requested documentation from the Parish's contract monitors, PEC and AFA, to support its validation of work performed in streams and creeks. Specifically, FEMA requested "before and after" photographs for any debris removal work claimed. With regard to PEC, FEMA also noted that of the 246 work orders provided, the contractor had completed work on only two orders. *See, (Exhibits in possession of Relator),* Exhibit 99 – Email from Jeffery Jones to John Shires, "Livingston Documentation," August 29, 2009; *(Exhibits in possession of Relator)* Exhibit 100 - Email from Jeffrey Jones to Eddie Aydell/AFA, "Livingston debris," August 28, 2009.

141. On September 4, 2009, the NRCS State Conservation Engineer set forth requirements to be met by the Parish in order to obtain NRCS assistance. The Parish was to make its request in writing and obtain all necessary permits and "landrights" (rights of entry) prior to NRCS beginning the work. *See, (Exhibits in possession of Relator),* Exhibit 101 – Email from Edmund Giering to Sam Willis, Subject: Livingston Parish DSRs – status, September 4, 2009.

142. On November 5, 2009, NRCS State Conservation Engineer, E.J. Glering, summarized the NRCS' attempts to obtain confirmation from the Parish of whether it intended to act on its request for EWP assistance from the NRCS, beginning in November 2008. Mr. Glering informed the Parish President of NRCS' determination that six channels in the Parish were eligible for EWP assistance. The NRCS official informed the President that November 13, 2009 had been established as a deadline for the Parish to declare its intention to participate in the EWP. *See, (Exhibits in possession of Relator),* Exhibit 102 – Letter from E.J. Giering, State Conservation Engineer to Mike Grimmer, Parish President, "National Resources Conservation Service (NRCS) Emergency Watershed Protection Program (EWP) Assistance for Natural Disasters," November 5, 2009.

143. On January 15, 2010, FEMA issued environmental reviews of the waterway debris work claimed. FEMA concluded that, as the work was completed prior to FEMA's review, the Parish failed to submit required documentation in accordance with 44 C.F.R. Part 10. *See, (Exhibits in possession of Relator),* Exhibit 103 – FEMA, Record of Environmental Consideration for Waterway Debris Removal Projects, January 15, 2010. The FEMA reviewer recommended the project was ineligible for grant assistance. *Id.* The FEMA reviewer also noted that the scope of the work requested by the Parish included items that would seem to require 404 and 401 permits from the USACE; may require Coastal Use Permits from the Louisiana Department of Natural Resources; that work had appeared to have been done in violation of Section 7 of the Endangered Species Act; and also involved other potential violations of federal environmental and historic preservation law. *Id.*

144. On January 26, 2010, FEMA obligated PWs 05590, 05591, 05593, and 05594 for zero dollars. The four PWs covered debris operations inside the drainage districts, outside the

districts, and monitoring activities for each. The Parish requested assistance for a total of $29,505,048; the Parish did not identify estimated costs for the PW for Gravity Drainage District work. As the FEMA validation review found no eligible work, all PWs were written for zero dollars. *See, (Exhibits in possession of Relator),* Exhibit 104 – FEMA PW 05590 Waterway Debris Removal Outside Drainage Districts; *See (Exhibits in possession of Relator)* Exhibit 105 - FEMA PW 05591 Waterway Debris Removal Monitoring Gravity Drainage Districts 1, 2, and 5; *(Exhibits in possession of Relator)* Exhibit 106 -PW 05993, Waterway Debris Removal Monitoring Outside Drainage Districts; and, *see (Exhibits in possession of Relator)* Exhibit 107 - PW 05594, Waterway Debris Removal, Gravity Drainage Districts 1, 2, and 5.

145. On June 14, 2010, the Parish filed a first appeal of FEMA's determinations on the waterway debris with GOHSEP. *See (Exhibits in possession of Relator)* Exhibit 108 – Livingston Parish First Appeal of PWs 5590, 5591, 5593, and 5594, June 14, 2010. The Parish requested assistance for a total of $46,134,340.38 as follows:

a. PW 05590	**$15,645,457.69**
b. PW 05591	**$ 5,267,463.25**
c. PW 05593	**$ 3,500,000.00**
d. PW 05594	**$ 21,721,419.44**

146. On July 8, 2010, the Parish filed Supplement 1 to the waterway debris appeal with GOHSEP. The Supplement provided additional information on procurement, monitoring, permitting and access issues. *See, (Exhibits in possession of Relator),* Exhibit 109 – Livingston Parish First Appeal, Supplement 1, July 9, 2010.

147. On August 10, 2010, the Parish filed Supplement 2 to the appeal with GOHSEP. This Supplement addresses FEMA's denial of assistance for the Parish's failure to comply with environmental regulations. *See, (Exhibits in possession of Relator),* Exhibit 110 – Livingston Parish First Appeal, Supplement 2, August 10, 2010.

148. On August 11, 2010, GOHSEP filed a response to the first appeal of FEMA's determinations on the waterway debris on behalf of the Parish. GOHSEP supported the Parish's appeal. *See, (Exhibits in possession of Relator),* Exhibit 111– GOHSEP letter to FEMA Region VI Administrator, Livingston Parish First Appeal, August 11, 2010.

149. On May 13, 2011, FEMA denied the Parish's first appeal and determined that all waterway work claimed was ineligible for Public Assistance. *See, (Exhibits in possession of Relator),* Exhibit 112 – FEMA Response to Livingston Parish First Appeal, May 13, 2011. FEMA based this denial on the Parish's failure to provide adequate documentation to substantiate its claim of an immediate threat from disaster-related debris, the Parish's failure to comply with federal environmental regulations, and the Parish's failure to obtain required permits until issued a Cease and Desist Order by the USACE in July 2009. *Id.* FEMA also concluded the Parish's monitoring firms failed to comply with contractual agreements and their claims were also ineligible for assistance. *Id.*

150. On August 1, 2011, Roy Zachary submitted to Carla Richard, Appeals Manager – Disaster Recovery Division a letter stating, "At the Livingston Parish Gravity Drainage District #1 meeting on Tuesday, July 26, 2011, the Board was given copies of documents seeing to be contract work orders issued by LPGDD#1. The documents are unsigned, and I am attaching copies of the documents. No member of the Board had ever seen these documents before the Tuesday night meeting. The Board further confirmed that Wesley Kinnebrow, the District Manager, had not signed the documents. This letter is being sent to you so that there is no misunderstanding about the authorship of these documents. They were not prepared by the District, signed by the District, or Authorized by the district." *See* Exhibit 222- Letter from Roy Zachary, Chairman of Livingston Parish Gravity Drainage District #1, to Carla Richard, Appeals

Manager for Disaster Recovery Division GOHSEP, "Re: Livingston Parish Gravity Drainage District #1 Hurricane Gustav Debris"

151. On September 12, 2011, A. Shelby Easterly submitted to GOHSEP and the office Livingston parish president Mike Grimmer a letter stating, "I am submitting copy of the amended electronic data submitted for the second appeal related to drains." This submission of information and substitution was an attempt to supply FEMA with misleading information regarding the maintenance of drains throughout the parish. *See (Exhibits in possession of Relator)* Exhibit 266.

152. On September 12, 2011, GOHSEP filed a second appeal response of FEMA's denial of assistance for waterway debris claims. *See, (Exhibits in possession of Relator),* Exhibit 113 – GOHSEP Letter to FEMA Assistant Administrator – Recovery Directorate, Livingston Parish, Second Appeal, September 12, 2011.

153. On September 4, 2012, the U.S. Environmental Protection Agency found that Gravity Drainage District 2 had caused or directed the discharge of pollutants on multiple occasions between April 2008 and approximately August 2010 into 1.5 acres of wetlands. The GDD did not have a permit issued by the USACE as required by Section 404 of the Clean Water Act and these actions constituted a violation of Section 301 (a) of that Act (33 U.S.C. 1311 (a). *See, (Exhibits in possession of Relator),* Exhibit 114 – United States Environmental Protection Agency Region 6, In the Matter of Gravity Drainage District No. 2, *Administrative Order on Consent and Information Demand*, September 4, 2012.

OIG Audit- OIG-14-01-D

154. On April 3, 2013, the Parish sent a letter to the OIG requesting an audit of its PA applications and FEMA's resulting determinations pursuant to Section 565 of the 2013 Appropriations Act. *See, (Exhibits in possession of Relator),* Exhibit 115 - Parish Audit Request, April 3, 2013. The audit request came after FEMA had issued its final determination on the

Parish's second appeal for PW 54 (for leaner and hanger debris) and while a second appeal on PWs 5590, 5591, 5593 and 5594 (for waterway debris removal) was still pending.

155. From April 2013, through October 2013, the OIG conducted an audit of all of the Parish's debris removal projects for Hurricane Gustav. *Id.*

156. On July 1, 2013, FEMA informed GOHSEP that it was no longer reviewing the Parish's second appeal of the waterway debris claims or PW 54. *See, (Exhibits in possession of Relator),* Exhibit 116 – Letter to Kevin Davis, Director, GOHSEP, Second Appeal of FEMA Determinations on PWs 5590, 5591, 5593, 5594; and Request for Reconsideration of Second Appeal – PW 54, July 1, 2013.

157. In August 2013, prior to the OIG's issuance of the final Audit Report, the OIG discussed its audit results with Parish officials, FEMA Regional officials, and FEMA Headquarters officials in separate meetings. The OIG also provided a draft of its findings to FEMA in advance of an August 14, 2013 exit meeting with FEMA officials. *See, (Exhibits in possession of Relator),* Exhibit 117 – Audit meeting discussion notes with draft OIG report.

158. On August 29, 2013, FEMA provided a written rebuttal to the OIG's draft report. *See, (Exhibits in possession of Relator),* Exhibit 118 - FEMA Response to Draft Audit Report, August 29, 2013. In FEMA's response to the OIG's draft findings, FEMA stated its view that Section 565 of the 2013 Appropriations Act unequivocally required the OIG to examine FEMA's eligibility decisions with respect to the Parish's debris removal and to issue related findings. *Id.* FEMA also stated its disagreement with the OIG's finding that its failure to timely meet the second appeal response deadline constituted a *de facto* denial of the appeal, arguing that the effect of such a failure is not only outside the scope of the OIG's audit, but that regardless, eligibility determinations are discretionary actions that are precluded from judicial review under the

Stafford Act. *Id.* at pg. 2; *see also* Stafford Act, § 305, 42 U.S.C. § 5148 ("Non-liability of Federal Government"). In addition, FEMA agreed that the Agency needed to strengthen its policies and procedures regarding first and second level appeals to ensure timeliness and discussed its efforts towards training and pending guidance to address this issue. *See,* Exhibit 118, at pg. 2 - FEMA Response to Draft Audit Report, August 29, 2013.

159. On October 24, 2013, the OIG released its final findings in Audit Report Number OIG-14-01-D (the "Audit Report"), entitled "FEMA's Application of Rules and Federal Regulations in Determining Debris Removal Eligibility for Livingston Parish, Louisiana." *See*, (*Exhibits in possession of Relator*), Exhibit 119 - OIG Audit Report. As the Audit Report does not contain any recommendations by the OIG, the audit does not require a FEMA response. *See id.* at pg. 8.

160. In the Audit Report, the OIG found no eligibility determination error on behalf of FEMA. Rather, the OIG took issue only with appeal timeline requirements, not eligibility, and stated that "[a]lthough nothing came to our attention to indicate that FEMA's decisions on the eligibility of the Parish's debris removal costs were not appropriate, FEMA did not always follow federal rules and regulations in making those decisions." *See id.* at pg. 3. Specifically, the OIG found that for two appeals filed by the Parish, FEMA had not responded within the 90-day time limit established by its regulations. *Id.* In addition, the OIG noted that with regard to the Parish's second appeal for reimbursement of costs incurred in the clearing of waterways, FEMA had "in effect" denied reimbursement to the Parish by failing to make a decision on the appeal by the regulatory appeal response deadline as a result of the OIG's audit. *See id.* at pp. 3 & 6.

161. The October 24, 2013 official Audit Report included the OIG's analysis of comments to the draft findings. *See,* Exhibit 119, at pp. 7-8 - OIG Audit Report OIG-14-01-D.

The OIG stated, *inter alia*, that it disagreed with FEMA's interpretation of the scope of the OIG's responsibilities under Section 565 of the 2013 Appropriations Act. *Id.* Specifically, the OIG believes that under its interpretation of Section 565, the OIG is not required to assess FEMA's eligibility decisions. *Id.* at p. 7.

162. On November 8, 2013, Livingston Parish filed a formal, *See* Exhibit 264 - Request for Arbitration for PWs 00054 versions 0-1and 05590, 05591, 05593, and 05594.

IX. CAUSE OF ACTION

COUNT I: FEMA FRAUD 31 U.S.C. § 3729

LEANERS & HANGERS

163. FEMA's determinations on eligible leaning trees and hanging tree limbs ("Leaners and Hangers") debris removal work are correct and the Parish's claim for additional funding should be denied. While the Parish asserts that the leaner and hanger debris work they performed after Hurricane Gustav was Hurricane Gustav eligible work, performed by the most experienced debris experts in the state, documented well beyond the requirements necessary to determine FEMA eligibility by a properly procured debris monitoring company, and performed precisely according to the requirements set forth in the debris contracts, the fact is their assertions fall short of the truth and is unsupported in the record. *See Exhibit 264-Request For Arbitration* at Pages 9-12. The Parish asserts that all of this work was necessary to eliminate life and safety threats on improved property and right-of-ways that were the legal responsibility of the Parish,[30] which is also untrue and unsupported by the record. *Id.* Furthermore, the Parish incorrectly asserts that

[30] FEMA wrote 1192 Category A (Debris Removal) PWs after Hurricane Gustav for all applicants across the State of Louisiana. *See, Exhibit* 23 – Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal. These 1192 Category A PWs totaled $252,280,021.05 in assistance for debris removal. *Id.* Livingston Parish's debris removal claim in this Arbitration is for $59,183,143.00, 23% of the total claims for every applicant in Louisiana after Hurricane Gustav. Also worth noting is that a total of 8 of the 1192 PWs written were appealed and 6 of those appeals were made by Livingston Parish.

FEMA's twice validated eligibility determinations related to leaners and hangers were fatally flawed and FEMA misapplied regulations and policies. Again, this is untrue and unsupported in the record. *Id.* at Pages 14-18.

164. The reality is that the Parish's handling of the leaner and hanger debris work was fatally flawed from start to finish and did not comply with FEMA's regulations and policies. Work was performed by the Parish that could not be established as resulting from Hurricane Gustav pursuant to 44 C.F.R. § 206.223(a)(1), that was not the legal responsibility of the Parish as required by 44 C.F.R. § 206.223(a)(3), that was not an immediate threat to life or property as required by 44 CFR § 206.224, and not sufficiently documented as required by FEMA policy. In addition, FEMA has concerns with the procurement of the debris monitor contract as it appears to have failed to meet the procurement requirements set forth under 44 C.F.R. § 13.36. Accordingly, FEMA's determinations are correct and the Parish should be denied all additional funding for leaners and hangers claimed in the Arbitration Request.

A. FEMA's Denial of Livingston Parish's Claimed Leaner and Hanger Debris Work Is Correct Since the Parish Could Not Demonstrate *All* of the Claimed Work Was the Result Of a Major Disaster Event Pursuant to 44 C.F.R. § 206.223(a)(1).

165. FEMA properly denied ineligible leaner and hanger work since the Parish failed to establish the work as resulting from Hurricane Gustav. Pursuant to 44 C.F.R. § 206.223(a)(1), an item of work must "be required as a result of the emergency or disaster event." FEMA provided the Parish with $338,859.30 for work clearing right-of-ways within the first 72 hours after the disaster. *See, (Exhibits in possession of Relator), Exhibit* 120 – PW 5671. This assistance enabled the Parish to open its right-of-ways to first responders and other emergency personnel to obtain access to the Parish. *Id.* Additionally, FEMA provided the Parish $7,625,573.17 in debris removal assistance to support work necessary to clear right-of-ways beyond the first 72 hours,

including $2,735,007.00 for leaner and hanger debris removal work. *See* Exhibit 34 – PW 54v1 (the "Leaners & Hangers PW"). After the Parish completed their leaner and hanger debris removal efforts, and after several validations of the work was performed, FEMA found only 16% of the hanger work and 34% of the leaner worked submitted was eligible for reimbursement. *See,* Exhibit 29- Spreadsheet showing total Livingston Parish Leaner & Hanger work paid- 20 percent sample results. Accordingly, FEMA denied $13,913,178 in leaner and hanger work funding requested by the Parish. *See* Exhibit 32 – PW 54v1. A portion of that work was correctly denied because the work was not required as a result of Hurricane Gustav pursuant to 44 C.F.R. § 206.223(a)(1).

166. Documentation and photographic evidence submitted by the Parish to FEMA for reimbursement includes work performed on dead and rotting trees and branches. *See, (Exhibits in possession of Relator),* Exhibit 121 – Parish work performed on dead and rotting trees submitted to FEMA. These trees and limbs were clearly dead and/or rotting prior to the disaster and thus the work to remove them was not required as a result of the disaster in accordance with 44 C.F.R. § 206.223(a)(1). *Id.*

167. Additionally, much of the work performed on leaners and hangers is ineligible maintenance trimming, mixed in and claimed, while also performing leaner and hanger debris removal work required as a result of the disaster. *See, (Exhibits in possession of Relator),* Exhibit 122 – Maintenance Trimming Work- Photo of a good hanger and countless bad hangers. As such, there were ineligible claims submitted for cuts to healthy tree limbs. *Id.* For example, in this documentation submitted to FEMA, there is a branch at the bottom of the picture with a clear break and a good cut made directly behind the break. *Id.* This would appear to be an eligible hanger. *Id.* However, contrarily, behind that limb and taking up the rest of the photograph is a

pile of limbs with few, if any, visible breaks and many with no dead leaves at all. *Id.* IED certainly should have known not to cut a limb with no break and also should have known not to cut a healthy branch if it intended to claim eligibility from FEMA. PEC also advised IED of this distinction since PEC field monitors were advised, "Cuts of healthy limbs are NEVER paid cuts." *See* Exhibit 16 – PEC Guidance to Monitors, October 6, 2008. Most of these limbs were also visibly cut well up the limb with multiple unbroken limbs attached to them. *See* Exhibit 122. Time and again this type of documentation, where the Parish claimed work that was clearly ineligible for reimbursement under the FEMA Public Assistance program, is what FEMA observed both in the documentation submitted and in the field. *See* Exhibit 23- Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal.

168. The Parish's claim for cuts that were made to dead and rotting trees, as well as those made to healthy trees and limbs were clearly not required as a result of Hurricane Gustav in accordance with 44 C.F.R. § 206.223(a)(1). FEMA's determination to deny a portion of funding because most of the work was not required as a result of Hurricane Gustav and FEMA's determination to deny the ineligible work was correct.

B. The Parish Failed to Evidence It Had Legal Responsibility for Most of the Claimed Leaner and Hanger Work As Required by 44 C.F.R. § 206.223(a)(3).

169. FEMA correctly denied eligibility for a portion of the leaner and hanger debris claimed because the Parish was unable to demonstrate it had legal responsibility for the work as required by 44 C.F.R. § 206.223(a)(3). To be eligible for financial assistance, an item of work must be the legal responsibility of an eligible applicant. *See* 44 CFR § 206.223(a)(3). As explained in FEMA 322 Public Assistance Guide, legal responsibility is generally demonstrated by ownership. *See, (Exhibits in possession of Relator),* Exhibit 123 – FEMA 322 Debris

Management Guide (June 2007) at Page 23. Repeatedly, portions of the work performed by the Parish failed to meet this basic eligibility requirement.

170. One example occurred with leaners and hangers claimed by the Parish which fell under the legal responsibility of another subgrantee, the Livingston Parish School Board. The Parish's Arbitration Request claims $107,610.00 for work performed on Livingston Parish School Board property. *See, (Exhibits in possession of Relator),* Exhibit 124 – Parish Documentation for work performed on Livingston Parish School District property. The work claimed by the Parish was conducted, documented and photographed well after the School Board had separately applied for, and already been reimbursed for, its own debris removal activities. *See* Exhibit 23 – Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal; *see also (Exhibits in possession of Relator*) Exhibit 125- PW 02439 – Livingston Parish School Board project worksheet. Notably, the PW written for the Livingston Parish School Board's eligible debris removal totaled $52,977.62 for all of its twenty-seven campuses, approximately one-half of what the Parish later claimed for leaner and hanger debris removal on just two of the twenty-seven campuses. *See* Exhibit 124; Exhibit 125.

171. The Parish was aware of the fact that work done on Livingston Parish School Board property was not their responsibility and yet the Parish still submitted its claims to FEMA for reimbursement. On August 22, 2011, then Parish President, Mike Grimmer, wrote a letter to Livingston Parish Public Schools Superintendent, Bill Spear. President Grimmer wrote:

> During a recent audit with GOHSEP I was questioned about work performed on Livingston Parish School Board property. In question are invoices for work performed at Albany High School and Lewis Vincent in Denham Springs. At any point either before or after Hurricane Gustav did your office or any representative of the school board, maintenance department, principles or any other persons working for the school board authorize this work?

See, (Exhibits in possession of Relator), Exhibit 126 – Letter from Mike Grimmer to Bill Spear dated August 22, 2011.

172. On August 23, 2001, Superintendent Spear responded indicating that the School Board had hired its own contractor to remove debris immediately after the storm and had received assistance from the National Guard. *See, (Exhibits in possession of Relator),* Exhibit 127 – Letter from Bill Spear to Mike Grimmer dated August 23, 2011. Mr. Spear went on to state that, "To my knowledge, no company other than those listed above was authorized by any individual employed by the Livingston Parish School Board or system to provide debris cleanup on any of our campuses regarding Hurricane Gustav." *Id.* Additionally, the schools cleared the leaners and hangers from all school properties within the first week after Hurricane Gustav in order to allow them to reopen the schools. *See* Exhibit 125- PW 02439 – Livingston Parish School Board PW. Because of the School Board's work, the schools were already reopened by the time the Parish contractors removed ineligible leaners and hangers from school property.[31] *See* Exhibit 124 – Parish Documentation for work performed on Livingston Parish School District property. The Parish simply had no authority to be on school property and the work they claim is not allowable under 44 CFR § 206.223(a)(3).

173. One of the most egregious portions of the Parish's leaners and hangers claim is associated with work completed in the public parks throughout the Parish. Approximately $1,055,445.00 of the Parish's claim comes from leaner and hanger work claimed in North Park, South Park and the Live Oak Baseball Park located in the village of Watson. *See, (Exhibits in possession of Relator),* Exhibit 128 – Documentation for work performed in North Park, South

[31] As further justification for FEMA's denial, the work done on the property did nothing to protect life or property pursuant to 44 C.F.R. § 206.224, since all debris removal on the property had already been completed by the School Board.

Park and the Live Oak Baseball Park not under the Parish's legal responsibility. However, Livingston Parish Parks and Recreation District #3 is responsible for these parks and is the eligible subgrantee for all work done within the parks. *Id.; see also* Exhibit 23 – Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal. As such, the work claimed by the Parish is inappropriate and is not eligible for reimbursement under 44 CFR § 206.223(a)(3).

174. As yet another example, the Parish claims $85,595.00 worth of work performed at a community center used as an American Red Cross shelter located in Denham Springs at LM Lockhart Park. LM Lockhart was also the legal responsibility of the Livingston Parish Parks & Recreation District #3 and therefore not the legal responsibility of the Parish.[32] *See, (Exhibits in possession of Relator),* Exhibit 130 – Documentation for work performed at LM Lockhart Park. Therefore any claims made by the Parish for debris removal throughout these parks, which are clearly not their direct responsibility, are not eligible for reimbursement under 44 CFR § 206.223(a)(3).

175. The record also reveals that even private homeowners weren't excluded from the Parish's intrusion and debris removal claims for which it had no legal responsibility. The Parish President's Office was inundated with calls and complaints from private homeowners related to trees and limbs cut on their own property. *See* Exhibit 36 – Affidavit of Michael Grimmer, Livingston Parish President. Parish President Grimmer states in his affidavit that, "Beginning in the later part of September 2008, my office was getting calls from several homeowners and

[32] Despite IED performing nearly $1.1 million of work in the Parish Parks, which they had no authority to do, the actual leaner and hanger damage to these parks was so insignificant that Livingston Parish Parks & Recreation District #3 only requested reimbursement from FEMA for force account labor for placing woody debris on the curbside. There was no claim made by the Parish Parks for leaner and hanger removal. *See, Exhibit* 129 - Livingston Parish Parks & Recreation District #3 project worksheets 01467 and 01468.

landowners who were voicing concerns with the amount of leaners and hangers being cut. On average I would say we were receiving anywhere from 5 to 10 calls per day. . ." *Id.* at Page 4.[33] Additionally, several lawsuits were filed against IED and the Parish as a result of debris removal from private property.[34] This is further confirmation that a portion of the work claimed by the Parish was performed on private property, for which the Parish is not legally responsible, and thus is not reimbursable pursuant to 44 C.F.R § 206.223(a)(3). *See, (Exhibits in possession of Relator),* Exhibit 131– Invoice for work completed on private property; *see also (Exhibits in possession of Relator)* Exhibit 132 – FEMA validations showing work done on private property submitted for reimbursement.

176. These are just a few examples of the inappropriate and incorrect work performed by the Parish on property for which it had no legal responsibility.[35] A total of the work associated with the School Board and Parish Parks & Recreation District #3 discussed above demonstrates that $1,248,650.00, or at least 8% of the Parish's leaners and hangers claims just from these examples cited, were ineligible because the Parish did not have legal responsibility to complete debris removal operations on these properties. This figure casts doubt on the Parish's assertion that PEC's "internal" audit of *all* of the Parish's leaner and hanger claims found that only 11% of the total leaners and hangers were ineligible. *See, (Exhibits in possession of Relator),* Exhibit 135

[33] It is important to note that private property debris removal can be approved in some instances and must have FEMA approval beforehand. However, the Parish did not obtain approval from FEMA to remove debris from private property. Therefore, private property debris removal in Livingston Parish after Hurricane Gustav was the responsibility of the property owner and not the Parish.

[34] FEMA does not include any suits filed against the Parish and/or IED for private property debris removal as Exhibit s in order to keep the record to a minimum. However, if requested, FEMA can submit these to the Panel.

[35] Other examples include, but aren't limited to, work the Parish did within the Town of Livingston and the Town of Walker for which they had no legal responsibility. *See, (Exhibits in possession of Relator) Exhibit* 133 – Documentation for work performed in the Town of Livingston including Town of Livingston PW 00071; *See also* Exhibit 134 – Documentation for work performed in the Town of Walker including Town of Walker PW 00236.

– PEC Letter to Daryl G. Pupera, Temporary Legislative Auditor, RE: Draft Compliance Audit Report Response, March 22, 2010, Page 6; *see also (Exhibits in possession of Relator)* Exhibit 136 – PEC Leaner/Hanger Audit dated March 29, 2009. In fact, a review of PEC's audit findings demonstrates that the vast majority of the 8% of the leaner and hanger work the Parish performed on property which the three aforementioned subgrantees clearly had responsibility over is shown as *eligible* in PEC's audit. *See, (Exhibits in possession of Relator),* Exhibit 137 - PEC audit findings related to work performed on School Board Property and Parks and Recreations District #3 property.

177. It is clear to FEMA, and should be clear, that a significant portion of the leaner and hanger debris removal work was performed on property for which the Parish was not legally responsible, including private properties. Further, PEC's "internal" audit, which the Parish relies on for its assertions, and which fails to account for many of the examples, which FEMA has provided, cannot be given any serious consideration by the Panel. *See* Exhibit 136. Instead, the Panel should agree with FEMA's multiple validations and determination to deny a portion of funding because the Parish failed to provide evidence that it had legal responsibility for all of the claimed leaner and hanger work as required by 44 C.F.R. § 206.223(a)(3).

C. The Work Performed by IED on Leaners and Hangers, which was Denied by FEMA, was Ineligible Because It Was Not An Immediate Threat to Life, Public Health and Safety, Or To Improved Property In Accordance with 44 CFR § 206.224 and FEMA Policy

178. The work claimed by the Parish for IED's leaner and hanger debris removal in PW 54, which was denied by FEMA, is not eligible because the Parish failed to show that the debris removed posed an "immediate threat" to life, public health and safety or to improved property as required under 44 C.F.R. § 206.224. FEMA provides clear guidance outlining what type of leaners and hangers meet the requirements set forth under 44 C.F.R § 206.224. Specifically,

FEMA 325 Public Assistance Debris Management Guide (July 2007) defines a "leaner" which poses an immediate threat to life, public health and safety or to improved property as a tree that:

> (1) Has more than 50 percent of the crown damaged or destroyed;
> (2) Has a split trunk or broken branches that expose the heartwood;
> (3) Has fallen or been uprooted within a public-use area and/or;
> (4) Is leaning at an angle greater than 30 degrees.

See, (Exhibits in possession of Relator), Exhibit 138, at Page 24-25 – FEMA 325 (July 2007).

FEMA 325 also defines eligible "hangers" as hanging limbs that must be:

> (1) Located on improved public property;
> (2) Greater than two inches in diameter at the point of breakage and;
> (3) Still hanging in a tree and threatening a public-use area.

Id. Furthermore, FEMA 325 provides details with regards to how the hangers should be removed:

> Only the minimum amount of work necessary to remove the hazard is eligible. Pruning, maintenance trimming and landscaping are not eligible. Work should be executed in an efficient manner… Work to remove hanging limbs from a tree that has been determined to be a hazard and is scheduled for removal is not eligible. If this work is contracted out, it is typically done on a per tree basis. An eligible scope of work may be to cut the branch at the closest main branch junction. Removing the entire branch back to the trunk may not be eligible.

See Exhibit 138, at Page 24- 25.

1. Examples of FEMA Determined Eligible Leaners and Hangers

179. In making eligibility determinations for leaners and hangers, FEMA reviews all of the information provided by the Subgrantee, in this instance the Parish, to evaluate whether the leaner and hanger meets the regulatory and policy requirements. In an effort to assist the Panel, FEMA provides the following documentation examples of leaner eligible work provided by the Parish to demonstrate what an eligible leaner looks like. This particular documentation establishes eligibility because it shows a tree leaning more than 30 degrees over a public right of way, with evidence that the lean is a result of wind damage from the storm, as required by FEMA

regulations and policies. *See, (Exhibits in possession of Relator),* Exhibit 139 – Documentation and Photograph examples of FEMA determined eligible leaners in the Parish; *see also (Exhibits in possession of Relator),* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix D.[36] FEMA also provides the following documentation examples, submitted by the Parish, to demonstrate what an eligible hanger looks like. This documentation establishes eligibility because it shows a tree with broken limbs at least two inches in diameter still hanging in the tree over the public right-of-way, as required by FEMA regulations and policies. *See, (Exhibits in possession of Relator),* Exhibit 141 – Documentation and Photograph examples of FEMA determined eligible hangers in the Parish; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix L. The documentation also establishes eligibility because it shows hangers which were cut just past the break of a main tree branch and at the closest main branch junction when the break is to a secondary limb, allowing for the minimum amount of work necessary to remove the hazardous hanger in the most efficient manner, as required by FEMA regulations and policies. *See* Exhibit - 141.

2. Examples of FEMA Determined *Ineligible* Leaners

180. Despite these limited examples of eligible work cited above, the majority of the leaner and hanger debris removal claims failed to comply with FEMA regulations and policy and, therefore, was properly denied by FEMA.[37] Specifically, documentation, including photographs, from the debris monitors show a large number of leaners claimed by the Parish which were not

[36] As recommended in filings and teleconferences it is believed that experts provide the CBCA with a unique tool during the Arbitration process. The Parish was opposed to the hiring of an independent arborist to assist the Panel in understanding the issues at hand in the instant case. Despite the Parish's opposition, FEMA still believes experts can benefit the Panel. As such, FEMA hired an arborist to assess the portion of the Parish's claim associated with leaners and hangers. The arborist findings cover all aspects of the work completed and will be referenced often throughout this brief and during testimony.

[37] *See,* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix E and M.

leaning, had not fallen onto the public right-of-way, and had little to no damage to the trunk or crown of the tree. *See, (Exhibits in possession of Relator),* Exhibit 142 – Leaners submitted to FEMA for reimbursement. *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix E. Other documentation, including photographs, show leaners with obvious signs that the trees were already dead and rotten prior to Hurricane Gustav, thus ineligible under 44 C.F.R. § 206.223(a)(1) and leaners off of the right-of-way and posing no immediate threat to lives, public health and safety or to improved property as required under 44 C.F.R. § 206.224. *See, (Exhibits in possession of Relator),* Exhibit 143 – Documentation and Photographs of Leaners with damage not related to the disaster; *see also (Exhibits in possession of Relator)* Exhibit 144 – Documentation and Photographs of Leaners not in the right-of-way; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix C, E and G.

181. FEMA's determination to deny a majority of the leaner work was correct because the Parish failed to demonstrate how this work was an "immediate threat" to life, public health and safety or to improved property as required under 44 C.F.R. § 206.224. In multiple reviews of the over 1,300 claims for leaner work submitted by IED, FEMA repeatedly found claims, like those exampled above, which failed to meet eligibility requirements outlined in 44 C.F.R. § 206.224 and FEMA 325. The Parish was consistently unable to provide FEMA with evidence that most of the leaners claimed posed an immediate threat to life, public health and safety or to improved property. Nor could the Parish consistently provide FEMA evidence that the trees which were removed as leaners had more than 50 percent of the crown damaged or destroyed; had a split trunk or broken branches that exposed the heartwood; that the leaner had fallen or been uprooted within a public-use area and/or; the tree was leaning at an angle greater than 30 degrees.

See Exhibit 138 -FEMA 325 Public Assistance Debris Management Guide at Page 24. As a result, after multiple validations and review, FEMA had no choice but to find the majority of this leaner work ineligible as it failed to meet the requirements for eligible leaners as set forth in 44 C.F.R. § 206.224 and FEMA 325. *Id.* As will be described in much detail later, the non-photographic documentation provided to FEMA was simply lacking in the majority of cases and FEMA therefore, in an effort to validate as much of the Parish's work as possible, often relied on work that included visual evidence in an attempt to make the best link between work performed and eligibility. Unfortunately, as shown above and throughout this brief, the documentation only further exacerbated FEMA's efforts to find eligible work associated with leaners.

3. Examples of FEMA Determined *Ineligible* Hangers

182. FEMA's determination to deny a majority of the hanger work was also correct because the Parish failed to demonstrate how this work was an "immediate threat" to life, public health and safety or to improved property as required under 44 C.F.R. § 206.224. In fact, the work performed by IED in association with hangers was even more egregious and ineligible than the leaner work. Once again, documentation of eligible work was severely lacking. Most documentation included a form entitled "Daily Hazardous Tree Monitor Report" which was intended to provide a record of the date and time, location (address and GPS) and dimensions of leaners and/or hangers claimed. *See, (Exhibits in possession of Relator),* Exhibit 145 – Example of a Daily Hazardous Tree Monitor Report. The form also provided for a listing of all supporting photographs, but photos were often not included in the Parish's claims submitted to FEMA. *Id.* Not including photos is acceptable by FEMA if the monitor's notes clearly describe the immediate threat in some manner. Unfortunately for the Parish, however, their monitors did no such thing. The main purpose of these forms appears to be to record "pay items" – regardless of

whether the cost of the claimed cut was eligible for FEMA reimbursement – meaning FEMA should just assume if a form was filled out, then it must be eligible. This is inappropriate and fails to comply with FEMA regulations and policy.

183. What should have been provided to FEMA, in accordance with 44 C.F.R. § 206.224 and FEMA 325, was evidence of an immediate threat, such as limbs hanging from a tree, located on improved property, greater than two inches in diameter at the point of breakage, limbs threatening a public area, and evidence that the work was performed. *See* Exhibit 138 – FEMA 325. Instead, the documentation, including photographs, submitted by the Parish show trees with no visible hanging limbs, limbs with no threat to improved or public property, nor a greater than two inch diameter at the point of breakage contrary to Federal regulation and FEMA policy cited above. *See, (Exhibits in possession of Relator),* Exhibit 146 – Parish Standard documentation of hanger claimed work; s*ee also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix H, J and M. In some instances, documentation, including photographs, show limb after limb with no break at all yet each limb was cut and claimed by the Parish. *See, (Exhibits in possession of Relator),* Exhibit 147 – Hanger documentation and photographs of limbs with no breaks; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014. Similarly, the Parish provided documentation of clearly ineligible work for hangers where limbs were cut multiple times and each cut was submitted to FEMA as a separate claim. *See, (Exhibits in possession of Relator),* Exhibit 148 – Hanger documentation and photos of single limbs with multiple cuts; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014. Here, IED clearly knew, or should have known, this was not acceptable to support FEMA eligibility reimbursement. PEC, responsible for insuring IED's work was done properly, had clearly been advised in the October 6, 2008 memo mentioned above that, "**If there are**

multiple branches broken on a limb, there is only ONE paid cut to the limb. Do not write down two or more cuts from the same limb." *See,* Exhibit 16– PEC Guidance to Monitors, October 6, 2008. However, despite PEC's clear instructions, IED claimed multiple cuts to the same limb and PEC's own staff marked these cuts eligible on monitor's logs. *See, (Exhibits in possession of Relator),* Exhibit 149 - claims for reimbursement of multiple cuts on the same limb; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014.

184. During its multiple validation and reviews, FEMA also found ineligible limbs that were cut away from the break[38] and in some instances at the branch collar itself. *See, (Exhibits in possession of Relator),* Exhibit 150– Hanger documentation and photos showing cuts made away from the break; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix A.[39] FEMA also found claims where perhaps one or two hangers were actually visible but the limbs were not cut at the break nor were they cut at the tree collar. Despite the guidance to cut the limb at the break, the Parish cut down the entire tree and submitted the multiple cuts required to cut down the tree as individual hanger claims. *See, (Exhibits in possession of Relator),* Exhibit 151 – Hanger claim where entire tree was cut down; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014. Next consider the trees, which were clearly not within the right-of-way, some of which appear to be in the middle of the woods. *See,*

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[38] For many of these instances, FEMA gave the Parish the benefit of the doubt with regards to whether a break actually existed because in many instances the break is not visible in the photograph. With that said, the limbs were clearly cut away from the break where the limb was thicker, making it impossible for FEMA to determine if the limb was 2" at the break.

[39] These are not only ineligible in accordance with the guidelines set forth under FEMA 325 but they also raise environmental concerns because they can cause permanent damage to the tree. *See, Exhibit* 138 – FEMA 325; *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014. The branch collar is the swollen area at the base of the branch where the branch connects to the tree trunk. If the collar of the branch is removed, the chances of the trunk becoming infected by decay and canker-causing microorganisms are greatly increased. *Id.*

(Exhibits in possession of Relator), Exhibit 152 – Hangers not in the right-of-way; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix G.[40]

185. One of the more absurd claims submitted by IED dealt with a tree with one or two visible hangers, yet IED submitted 49 separate hanger claims to the Parish. *See, (Exhibits in possession of Relator),* Exhibit 154 – Photograph of tree with 49 hanger claims. What was left resembled a telephone pole more than a tree, without a single branch remaining and begs the question, ***why didn't IED simply cut the entire tree down with one or two cuts rather than make 49 separate cuts?*** Relator asserts that the answer is: ***the Parish was attempting to improperly claim reimbursement for ineligible work.***

186. Just as FEMA couldn't ignore the ineligible work performed, Livingston Parish's President, Mike Grimmer, could not ignore the ineligible work performed by IED either. In a presentation to the Livingston Parish Chamber of Commerce in July of 2011, Parish President Grimmer provided the member of the Chamber of Commerce with a PowerPoint presentation, which clearly outlined the type of work IED performed. *See* Exhibit 36 – Affidavit of Michael Grimmer, Livingston Parish President, Attachment 1. The presentation includes example after example of ineligible work performed by IED.

187. After its review of the Parish's documentation and its own validations it is clear to FEMA, as it should be to this Panel, that the majority of IED's leaner and hanger work was

[40] While these were clearly not eligible for FEMA reimbursement, they also raise the question of whether the Parish followed guidance provided by FEMA at kickoff meetings addressing environmental concerns such as the Endangered Species Act. *See, Exhibit* 153 – FEMA Green Sheet for FEMA-1786/1792-DR-LA. This guidance required the Parish to coordinate with the Department of Wildlife and Fisheries to ensure the work performed did not disrupt the habitats of endangered species, for which there is no evidence the Parish complied with. *Id.*

conducted in complete disregard of FEMA eligibility requirements and should be considered ineligible pursuant to 44 C.F.R. § 206.224 and FEMA 325.

D. PEC Tree Tickets and Monitor's Notes Repeatedly Failed to Meet Requirements Set Forth Under FEMA Regulation, Policy and Guidance

188. As discussed, FEMA's ineligibility determination for the majority of the Parish's leaner and hanger claims is correct due to lack of evidence that the work posed an immediate threat to life, public health and safety or to improved property as required under 44 C.F.R. § 206.224 or because it failed to meet the specific requirements for eligible leaners and hangers as required by FEMA 325, or both. However, the Parish argues in its Arbitration Request that FEMA erred by relying on photographs and insisting the tree tickets generated by PEC are sufficient to determine eligibility. *See Exhibit 264-Request For Arbitration* at Pages 14-18. It is true that FEMA neither mandates photographs in order to determine eligibility of leaners and hangers nor does FEMA require "eyes on" every cut made, as that is the job of the contract monitor. However, what FEMA does require before obligating taxpayer dollars is documentation adequate to establish the work performed was eligible for grant reimbursement.

189. FEMA's published guidance states that monitoring debris removal work involves constant observation of crews to ensure that workers are performing eligible work in accordance with Public Assistance guidelines, and helps to verify compliance with all applicable Federal, State and local regulations. *See, (Exhibits in possession of Relator),* Exhibit 155 - FEMA Fact Sheet 9580.203. The monitor is responsible for ensuring ***only*** debris specified in the contract is collected (and is identified as eligible or ineligible). *Id.*

190. The documentation required from the monitor necessary for FEMA to find the work eligible should:

(1) Describe the immediate threat, e.g. photos of hanging limbs or leaning trees;

(2) Clearly define the scope of work to remove the immediate threat;
(3) Specify the improved public property location by recording the nearest building address and/or GPS location; and
(4) Denote date, labor and equipment used to perform the work.

See Exhibit 138 - FEMA 325 at page 25.

191. FEMA determined, after a thorough review of the submitted documentation, the tree tickets and monitor's notes submitted by the Parish simply recorded pay items without regard to eligibility, and because of this, they failed to comply with FEMA policy and guidance, thus were an unreliable source for substantiating eligible claims. *Id.* FEMA's difficulty in identifying eligible work through the tree tickets and monitor's notes is a direct result of the failure of PEC, the debris monitoring contractor, to properly document the work performed.

1. Monitors notes failed to provide the key elements necessary for determining eligibility as outlined in FEMA 325 and FEMA Fact Sheet 9580.203

192. Relator asserts that Parish documentation egregiously fails to comply with Relator policy and guidance. The Parish argues that PEC documented well beyond the requirements necessary to determine FEMA eligibility and well within the parameters and requirements of PEC's contract with the Parish. *See* Exhibit 264-Request For Arbitration at Pages 11-12. The Parish also argues in its Arbitration Request that the debris contractor's tree tickets are the birthplace of all evidence demonstrating the eligibility of the leaner and hanger work. *Id.* The Parish further argues the tree tickets alone provide sufficient documentation to support eligibility – no other documentation or analysis is warranted now or was required then for FEMA to make an informed eligibility determination. *Id.* Finally, the Parish argues that PEC monitors were highly trained and well versed in FEMA eligibility. *Id.* However, despite the Parish's claims, without the information required from the contract monitor as outlined in FEMA 325 and FEMA Fact Sheet 9580.203 it is not possible for FEMA to find work eligible for reimbursement.

i. The documentation did not sufficiently describe the immediate threat

193. In order for the work to be eligible, the subgrantee must be able to show an immediate threat existed as required under 44 C.F.R. § 206.224. The first requirement under FEMA 325 is very specific as to how the subgrantee is to accomplish this. *See* Exhibit 138. It indicates the "type" of description required and it is the only one of the four documentation requirements that provides an example. *Id.* That example is photographs. *Id.* Photographs are obviously the best way to describe the immediate threat because it provides FEMA with the visual evidence of the threat as seen by the monitor before a cut is made. In the case of PEC, they chose to utilize photographs in some instances but not all. Unfortunately, where photographs were not provided, PEC's additional documentation seldom provided sufficient description of the immediate threat and therefore failed to meet the first requirement under FEMA 325. Further, many of the Daily Monitoring Tracking Logs (tree ticket and monitor's notes) generated by PEC were nothing more than a diary of the monitor's day instead of a description of the immediate threat and work performed. *See, (Exhibits in possession of Relator),* Exhibit 156 – Examples of Daily Hazardous Tree Monitor Reports.

194. Worse yet, even when photographs were taken, they often failed to sufficiently describe the immediate threat as well. Many photographs show piles of branches already cut with no way for FEMA to identify the tree from which they came. *See, (Exhibits in possession of Relator),* Exhibit 157 – Photographs of cut branches; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014. Many photographs where an actual tree is visible show no signs of having been damaged by the storm, no visible hangers and/or branches already cut off. *See, (Exhibits in possession of Relator),* Exhibit 158 – Photographs of undamaged trees and trees with branches already removed; *see also* Exhibit 140 – Arborist Review, Draft Report dated

February 24, 2014. Many photographs were insufficient even where FEMA was actually able to identify possible hangers because the photographs provide FEMA with no way to identify the location of the tree vis-à-vis the public right-of-way. These photographs often showed trees in heavily wooded areas well off of any road and/or clearly on private property. *See, (Exhibits in possession of Relator),* Exhibit 159 – Photographs w/ no right-of-way visible; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014. Finally, there are some photographs where the right-of-way is visible and hangers are visible as well, but the photographs only served to provide FEMA with evidence that the work claimed was performed on trees clearly out of the right-of-way posing no immediate threat. *See, (Exhibits in possession of Relator),* Exhibit 160 - Photographs of trees outside of right-of-way; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014.

195. FEMA is not the only agency to have found flaws in the documentation provided by PEC. On April 28, 2010, the Louisiana Legislative Auditor ("LLA") issued audit findings related to PEC's leaner and hanger monitoring work in Livingston Parish. The LLA states in its April 28, 2010 audit that:

> We also examined PEC's documentation of leaners and hangers removal and reviewed charges where there was a large volume of leaners or hangers at one given GPS location. After reviewing the documentation, we discussed instances with PEC when photographic documentation indicates limbs that appear not cut, measurements that were incorrect, cuts that may not meet FEMA size criteria, hanging limbs cut from leaning trees, and trees that appear to have limbs cut that did not meet the FEMA hanger criteria.

See Exhibit 45 – LLA Livingston Parish Council Compliance Audit Issued

196. April 28, 2010. Thus, the LLA compliance audit found the same Parish evidentiary problems that FEMA encountered, which reaffirms FEMA's determination to deny funding for such undocumented work is incorrect.

ii. The scope of work to remove the immediate threat was not clearly defined

197. The second requirement of the monitor under FEMA 325 is to provide documentation, which clearly defines the scope of work to remove the immediate threat. Relator asserts that the Parish, in most cases, failed to do so. *See* Exhibit 138 – FEMA 325. While in most instances PEC at least indicated the number of cuts in the documentation, in many instances the documentation did not line up with other information provided, making the number of cuts unreliable for FEMA validation. For example, some tickets provided the number of cuts but photographs provided with the ticket were duplicates used for multiple tree tickets. *See, (Exhibits in possession of Relator),* Exhibit 161 – Same photographs used for multiple tickets; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix I. Additionally, due to the failure of the majority of the documentation to clearly show eligible work, it was often impossible for FEMA to determine which ticket belonged to the duplicate photographs. Therefore, tree tickets generally failed to provide FEMA with sufficient information to confirm the scope of work performed. Thus, the Parish's claim that the tree tickets were the only evidence needed is without merit.

iii. Locations of improved public property were not accurately documented

198. The third requirement under FEMA 325 is that the documentation must specify the improved public property location by recording the nearest building address and/or GPS location. *See* Exhibit 138 – FEMA 325. PEC did document GPS coordinates on the tree tickets

in most instances, but those GPS coordinates often failed to match the GPS coordinates on PEC spreadsheets. FEMA simply could not rely on them to confirm the location of the work performed. FEMA was provided with GPS coordinates in other Parishes, and in some cases even other States. *See, (Exhibits in possession of Relator),* Exhibit 162 – Map of GPS Locations listed on tree tickets. GPS coordinates within the Parish were often flawed as well and led FEMA to locations in the middle of the woods, locations on private property and various other locations well outside of any right-of-way. *Id.*

199. The GPS coordinate data was also confusing. PEC was responsible for submitting GPS coordinates to FEMA to substantiate eligible work claimed. However, some PEC monitors used GPS available on cell phones, some used GPS available on cameras and others used GPS from their vehicles, despite having all been issued GPS devices. *See* Exhibit 23 - Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal. These varying types of GPS devices often gave different types of GPS readings, which caused inconsistent readings and increased difficulty for FEMA to validate locations. *See, (Exhibits in possession of Relator),* Exhibit 163 – Tree tickets with different types of GPS readings. Even the location where GPS coordinates were taken was inconsistent between monitors. Some monitors would take the GPS reading from beside the tree where the cut was made, others from inside their vehicles and others from beside piles of dead branches alongside the road. *See* Exhibit 23 - Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal. These inconsistent and inaccurate GPS coordinates documented by PEC, and provided to FEMA, simply added to FEMA's difficulty in validating the eligibility of the work performed.

iv. Documentation for date, labor and equipment used to perform work was insufficient

200. Finally, FEMA 325 requires that the monitor denote the correct date, labor and equipment used. *See* Exhibit 138 – FEMA 325. Once again, PEC's documentation was generally lacking. While the tree tickets did denote the date in most instances, they often failed to properly document the labor and equipment used. *See, (Exhibits in possession of Relator),* Exhibit 164– Examples of average tree ticket documentation. These tickets may have been sufficient to document "pay items" as far as the Parish was concerned, but they simply failed to meet FEMA's requirements for validation of the work in accordance with FEMA 325.

201. While any one of the above issues with PEC's documentation by itself would have been detrimental to the Parish's claim for leaners and hangers, when combined together they made it virtually impossible for FEMA to validate the majority of the work claimed. Further, the Parish's claim that proper documentation was provided, as demonstrated herein, is wholly without merit.

2. Discrepancies in how and when debris monitors were documenting eligible work meant that the Parish's documentation cannot be relied upon to evidence eligibility

202. Under PEC's own contract with the Parish, monitors were required to ensure "FEMA emergency plan and debris removal contract requirements were met" *See, (Exhibits in possession of Relator),* Exhibit 165 – Debris Management and Monitoring Services Agreement, PEC Project No. 10683, September 8, 2008 at Page 1) and "*to provide documentation as required by FEMA reimbursement requirements.*" *Id* at Page 2. PEC's contract with the Parish is very clear as to the role of the monitors. PEC's contract states, "*The primary function of the Loading*

Site Monitors[41] *is to issue debris load tickets for eligible debris cleared and to provide documentation as required by FEMA reimbursement requirements."* *Id.* at Page 2. The contract stated debris monitors would be provided video and digital cameras to document the removal of eligible debris. *Id.* at Page 3. The contract also required PEC to assist debris monitors in making eligibility determinations, when necessary. *Id.* at Page 4. PEC failed to meet all of these contract requirements.

203. In a letter to the LLA dated November 3, 2009, Mr. Tony Arikol, President of PEC, wrote, "**Our field monitors were to document all work performed by the Contractor, and to make notation to what appeared to be eligible or ineligible** in accordance with FEMA eligibility criteria . . . ." *See, (Exhibits in possession of Relator),* Exhibit 166 – Letter from Tony Arikol, President, PEC to Jodie Carter, LLA Compliance Audit Division, November 3, 2009. The LLA made note that "Mr. Arikol's interpretation of PEC's contractual responsibilities is different than the requirements of PEC's contract terms. Our sample documentation provided by PEC contained no evidence that PEC's debris monitors recorded eligibility determinations." *See* Exhibit 45 – LLA Livingston Parish Council Compliance Audit Issued April 28, 2010. Then in a letter to the LLA dated March 22, 2010 sent in response to LLA's audit findings, Mr. Arikol wrote:

> "The **monitors documented everything - no effort was made to not document any work whether eligible or ineligible**, but the vast majority and everyone's intent was to do eligible work only. Basically the monitors and crews worked diligently to perform only eligible work and provided documentation for all work in

[41] The Panel will see various terms used interchangeably in both PEC's contract and the Parish's Arbitration Request to describe the debris monitors responsible for ensuring the eligibility of the leaner/hanger work performed by IED. They are called "Loading Site Monitors," "Debris Management Site Monitors," "Debris Contract Monitors," and just simply "Debris Monitors." Despite the various names, these are all referencing the debris monitors who generated the Daily Hazardous Tree Monitor Reports that are referenced throughout this brief.

> accordance with FEMA DAP9580.203. **The monitors did not specifically record eligibility** (eligible vs. ineligible) since to the best of their ability they were recording eligible work."

See, (Exhibits in possession of Relator), Exhibit 167 – PEC response to LLA audit, March 22, 2010.

204. Based on this, it appears that PEC's President was himself confused about the requirements set forth under the contract with the Parish and the requirements set forth in FEMA policy. If the President of the company was confused, it is not surprising that the staff in the field were confused as to their responsibilities. Adding to the internal confusion of the debris monitor's job was a memo sent out to the debris monitors from PEC's Project Manager, Preston Gill, on October 6, 2008. Mr. Gill advised the monitors:

> "**Crews are to cut down and remove any hazards whether it is a paid cut or not.** Do not let the crew tell you that they will not make a cut unless they are paid for it. If they say that, tell them that you are instructed to quit writing tickets until it is removed."

See, Exhibit 16 – PEC Guidance to Monitors, October 6, 2008.

205. Therefore, on the one hand you had PEC's President stating the monitors were to document everything and make notations between eligible and ineligible work. Next you have PEC's President stating that the monitors did not record eligibility. Finally, you have the debris monitor's Project Manager advising the monitors that IED should be cutting down and removing hazards whether it was a paid item or not, which the monitors were supposed to document. It is no wonder that the debris monitor's work was flawed in the field when the guidance they were receiving from PEC management was inconsistent, and in direct conflict with, the requirements of the PEC contracts and FEMA regulation and policy.

206. These flip-flops in PEC's guidance with regards to what debris monitors were and were not supposed to document was also noted by FEMA in response to the Parish's second

appeal. FEMA made note of the same discrepancies that LLA noted in the statements made by Mr. Arikol. FEMA's second appeal states, "Given the discrepancies in how and when debris monitors were documenting eligible work, the load tickets cannot be relied upon to accurately document eligibility in this case". *See Exhibit* 53 – FEMA HQ Response to Second Appeal, January 6, 2012.

207. In their own audit, the LLA similarly felt that the flaws in PEC's guidance made **all** of PEC's documentation, other than photographs, insufficient for purposes of identifying eligible work. The LLA stated that:

> "Given PEC's statement that all work was documented and eligibility determinations were not made in the field, we could not rely on the accuracy of the tree tickets. Therefore, we examined the photos for each tree ticket in our sample of charges totaling $45,900 to determine if all of the evidence was consistent with FEMA criteria. Although all tree tickets in our sample indicated photographs were taken, PEC could not produce photographs for 47% of the charges,"

See Exhibit 45 – LLA Livingston Parish Council Compliance Audit Issued April 28, 2010. GOHSEP also identified critical flaws with regards to PEC's work as it related to the requirements set forth in PEC's contract with the Parish. GOHSEP conducted an audit of the work done in the Parish in accordance with requirements set forth in the Single Audit Act of 1984, the Stafford Act and OMB Circular A-133. GOHSEP issued its findings to the Parish on June 16, 2011, in which GOHSEP states, "The Parish had discrepancies in what debris removal was in scope. The project was not properly monitored". *See, (Exhibits in possession of Relator),* Exhibit 168 – GOHSEP Audit dated June 16, 2011. GOHSEP also made note of the concern that there were "… several different reconciliations of the Debris Removal Work by IED and PEC." *Id.* GOHSEP advised the Parish, "The lack of controls over monitoring may lead to misuse of

funds. The Parish should monitor the contractors that they hire to assure their work is in scope and completed correctly." *Id.*

208. In the sample of charges reviewed by the LLA, they could only identify 7% that was consistent with FEMA guidance. *See* Exhibit 45. Additionally, LLA found 43% of the photographs failed to provide conclusive evidence of eligibility and another 3% of the photographs clearly showed ineligible work. *Id.* The remaining 47% of the LLA sample consisted of tree tickets where the Parish indicated photographs were taken but PEC could not produce them. *Id.* In comparison, FEMA was able to confirm 34% of the leaners and 16% of the hangers as eligible for reimbursement because if a review was questionable, FEMA allowed the claim as eligible for the benefit of the Parish. FEMA's validation was significantly higher than LLA's and, despite LLA's findings, FEMA opted to again lean in favor of the Parish, and find eligibility at the higher FEMA percentages. Still, the Parish chooses to assert that PEC's own internal audit findings are the most accurate assessment of eligible work. *See* Exhibit 136 – PEC Leaner/Hanger Audit dated March 29, 2009; *see also* Exhibit 264- Request for Arbitration at Page 30. PEC's *self-evaluation* determined that 89% of the leaners and hangers work was eligible. *Id.* Given the evidence, it seems implausible to FEMA that PEC's assessment is accurate and the discrepancies in how and when debris monitors were documenting eligible work means the Parish's documentation cannot be relied upon to accurately document eligibility.

3. PEC's Monitors and PEC's Arborist Were Not Well Trained nor Well Versed in FEMA Eligibility, Despite the Parish's Claim.

209. Relator asserts the Parish's claims that monitors and debris removal workers were experienced and well trained is without merit. The Parish argues that PEC's staff understood and followed FEMA regulation and guidance. *See Exhibit 264-Request For Arbitration* at Page 25. The Parish states:

> The Parish and its contractors, IED and PEC, individually and collectively understood the necessity of complying with FEMA's procedures in order for the Parish to qualify for Public Assistance. From the outset, the contractor and monitors exercised care and attention to ensure that the work performed would satisfy FEMA's requirements. Those efforts involved both training of the employees to ensure understanding of, and familiarity with, FEMA's rules, and supervising the contractor's work to confirm compliance with those rules. PEC, teamed with its subcontractor, BBEC, utilized debris monitors with prior experience in managing and supervising debris removal projects. These experienced monitors were thoroughly acquainted with FEMA procedures and had studied the relevant FEMA guidance documents related to leaner and hanger eligibility.

Id.

The Parish goes on to state:

> Several of the senior BBEC and PEC staff worked in supervisory roles, regularly answering questions posed by the more junior staff and shadowing the less experienced monitors as they did their jobs. When the project workload demanded additional debris monitors, PEC and BBEC hired local residents and its experienced monitors trained them.

Id.

210. The Parish also argues that Wendell Anthony, the licensed arborist hired to assist the field staff in eligibility, was responsible for ensuring FEMA eligibility requirements were met.

Id. The Parish states:

> Wendell Anthony is a licensed arborist with more than 25 years of experience in hurricane debris removal projects involving FEMA, including nearly 20 years of experience on FEMA-reimbursed projects. He and BBEC's project supervisor, Mike Prichard, continuously worked together to train, instruct, and supervise work crews to assure that FEMA eligibility requirements were met. When new workers started on the job, they participated in an extensive training program where the senior members of the team taught them the FEMA requirements and the required documentation procedures.

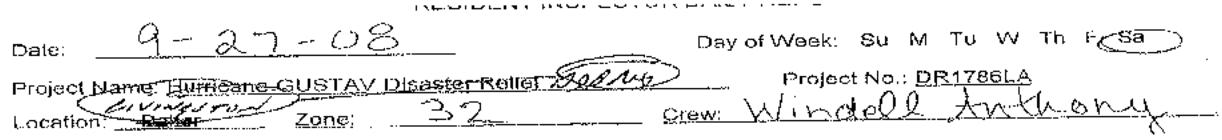
Id.

211. Once again, the information presented by the Parish in the Arbitration Request is incorrect. The record evidences that the PEC monitors were poorly trained by supervisors and arborists who clearly were not aware of FEMA eligibility requirements. Moreover, these monitors took no necessary precautions to ensure the work being done was even necessary. Additionally, the monitors were advised to document ineligible cuts and to ***knowingly submit fraudulent claims*** to FEMA. These claims have been denied repeatedly and with good cause. The fact that these documents were submitted to FEMA in several appeals is the reason for this submission of a FCA. Again, they submitted fraudulent documents in an attempt to obtain more funding from the government than necessary.

212. For example, on September 27, 2008, almost a full month into the leaner and hanger debris removal, PEC debris monitor Stephanie Stephens "Resident Inspector Daily Report" notes the following:[42]



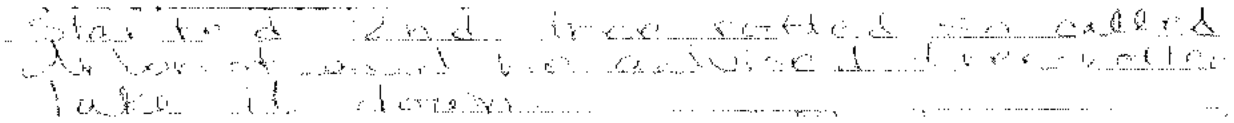
See, (Exhibits in possession of Relator), Exhibit 169 – Stephanie Stephens Resident Inspector Daily Report dated September 27, 2008. This shows PEC was still training monitors nearly half way into the leaner and hanger debris removal efforts. Furthermore, Ms. Stephens' Resident Inspector Daily Report indicates that she was being trained as a member of Wendell Anthony's crew:



[42] Beyond the fact that Ms. Stephens is being trained to monitor leaners and hangers work almost a month after the work had begun, Ms. Stephens is assigned to monitor cuts being made in South Park. As noted earlier, the Parish did not have legal responsibility for South Park so they should not have been there to begin with. *See supra.*

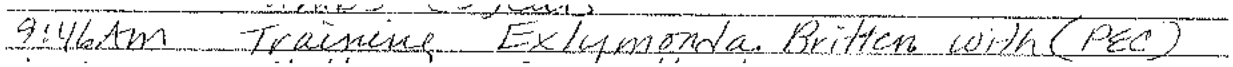
Id. Mr. Anthony is the Arborist who the Parish alleges was highly experienced on FEMA reimbursed projects and was responsible for training, instructing, and supervising work crews to assure that FEMA eligibility requirements were met. Mr. Anthony has proven time and time again that he lacks the experience necessary to determine what may or may not be considered a threat to life or property. Mr. Anthony is nothing more than an opportunist who seeks to gain as much funding on work both he and his crews are aware do not meet the requirements set forth by FEMA. *See Exhibit 264-Request For Arbitration* at Page 25.

213. During Ms. Stephens training the team came across a rotten tree and Ms. Stephens notes the following:



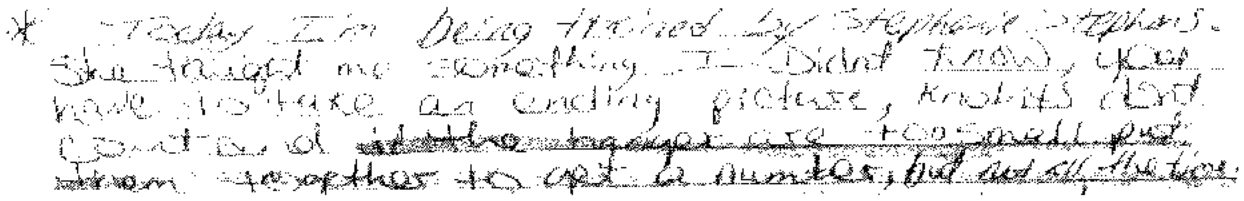
See, Exhibit 168 – Stephanie Stephens Resident Inspector Daily Report dated September 27, 2008. Later that same day Ms. Stephens documents cutting down another rotten tree as she had been advised to by the contractors Arborist, Mr. Anthony. *Id.* This not only evidences that Mr. Anthony was not well versed in FEMA eligibility, but it also shows that PEC monitors were being trained to perform ineligible work.[43]

214. On October 2, 2008, Ms. Stephens makes the following entry into her Resident Inspector Daily Report:

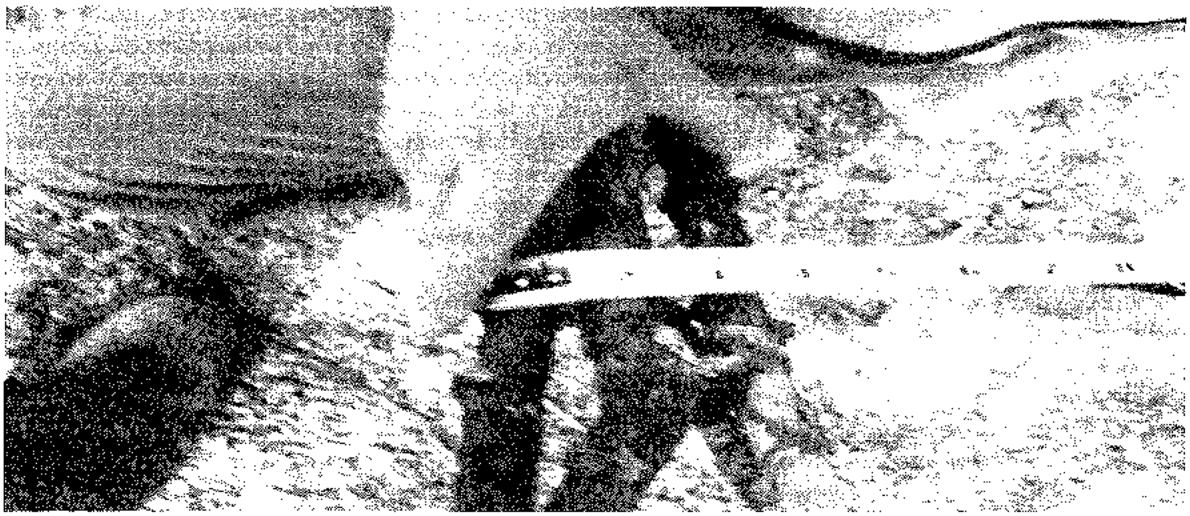


[43] Mr. Anthony's involvement raises additional concerns. First, Mr. Anthony was hired by IED (the contractor) but was training the PEC field staff (those responsible for monitoring the contractor) on how to identify eligible work. *See, Exhibit* 23 – Affidavit of Jeffrey Jones. Second, approximately 80% of the crews working for IED were subcontractors working for Mr. Anthony. *Id.* Therefore, Mr. Anthony was training monitors for PEC to oversee and verify the eligibility of cuts being made which he would potentially receive reimbursement for. FEMA finds this to be a significant ethical and legal conflict.

See, (Exhibits in possession of Relator), Exhibit 170 – Stephanie Stephens Resident Inspector Daily Report dated October 2, 2008. Five days after having been trained herself, PEC now considers Ms. Stephens to be a senior member of the debris monitor team capable of training new monitors still coming in. *Id.* Ms. Exlymonda Britten, who was the person Ms. Stephens was now training to be a monitor just five days after having been trained herself, makes the following entry on her Resident Inspector Daily Report on that same day:



See, (Exhibits in possession of Relator), Exhibit 171 – Exlymonda Britten Resident Inspector Daily Report dated October 2, 2008. In the section FEMA has highlighted, Ms. Britten makes note that **"if the hanger[s] are too small put them together to get a number, but not all the time."** *Id.* Ms. Britten was being trained to submit *fraudulent* information to FEMA. This was not a unique situation. During FEMA's review there were multiple photographs, such as the one provided below, which confirmed this technique was implemented by PEC's monitors in Livingston Parish.



See, (Exhibits in possession of Relator), Exhibit 172 – PEC photograph for Ticket 06375[44].

215. This sampling of the information from these Resident Inspector Daily Reports clearly show that the Parish's argument that debris monitors were well trained by senior members of the team who were well versed in FEMA eligibility is blatantly false. Debris monitors were mostly local residents, given a crash course in leaner and hanger debris monitoring, who were trained to allow ineligible work to be performed and fraudulent claims submitted to FEMA. Further, and significantly, the Parish's arborist, Mr. Anthony, was hired by IED, the debris removal contractor for which a large portion of the crews were direct subcontractors of Mr. Anthony, but the Parish assigned Mr. Anthony to directly train the PEC monitoring contractors, responsible for quality control checking the debris removal contractors work. Mr. Anthony once again sought to gain as much funding as possible knowingly allowing the cutting of trees, limbs and other vegetation that he knew was not storm generated. Certainly Mr. Anthony's actions pose a direct conflict as Mr. Anthony had a direct financial interest in the amount of debris cut and removed. As such, council should make short shrift of the Parish's argument related to the experience of the debris monitors and its arborist.

4. FEMA's funding of Monitoring Costs Does Not Validate Eligibility for Assistance of Work Performed.

216. FEMA opted to fund monitoring costs for the leaner and hanger work at 100% because there was eligible leaner and hanger work. However, funding the monitoring costs does not mean the underlying work is eligible if the Parish cannot establish eligibility. The Parish's argument that FEMA's funding of PEC's monitoring costs somehow validates as eligible for

[44] FEMA provides this one example to provide evidence to the Panel that the guidance Ms. Britten received was actually implemented in the field. Upon request, FEMA can provide multiple examples showing this was a repeated practice and not a singular event.

assistance all of the work that PEC monitored is without merit.[45] *See Exhibit 264-Request For Arbitration* at Page 32. FEMA's decision to fund PEC for the work performed was based on the fact that PEC did monitor the work performed by IED as required by their contract and PEC was able to document some eligible work in accordance with the requirements of their contract and the requirements set forth in FEMA 325, albeit the eligible work was only 34% of leaners and 16% of hangers. This does not negate the fact that the majority of the work that IED completed, and PEC documented, for leaners and hangers was incligible. Therefore, it is disingenuous of the Parish to argue that funding provided to PEC for eligible work which PEC documented should somehow result in the funding of the *ineligible* work performed by IED, just because PEC documented that as well. IED may have fulfilled the requirements of their contract with the Parish by performing work not eligible for FEMA reimbursement but just because PEC documented that ineligible work does not mean FEMA should be required to reimburse the Parish for it. In fact, doing so is contrary to federal law and FEMA policy as argued herein.

E. Even if the Parish Could Evidence that the Claimed Work was The Result of the Disaster or Posed an Immediate Threat, Which Relator Asserts It Cannot, The Parish's Procurement Process Did Not Follow FEMA Procurement Regulations Pursuant to 44 CFR § 13.36, Requirements of Louisiana Procurement Law Under Title 38 of the Louisiana Revised Statutes, nor Requirements of the Livingston Parish Home Rule Charter.

217. The regulations, polices and guidance related to contracting for, completing and monitoring of leaner and hanger debris work provide a clear roadmap for subgrantee's to follow

[45] The Parish claims FEMA funded 60% of PEC's monitoring costs. *See Exhibit 264-Request For Arbitration* Request at Page 32. The Parish also claims that PEC is owed an additional $1.03 million. FEMA disputes this claim and submits that 100% of PEC's monitoring costs have been paid. *See, Exhibit* 18 – PW 166, Debris on Citywide ROW, January 2, 2009. FEMA has never received invoices or any other documentation to support this $1.03 million claim the Parish asserts. *See, Exhibit* 23 – Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal. It is important to note that the Parish's Arbitration Request does not include a dispute of the determinations made in PW 166, "the Debris Monitoring PW", and therefore this Panel does not have subject matter jurisdiction of this portion of the Parish's claim. Accordingly, this $1.03 million portion of the Parish's claim should be stricken from the Panel's review of this case.

in order to ensure the maximum reimbursement possible from FEMA. First, the process must begin with a properly procured contract in accordance with Federal and State regulations. Specifically, 44 C.F.R. § 13.36 outlines the requirements for proper procurement of contracts and states in 13.36(b) that:

> "Grantees and subgrantees will use their own procurement procedures which reflect applicable state and local laws and regulations, provided that the procurement conforms to applicable Federal law and the standards identified in this section."

218. This regulation goes on to include multiple requirements, including the requirement for procured contracts to be properly advertised. *Id* at 13.36(d)(2). The regulations also require that procurement transactions be performed in a manner providing full and open competition except under very limited circumstances. *Id* at 13.36(c)(1). One allowable circumstance is when there is a public exigency or emergency for the requirement that will not permit a delay resulting from a competitive solicitation. *Id.* at 13.36(d)(4)(i)(B). However, even in this circumstance, the Subgrantees are subject to the general requirements that (1) a cost or price analysis must be done in connection with every procurement action, including contract modifications, *Id.* at 13.36(f)(1), and (2) profit is to be negotiated as a separate element of the price for each contract in which there is no price competition and in all cases where cost or price analysis is performed. *Id.* at 13.36(f)(2). Additionally, the regulation also prohibits Subgrantees from using time and material type contracts unless a determination is made that no other contract is suitable and provided the contract includes a ceiling price the contractor exceeds at its own risk. *Id.* at 13.36(b)(10). Relator asserts that the Parish failed to comply with 44 CFR §13.36 in establishing its contracts for the FEMA claimed work.

219. The Parish's procurement process for the debris monitoring contractor, PEC, was severely flawed. First, the Parish failed to perform a cost analysis as required under 44 CFR

§13.36(f)(1) and they failed to include a ceiling price that the contractor exceeds at its own risk as required under 44 CFR §13.36(b)(10). *See* Exhibit 10 – Debris Management and Monitoring Services Agreement, PEC Project No. 10683, September 8, 2008. FEMA's policy guidance on debris monitoring states that while "[m]onitoring contracts are typically time and materials contracts, they "must contain a ***not-to-exceed*** clause per the requirements of Part 13 of 44 CFR." *See* Exhibit 155 - FEMA Fact Sheet 9580.203 at Page 5. PEC's contract clearly does not contain a not-to-exceed clause. *See, (Exhibits in possession of Relator), Exhibit* 10. Additionally, while the Parish did submit a cost analysis to GOHSEP, they did not do so until July 2010, almost *two years* after the work had been completed. *See, (Exhibits in possession of Relator),* Exhibit 173 – PEC cost analysis dated July 13, 2010. A cost analysis almost two years after the completion of the work is not sufficient to meet the requirements of 44 CFR §13.36(f)(1).

220. Second, the Parish also failed to do a formal advertisement for bids as required under 44 C.F.R. §13.36(d)(2).[46] Moreover, it has been established that Jeff Benoura with BBEC created the advertisement on September 4, 2008 and it was never formally advertised as stated in countless several of the parish's' arguments. In fact, it was only through the information obtained by the Delahoussaye that the actual documents surfaced. To date, the parish has never produced adequate information to support actual advertisements form any of the contracts awarded. IED On June 16, 2011, GOHSEP issued audit findings related to the Parish's procurement problems. GOHSEP found that:

> "The Parish did not follow Bid Procedures. There was not a formal advertisement for bids. The lack of controls over the bid process can lead to the Parish being over charged for services of contractors. It is recommended that the Parish follows bid procedures that are located in the Parish purchasing manual."

[46] While this particular procurement issue with PEC deals more with the waterways and will be addressed in detail in that section of the brief, it is mentioned here just to emphasize the multitude of procurement issues surrounding the Parish's contract with PEC.

See, Exhibit 168 – GOHSEP Audit dated June 16, 2011.

221. In the arbitration response, opposing counsel acknowledged the detriment that can arise from improper procurement, such as those procurement issues described above, at a January 23, 2014 Parish Council Meeting, where he was speaking to the Council about the possibilities of success and/or failure in the instant case. *Mr. Hilary S. Cairnie*, legal counsel for the Parish in this case, advised the Panel:

> "As counsel, we wanted to have some sense of whether or not this claim against FEMA was in some way tainted by an improper contract action, by some inappropriate conduct on the part of decision makers because obviously if that kind of thing had occurred, that would have a material impact on how we would position the case legally and potentially how it would be valued."

See, (Exhibits in possession of Relator), Exhibit 174 at Page 25 Lines 22-25 – Transcript of Mr. Cairnie speaking at January 23, 2014 Livingston Parish Council Meeting. Mr. Cairnie was correct. The issues with procurement do have a material impact on this case and the issues with procurement will certainly continue to be looked at by the federal government well beyond the decisions made by this Panel. Clearly, the Defendants, understood the importance of compliance with 44 C.F.R. Part 13, but despite this understanding, ***the evidence demonstrates that the Parish failed to comply with this regulation and the debris and monitoring contracts were not procured in compliance with Federal regulation.***

222. Third, Relator asserts, in addition to failure to comply with Federal procurement law, the Parish also failed to comply with Louisiana procurement law. The Louisiana Public Bid Law is found at Chapter 10 (Public Contracts) R.S. 38:2211 – 38:2296. *See, (Exhibits in possession of Relator), Exhibit* 175 – Louisiana Public Bid Law. Pursuant to R.S. 38:2211(11), the definition of "public entity" includes "any political subdivision of the state…." *Id.* As such, Livingston Parish is responsible for adhering to the Louisiana Public Bid Law when contracting

for services. Similar to the federal procurement laws identified herein which the Parish violated, Louisiana's Public Bid Law also requires proper advertisement, completion of a cost analysis and a not-to-exceed clause. *Id.*

223. Finally, the contract with PEC failed to meet the requirements of the Livingston Parish Home Rule Charter. See, (Exhibits in possession of Relator), Exhibit 176 – Livingston Parish Home Rule Charter. Section 3-09(A)(5) of the Parish's Home Rule Charter states that the Parish President has the power to "Sign contracts for projects, equipment, professional services and materials and supplies identified in the approved operating and capital improvement budgets or as specifically identified by ordinance. *Contracts for projects, equipment, professional services or materials and supplies not so identified shall be submitted to the council for approval.*" *Id.* at Page 14. The contract with PEC was never approved by the Parish Council as required by Livingston Parish's own legal requirement. Accordingly, the Parish failed to comply with federal, state and local procurement law.

F. Livingston Parish's Misleading and Inaccurate Statements Demonstrate a Misunderstanding of FEMA's Review of the Parish's Debris Work and is Inappropriate and Incorrect.

224. The Parish focuses the majority of its efforts in the Arbitration Request deflecting the flaws of the work performed by IED and PEC onto FEMA in hopes of drawing this Panel's attention away from the true facts of this case. It is important for FEMA to rebut the various claims the Parish makes against FEMA throughout the Arbitration Request.

1. Livingston Parish Incorrectly Claims that FEMA Initially Supported Fully Funding Leaners and Hangers Based On a May 29, 2009 "Draft" Version of PW 54v1

225. Livingston Parish incorrectly argues that FEMA drafted a "substitute" PW 54v1 wherein it would have provided $19,178,404 in funding primarily for leaner and hanger work.

See Exhibit 264- Request for Arbitration. at Page 13.[47] Based on this, the Parish makes the claim that "[w]hile FEMA staff clearly indicated their support for these substitute PWs, the May 29 version of PW 54v1 was not executed." *Id.* This is an inaccurate statement on the part of Livingston Parish and demonstrates the Parish's lack of understanding of the PW process. It is common practice for FEMA to enter the full dollar amount requested by a Subgrantee onto FEMA Form 90-91 ("PW Worksheet"), whether they are valid claims or not. *See* Exhibit 23 – Affidavit of Jeffrey Jones, FEMA Project Officer for Livingston Parish debris removal; see also 44 C.F.R. § 206.202(d). The cover page of the PW Worksheet is signed and the worksheet is submitted to the Subgrantee for signature to document the request and amount. *Id*; *see also* Exhibit 177, Sample cover page of a PW Worksheet. This PW is simply a tool used by FEMA management to acknowledge and track what claims and/or work is out there, the dollar value of those claims and to acknowledge receipt of the claims. *Id.; 44 C.F.R.* § 206.202(d). This is critical for submittal of monthly budgeting to FEMA Headquarters and the Office of Management and Budget in anticipation of what funding is *potentially* required in the coming months. To insinuate the creation of a version clearly marked "DRAFT," which was never obligated, as somehow inferring that FEMA has ruled on or even contemplated eligibility is incorrect, unsupported by law or policy, and contrary to PW processing protocol.[48]

2. Livingston Parish Incorrectly Argues that FEMA Should Fund 100% of IED's Work Because of Decisions Made in Other Municipalities

[47] Livingston Parish footnotes this draft PW version as an Exhibit that can be found at page 5001 of their appendix. The Exhibit is actually located at page 5011 of the Parish's appendix. The Panel will find that, as is the case here, a large number of the Parish's appendix references are incorrectly cited in the Arbitration Request.

[48] Ironically, Livingston Parish President, Mike Grimmer, refused to sign this draft because the dollar value was extremely higher than he had been led to believe by PEC and IED up until that point. *See, Exhibit* 36 – Affidavit of Michael Grimmer, Livingston Parish President.

226. The Parish argues that because PEC was the monitoring firm in West Feliciana Parish after Hurricane Gustav, and FEMA funded 100% of the debris removal in that Parish, FEMA should also fund 100% of the debris removal in Livingston Parish. *See Exhibit 264-Request For Arbitration* at Page 30-31. To defend this argument, the Parish also refers to an appeal decision made by FEMA after Hurricane Rita related to the Town of Vinton. *Id.* The Parish argues FEMA determined that since the same monitor used in Vinton was the same monitor for the City of Westlake, FEMA would apply the results of an audit of Westlake to the Town of Vinton. *Id* at Page 31. However, this analogy is flawed and the Parish's inappropriate attempts to argue for 100% funding in Livingston Parish leaves out critical information that makes these two situations distinctly different.

227. First, there are critical differences between Livingston Parish and West Feliciana. Due to the faulty documentation in West Feliciana, West Feliciana agreed to bring in an independent arborist to do a review of the work performed. *See* Exhibit 23- Affidavit of Jeffrey Jones. Livingston Parish, on the contrary, is vehemently opposed to the use of an independent arborist. Additionally, FEMA was able to initially confirm the eligibility of a much higher percentage of leaner and hanger work in West Feliciana (approximately 60%) compared to the 16% and 34% respectively for Livingston Parish. *Id.* With the addition of the findings from the independent arborist, FEMA was able to find additional eligible work at a higher rate than in the original sample which allowed West Feliciana over 80% eligibility for its leaner and hanger work.[49]

228. As for the Parish's argument regarding FEMA's determination related to the Town of Vinton after Hurricane Rita, again the situation is notably distinguishable. FEMA's decision in

[49] The findings of the Arborist brought in as a result of this Arbitration Request validate FEMA's eligibility determinations. *See. Exhibit* 140 – Arborist Review, Draft Report dated February 24, 2014.

Vinton was unique for several reasons. Vinton and Westlake are both small towns a short twenty minute drive from one another, which are similar in size and topography. Livingston Parish and West Feliciana Parish are very different in size and there is a much larger percentage of uninhabited lands in Livingston Parish than there is in West Feliciana. Also, the two Parishes are over an hour drive from one another. After Hurricane Rita, FEMA completed one validation of the leaner and hanger work in Vinton as compared to two validations completed for the City of Westlake. The second validation in the City of Westlake yielded a higher percentage of eligible work and since FEMA had not completed a second validation in Vinton, FEMA decided to fund both based on the second validation percentages for the City of Westlake. Like the City of Westlake, Livingston Parish also had a second FEMA validation completed on the leaner and hanger debris work, and even a Louisiana validation of the leaner and hanger work, which all reveal the majority of the work was ineligible. There is simply no comparison to, or connection with, Livingston Parish for the examples the Parish presents in its argument.

3. Livingston Parish Incorrectly Argues That FEMA's Timing Of Its Determinations Was Improper

229. The Parish also incorrectly asserts that the timing of FEMA's determinations was improper. The Parish provides a bulleted timeline of events in an effort to give the impression that FEMA did not actually review the tree tickets and supporting documentation. To do this, the Parish states that FEMA had made determinations only two (2) days after having received all of the documentation from the Parish. *See Exhibit 264-Request For Arbitration* at Page 18-19. However, like the previous Parish claims, this is also not true.

230. The Parish refers to a meeting purportedly held on July 29, 2009 in which FEMA met with Parish President Grimmer and told him that FEMA expected 16% of hangers and 36% of leaners to be eligible, two days after having received 100% of the documentation from the

Parish. *Id.* The record shows that this meeting was actually held on August 24, 2009, almost a full month after FEMA had received the documentation. *See, (Exhibits in possession of Relator),* Exhibit 178 – Corrected meeting notes; *see also* Exhibit 20 – Affidavit of Steve Gowen; Exhibit 36 – Affidavit of Michael Grimmer, Livingston Parish President. The wrong date was originally put on the top of the meeting notes and a corrected version was later sent to the State. *Id.* FEMA can only assume that the State submitted the updated meeting notes with the corrected date to the Parish, yet the Parish continues to pursue this false date in its argument.

231. The Parish also includes within its timeline, an argument related to FEMA's spreadsheets. The Parish argues that FEMA provided the Parish with a completed spreadsheet of the validation on August 27, 2009 and then again on September 10, 2009. *See (Exhibits in possession of Relator),* Exhibit 264 - Request for Arbitration at Page 19. Again, the Parish is incorrect. The two spreadsheets were clearly different and FEMA made note of the difference in the 2nd Appeal determination provided to the Parish. *See* Exhibit 53– FEMA HQ Response to Second Appeal, January 6, 2012. Once again, the Parish presents inaccurate facts to this Panel.

232. The Parish's attempts to argue an incorrect timeline in the hopes of discrediting FEMA's validation and somehow convincing this Panel that FEMA acted in bad faith, or in an inappropriate manner, is egregious and without merit.

233. The Parish has proven time and time again that their actions were not consistent with FEMA rules and regulations yet, they repeatedly submit documentation containing falsified information in order to receive funding for work that is just nonexistent.

4. Livingston Parish Continues to Incorrectly Argue the "No Photo No Money" Assertion.

234. The Parish spends a great deal of time in the Arbitration Request arguing their "no photo no money" assertion on the Panel. The Parish's assertion is incorrect. The Parish argues

FEMA was not willing to pay for any work where there were no photographs available to support that work. *See Exhibit 264-Request For Arbitration* at Page 15. This is simply false and the argument put forth by the Parish is flawed on many levels.

235. First, as previously stated, FEMA does not require photographs in order to determine eligibility of leaners and hangers. What FEMA does require before obligating taxpayer dollars is a level of confidence that the work performed was eligible. In order to have that level of confidence, FEMA required only that which is required under FEMA Policy, stated again:

> (1) Describe the immediate threat, e.g. photos of hanging limbs or leaning trees;
> (2) Clearly define the scope of work to remove the immediate threat;
> (3) Specify the improved public property location by recording the nearest building address and/or GPS location; and
> (4) Denote date, labor and equipment used to perform the work.

See, Exhibit 138 - FEMA 325 at page 25.

236. The first requirement is that the Parish describes the immediate threat to FEMA, an example of that being through the use of photographs, among other types of evidence. As previously shown, the Parish did not provide much of anything in replacement of photographs to describe the claimed immediate threat yet it is asserting that FEMA's use of photographs that were provided as documentary evidence was somehow flawed or inappropriate. While photographs are not the only way to describe the immediate threat, nor were they the only thing FEMA relied upon in its decision making process, they were the best evidence the Parish provided to FEMA to satisfy that first requirement of FEMA 325. *Id.* Accordingly, the Parish's claim that FEMA's use of photographic evidence was inappropriate and somehow created a new standard is without merit.

237. Secondly, if FEMA only paid for claims which included photographs, then FEMA would have only found approximately 7% of leaners and 3% of the hangers eligible, because

FEMA would not have awarded the eligible percentages they identified to the work that was not supported by photographic evidence. However, that is not what FEMA did. FEMA conducted a 20% sample validation of all documentation, determined percentage of eligibility for leaners and hangers on that 20% sample, and then extrapolated those percentages to the whole of the claims submitted, with or without photographic documentation submitted to support the claimed work. *See, (Exhibits in possession of Relator),* Exhibit 179 – 20% validation policy. In fact, FEMA performed a second validation, based upon a random sample submitted by the State that re-affirmed FEMA's original determinations. *See* Exhibit 45- LLA Audit Findings. A third validation analysis was also conducted by FEMA Headquarters which confirmed those same findings. *See* Exhibit 53– FEMA HQ Response to Second Appeal, January 6, 2012.

238. Notably, both the OIG and LLA found no fault with FEMA's review of documentation or eligibility determinations. *See Exhibit* 119 - OIG Audit Report at Pages 3 & 6; *see also* Exhibit 45 – LLA Livingston Parish Council Compliance Audit Issued April 28, 2010 at Page 6. The OIG specifically states, "… nothing came to our attention to indicate that FEMA's decisions on the eligibility of the Parish's debris removal costs were not appropriate." *See* Exhibit 119 - OIG Audit Report at Page 3. The OIG went on to state, "…unless the records indicate otherwise, we generally rely on FEMA's expertise to assess the eligibility of the debris itself." *Id.* Further, based on LLA's own efforts to validate the work from documentation provided by the Parish, LLA found FEMA's determinations to be heavily skewed in favor of the Parish. *Id* at Page 6. Neither the OIG, nor LLA, found fault in FEMA's determinations, yet both entities found *significant fault* in the work done by IED and PEC. *See* Exhibit 119 - OIG Audit Report at Pages 3 & 6; *see also* Exhibit 45 – LLA Livingston Parish Council Compliance Audit Issued April 28, 2010 at Page 6.

239. The Parish believes this Panel should ignore the repeated confirmation of FEMA's findings which were the result of a review of all documentation, the comments made by the OIG which support FEMA's findings, the validation done by the LLA which supports FEMA's findings and the validation conducted as part of FEMA's second appeal which supports FEMA's initial 20% validation findings. Incredulously, the Parish argues that FEMA was flawed in its use of photographs to validate the work completed, yet the Parish now asks this Panel to reach a different conclusion than FEMA by using the same photographs they faulted FEMA for relying upon. The Parish's arguments are inconsistent and wholly without merit. The Parish was fully aware, prior to the filing of the Arbitration Request that FEMA had, from the beginning, funded leaners and hangers that the Parish did not have photographs to support. The Parish's focus on the "no photo no money" myth is simply one more argument presented by the Parish in an attempt to focus the Panel's attention away from the correct validation process performed by FEMA, and away from the numerous fatal flaws of the work done by IED and the monitors.

5. Livingston Parish Incorrectly Claims that FEMA's 20% Validation Was Flawed.

240. The Parish also asserts that FEMA's 20% validation was itself flawed, however the Parish cannot provide valid evidence to support this assertion. First, the Parish claims that FEMA's first 20% validation conducted in August and September of 2009 was flawed because it relied only on cuts where photographs were available to support the claim. *See Exhibit 264-Request For Arbitration* at Page 15-18. As explained in detail above and herein, the sample did not solely rely on photographs and was what FEMA felt could provide the Parish with the highest percentage of eligible work because it provided a description of the immediate threat, as required by FEMA Policy 325. By utilizing all of the documentation provided by the Parish, FEMA in

good faith believed that this validation would be the most beneficial for the Parish. Yet, despite this approach by FEMA, the Parish continues to demonstrate dissatisfaction.

241. The second argument the Parish asserts in the Arbitration Request relates to what it asserts are discrepancies and flaws between FEMA's 20% validation and the November/December 2009 validation FEMA conducted on a random sample selected by GOHSEP. *Id.* With over 4,500 tree tickets and over 90,000 cuts for leaners and hangers, the Parish hand picks eight (8) tree tickets and eleven (11) individual cuts it wishes the Panel to focus on in an attempt to authenticate this argument. However, these 8 tickets not only disprove the Parish's argument but they provide clear examples of the Parish's misunderstanding of FEMA's validation methodology, the flaws of the work performed by PEC, and the validity of FEMA's eligibility determinations made. Below are the claims made by the Parish in association with the 8 tickets they present along with a summary of FEMA's review of those claims:

a. Ticket 07679

242. The Parish argues that FEMA inaccurately captured the number of cuts from Ticket 07679 and also made the wrong eligibility determinations with regards to the cuts identified on the ticket. *Id.* Both of these assertions are without merit.

243. As discussed thoroughly by FEMA in the 2nd Appeal response to Livingston Parish, FEMA validated on a per tree basis not a per ticket basis. *See* Exhibit 53– FEMA HQ Response to Second Appeal, January 6, 2012. As with most tree tickets submitted by the Parish, Ticket 07679 contains only a portion of the cuts made on the tree in question. *See, (Exhibits in possession of Relator),* Exhibit 180 – Tickets 07679 and 07680 documenting work done on the same tree. When PEC filled up a ticket they would simply start a new ticket to include the remaining cuts from a given tree. As FEMA attempted to validate all the work performed on the

individual trees, the validation would continue to the next ticket, with the results often being tabulated on the ticket, which first identified the specific tree. The Parish did not document work in accordance with FEMA's method used for entering data on the spreadsheets and the Parish was clearly made aware of this clarification in FEMA's response to the Parish's 2nd appeal. *See* Exhibit 53– FEMA HQ Response to Second Appeal, January 6, 2012

244. The Parish also argues that the photographs for Ticket 07679 show 25 eligible hangers instead of the 6 FEMA determined to be eligible. *Id.* Despite this claim by the Parish, the corresponding photographs tell another story and show multiple cuts that cannot be supported. The photographs show trees clearly out of the right-of-way and/or no right-of-way visible, with little or no visible storm damage in the form of hangers. *See, (Exhibits in possession of Relator),* Exhibit 181 – Ticket 07679 Documentation and Photographs; *see also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix U. The photographs also show multiple cuts with no visible signs of a break in the limb to support the necessity of the cut having been made. *Id.* The idea that the Parish would argue that the photographs show 25 eligible cuts only serves to show how flawed the Parish's interpretation of what constitutes eligible work is. After review of the evidence, the Panel should find that FEMA was generous in its review just to find 6 cuts eligible from this ticket.

b. Ticket 07208

245. The Parish argues that Ticket 07208 shows 9 cuts from 2 trees that should be confirmed as eligible by the photographs, which were taken to support them. *See Exhibit 264- Request For Arbitration* at Page 15. The Parish asserts that FEMA erred related to Ticket 07208 by denying all cuts in the August/September 2009 validation only to find 1 of the 9 cuts eligible

in the November/December 2009 validation.[50] *Id.* at Page 15-16. The Parish argues both determinations are wrong because all of the cuts are eligible. *Id.* Again the Parish is incorrect and the documentation and photographs tell a different story than that presented by the Parish.

246. Line 1 of Ticket 07208 provides no time, no address, no GPS and no mention of photographs; however, they do note and claim hazardous hangers. *See, (Exhibits in possession of Relator),* Exhibit 182 – Ticket 07208. It is not until Line 8 that photographs 1767-1783 are noted. *Id.* All FEMA gleaned from these photographs is minor damage to a few trees. The pictures provide no way to determine the location of the right-of-way, nor do they provide any way to determine which tree is the target tree, or whether an immediate threat is present. *Id.* Several of the photographs do show cut limbs, but as with most photographs taken by PEC, they show no signs of Hurricane Gustav generated breaks.[51]

247. In addition, when questioned by the LLA to respond to this ticket, the monitor or Parish modified the ticket including more information than what was originally reported to FEMA. *See, (Exhibits in possession of Relator),* Exhibit 183 – Documentation for Ticket 07208 submitted to LLA by Parish. The monitor or Parish included GPS coordinates in their LLA response but not in the FEMA request or in the documentation provided in this (Exhibits in possession of Relator), Exhibit 264 - Request for Arbitration.

248. Finally, as for the one leaner that FEMA found eligible in the second validation, it could be perceived as leaning greater than 30 degrees so FEMA decided to find it eligible on the second validation. *See* Exhibit 181 – Ticket 07208. While there are no elevated roots or exposed

[50] The Parish indicates that FEMA reversed a decision on one of the 5-11.99 inch hangers. This is not accurate. The determination by FEMA regarding these hangers remained consistent between both validations. FEMA did however reverse the decision related to the leaner documented on Ticket 07208.

[51] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix R.

soil to indicate the tree had been pushed by hurricane force winds, FEMA gave the Parish the benefit of the doubt on this item.

c. Ticket 06726

249. For Ticket 06726, the Parish argues that FEMA misstates the number of cuts claimed on the ticket by two, that FEMA changed its own determination between the two validations related to one leaner on the ticket and that all 25 cuts on Ticket 06726 are eligible based on the supporting photographs. *See Exhibit 264-Request For Arbitration* at Page 15-16.

250. The Parish is at least partially right on this example. FEMA did mistakenly omit 2 cuts found on Ticket 06726 from the validation. However, the omission had no impact on eligibility percentages or funding. With regards to FEMA's reversal on one of the leaners, the pictures provided show a tree before work was performed and then a picture of a cut tree on the ground. *See, (Exhibits in possession of Relator),* Exhibit 184 – Ticket 06726 Documentation and Photographs. Upon close inspection it appears that the pictures are of two different trees. *Id.* The first picture could show an eligible leaner, though the right-of-way is not clearly visible and the tree appears to be in a yard or wooded area. *Id.* However, the tree actually cut was simply rotting and had been dead for a considerable period of time. *Id.* FEMA still chose to give the benefit of the doubt to the Parish on this one in the second validation despite the discrepancies. The Parish argues that this shows inconsistency on the part of FEMA's validation. The reality is FEMA was itself leaning forward as much as possible in favor of the Parish during the second validation to ensure maximum eligibility, and where the documentation was questionably eligible, and the leap could be made, FEMA found eligibility in favor of the Parish. Despite that effort on the part of FEMA, the photographs for Ticket 06726 clearly show ineligible hangers. This was another attempt by the contractor to bill for as much as possible. Due to inexperienced monitors

this work was allowed and at times encouraged. It is not the responsibility of the Government to pay for work that was clearly outside the scope of eligibility. *Id.* There simply is not a way to make the leap towards eligible work on this ticket despite the Parish's claim that these photographs prove all 25 cuts to be eligible.[52]

d. Ticket 06986

251. Ticket 06986 has 1 leaner and 24 hangers for a total of 25 cuts from 5 trees. *See* Exhibit 264-Request For Arbitration at Page 16. The Parish argues that FEMA misstates both the number of trees and the number of cuts on this ticket (1 leaner and 30 hangers for a total of 31 cuts from 7 trees). *Id.* However, as with Ticket 07679, the cuts associated with these particular trees were rolled over onto other tickets. FEMA's validation used all tickets which, represented cuts from any given tree to document FEMA spreadsheets. Again, the Parish was made aware of this in FEMA's response on the 2nd appeal but the Parish chooses to continue to assert this flawed argument in an effort to discredit FEMA's validations. *See* Exhibit 53– FEMA HQ Response to Second Appeal, January 6, 2012

252. Further, the Parish is incorrect in its assertions that all the cuts on this ticket are eligible. The first photograph shows that there is no evidence of a break and no signs of storm damage. Instead, it is a photograph of what appears to be a 3-inch cut from an Oak tree extremely zoomed in and on the ground. *See, (Exhibits in possession of Relator),* Exhibit 185 – Ticket 06986 Documentation and Photo #1. Additionally, there is nothing in the photograph or the Daily Hazardous Tree Monitor Report for this ticket, which describes the immediate threat for FEMA in accordance with the requirements in FEMA 325. Id.; *see also* Exhibit 138 – FEMA 325 at Page 24.

[52] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix N.

243. The third photograph associated with this ticket is identified as item 3, at 2:29, W. River View Drive, GPS location as 30.19.70 9050.74, measuring 2 inches in diameter. *See, (Exhibits in possession of Relator),* Exhibit 186 – Ticket 06986 Photo #3. Although PEC documented the location, GPS coordinates and size of the cut, they once again fail to document the immediate threat in either the photographs or the Monitor Report as required in FEMA 325. *See* Exhibit 138 – FEMA 325 at Page 24. FEMA 325 makes it clear that FEMA reimbursement is contingent on proof of the elements necessary to show eligibility, *Id.* at Page 24, and as shown above, the photographs and Monitor Notes attached to this ticket fail to provide that evidence. While the Parish would have this Panel believe this was an eligible cut, in response to the LLA audit, the Parish notes this ticket as an ineligible cut on the line item and the Parish placed an ineligible mark on the photograph. *See* (*Exhibits in possession of Relator*), Exhibit 264 - Request for Arbitration at Page 16; *see also* Exhibit 136 – Parish response to LLA audit.

254. Just as with the information and arguments the Parish made to LLA, OIG, and FEMA in regards to leaners and hangers, the information and arguments the Parish provides to this Panel in support of its claim lacks the consistency and accuracy necessary for them to hold merit.[53]

e. Ticket 07159

255. For Ticket 07159, in another effort to show FEMA's inconsistency, the Parish again argues that FEMA's determinations changed from the first validation to the second. *See* (*Exhibits in possession of Relator)*, Exhibit 264 - Request for Arbitration at Page 16. The Parish argues that FEMA changed its eligibility determination on 2 hangers and this shows that FEMA was inconsistent. *Id.* However, FEMA's second validation was only done because the Parish

[53] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix Q.

disputed the results of the first validation and FEMA performed another review and made a change in its determination after a generous interpretation of the monitor's notes. *See, (Exhibits in possession of Relator),* Exhibit 187 – Ticket 07159 Documentation and Photographs. The Parish now chooses to use that generosity as a tool to argue FEMA's inconsistency in support of their claim.

256. Additionally, the Parish's assertion that the photographs, which correspond to the items on this ticket, confirm eligibility is incorrect. *See* (Exhibits in possession of Relator), Exhibit 264 - Request for Arbitration at Page 16. Some of the photographs attached to Ticket 07159, evidence only the tree cuts instead of showing the actual hanger, the break, or even the tree in most instances. *See* Exhibit 185. Other photographs reveal pile after pile of fresh cut branches with few visible breaks. *Id.* Finally, other photographs provide clear evidence that multiple cuts were made on the same limb contrary to FEMA policy. *Id.*

257. The lack of sufficient evidence describing the immediate threat provided by PEC in the photographs or the monitor's notes left FEMA no choice but to determine the work was ineligible and proves that FEMA's validation and decision to deny the majority of this work was the correct decision.[54]

f. Ticket 07196

258. The Parish's claim for Ticket 07196 is again that FEMA allegedly misstated the number of cuts identified on the ticket and that FEMA was inconsistent between the two validations. *See, (Exhibits in possession of Relator),* Exhibit 264 - Request for Arbitration at Page 16. FEMA acknowledges it did miscalculate the count by 2 on Ticket 07196, however, this error had no effect on the overall percentage of eligibility.

[54] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix O.

259. As for the photographs associated with this ticket, the Parish also once again claims that the photographs support all 25 cuts from Ticket 07196 as eligible work. *Id.* Upon inspection of the photographs, it is evident the Parish's assertion is inaccurate. The photographs show a tree with no signs of storm damage and no visible hangers. *See, (Exhibits in possession of Relator),* Exhibit 188 – Ticket 07196 Documentation and Photographs. The last three photographs attached to this ticket clearly show a cluster of trees that do not interfere with the right of way, do not provide FEMA information to determine the target tree, and do not identify the possibility of an immediate threat. *Id.*

260. The work that was identified as eligible could have easily been deemed ineligible if not for FEMA's efforts to decide in favor of the Parish if eligibility was questionable. And while the Parish argues in its Arbitration Request that the photographs support all 25 cuts as eligible, it is the Parish that is being inconsistent and "flip flopping." In response to the LLA, PEC's own audit has many of these same cuts clearly marked as ineligible. *See,* Exhibit 167 – PEC Leaner/Hanger Audit dated March 29, 2009. The Parish can't seem to accurately reflect its own eligibility findings so it is understandable why it has trouble speaking to and understanding FEMA's determinations on this ticket.[55]

g. Ticket 07541

261. Again, the Parish asserts that FEMA was inconsistent in the validations performed because FEMA's second validation of the cuts for Ticket 07541 found 5 additional cuts eligible than the first validation. *See* (*Exhibits in possession of Relator*), Exhibit 264 - Request for Arbitration at Page 16. As stated previously, the Parish requested the 2nd validation and had FEMA not pushed the limits of eligibility in the second validation in order to assist the Parish, the

[55] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix P.

findings from the two validations would have been identical. As a result, FEMA found 5 additional cuts where a minutia of evidence towards eligibility was identified.

262. The Parish also incorrectly asserts the argument that FEMA miscounted the total number of cuts for this ticket. Ticket 07541 identified 25 cuts for 3 trees and FEMA's validation for this ticket shows 30 cuts for 2 trees. As explained previously, in many situations the monitors would continue ticket entries for one particular tree from one ticket to the next and FEMA validation was recorded by tree not by ticket. For Ticket 07541, the first 5 cuts listed on Ticket 07541 were for a tree that was first documented on Ticket 07540. *See, (Exhibits in possession of Relator),* Exhibit 189 – Ticket 07540. Because FEMA's validation was recorded by tree, the 6 cuts for this tree identified on two separate tickets were recorded on Ticket 07540, where the tree was first documented by PEC. *Id.* The two trees which are first recorded by PEC on Ticket 07541 each had 15 limbs cut. *Id.* These cuts were recorded by PEC on Ticket 07541 and continued onto Ticket 07542. *See, (Exhibits in possession of Relator),* Exhibit 190 – Ticket 07542. Since FEMA recorded the cuts by tree, all 30 cuts were recorded in FEMA's validation on Ticket 07541. The Parish was made aware of FEMA's process for recording the cuts during the appeal process, but as stated previously, the Parish continues to push this flawed argument onto this Panel. *See* Exhibit 53– FEMA HQ Response to Second Appeal, January 6, 2012

263. As is the case with other tickets presented to the Panel for review, the photographs and monitor notes for Ticket 07541 also tell a much different story than that presented by the Parish. The photographs fail to provide FEMA with a description of the immediate threat. *See,* Exhibit 187-188. Instead, the photographs provide FEMA with a visual of ineligible work in the form of pruned trees and piles of branches with few visible breaks.[56] Despite the Parish's claim

[56] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix S.

to this Panel that the photographs show that all of the cuts are eligible, in PEC's validation of Ticket 07541 they too found ineligible work. Line item 13 of Ticket 07541, as reported to the LLA, is marked through with an "X", meaning it was ineligible. *See, (Exhibits in possession of Relator),* Exhibit 191 – PEC validation documentation for Ticket 07541. The Parish asserts 100% eligible work for this ticket onto the Panel despite knowing that their own monitor already identified portions of this ticket as ineligible.

h. Ticket 07833

264. For Ticket 07833 the Parish argues that FEMA documented 13 cuts where there was actually only 1 cut, again making the argument that FEMA's documentation was inaccurate and flawed. *See* (*Exhibits in possession of Relator*), Exhibit 264 - Request for Arbitration at Page 16. Despite having been advised of the method used to record the cuts during the validation process, the Parish asserts this false argument onto the Panel. *See* Exhibit 53 – Second Appeal. In fact, the final tree location recorded on Ticket 07832 had 13 limbs cut from it, with the last limb being the sole cut recorded on ticket 07833. *See, (Exhibits in possession of Relator),* Exhibit 192 – Ticket 07832 and 07833. When FEMA entered the information for this tree into the validation spreadsheet they recorded all cuts for this tree under Ticket 07833. *See, (Exhibits in possession of Relator),* Exhibit 193 – FEMA validation for Ticket 07833. FEMA's record was not inaccurate; it simply recorded the information in a manner that made it easier for FEMA to use as a reference.

265. Further, the photographs and other documentation tell a story much different than that presented by the Parish. On Ticket 07833, the first line item listed has a time written that is unrecognizable and the GPS coordinates are missing.[57] In addition to those flaws on the ticket

[57] In the Parish's response to the LLA, the Parish makes note of the missing GPS coordinates and added them in on the validated PEC ticket.

itself, the 17 photographs included for this ticket submitted to FEMA are also flawed. FEMA could have denied not only the one cut on Ticket 07833 but also the additional 12 cuts for this tree on Ticket 07832 because the photographs, like the monitor notes, provide FEMA with no way to determine the location of the tree to a public right-of-way. *Id.* In fact, the pictures look like they were taken on what could be a tree farm instead of a public right-of-way that could cause and immediate threat to life and property. *Id.* Despite the missing information and inconclusive photographs, in FEMA's effort to push the limits of its eligibility determination, FEMA found 3 cuts for this tree eligible.

266. With over 4,500 tickets the Parish chose to focus on the 8 examples listed above. With the exception of two tickets which slightly understated the number of cuts, all work reviewed was identifiably documented and results tabulated accurately. These tickets do nothing to further the Parish's claims against FEMA. Instead, they serve only to validate FEMA's eligibility determinations.[58]

G. Leaner and Hanger Conclusion

267. When taking into account all of IED, PEC and the Parish's errors outlined throughout this brief, the record reflects that FEMA's eligibility determinations are true and correct. Both the OIG and LLA found no fault with FEMA's eligibility determinations and both agree that it is FEMA, and FEMA alone, who can make the final determination regarding eligibility. Through multiple validations, and multiple audits supporting FEMA's findings, there is nothing presented by the Parish that demonstrates FEMA made any wrong decisions or misapplied regulation or policy in making those eligibility determinations.

[58] *See also* Exhibit 140 – Arborist Review, Draft Report dated February 24, 2014 at Appendix T.

268. FEMA stated, should the Panel feel it necessary to do its own sample validation as part of its review of the merits of this case, FEMA asks the Panel to keep these questions in mind while reviewing not only the photographs and monitor's notes submitted as Exhibits by Relator, but also those submitted by the Parish:

1. Was the work performed required as a result of the Disaster in accordance with 44 C.F.R. § 206.223(a)(1)?
2. Did the Parish have legal responsibility for the property on which the work was performed in accordance with 44 C.F.R. § 206.223(a)(3)?
3. Did the trees and limbs pose an immediate threat to life, public health and safety, or improved property in accordance with 44 C.F.R. § 206.223(a)(3)?
    a. If so, does the documentation sufficiently describe the immediate threat to life or property in accordance with the eligibility requirement under FEMA 325?
    b. Does the documentation clearly define the scope of work to remove the immediate threat in accordance with the eligibility requirement under FEMA 325?
    c. Does the documentation specify the improved public property location by recording the nearest building address and/or GPS location in accordance with the eligibility requirement under FEMA 325? Is that information accurate?
    d. Does the documentation denote the date, labor and equipment used to perform the work in accordance with the eligibility requirement under FEMA 325?

269. FEMA asked these questions, which contain the criteria for eligibility, as it reviewed the documentation submitted by the Parish for leaner and hanger debris removal. This Panel will find, as FEMA did, the answer to one or more of these questions is repeatedly "No." As such, the Parish's leaner and hanger claim in this case must be denied as the work performed failed to meet FEMA eligibility requirements. FEMA's original determination on leaner and hanger debris removal work was correct. Further, FEMA has demonstrated time and time again that the work performed was not only ineligible for reimbursement but in most cases fraudulent. FEMA has proven time and time again that the billing practices of the Defendants is flawed and this was an act of greed.

COUNT II: FILING FALSE PUBLIC RECORDS 31 U.S.C. § 3729(a)(b)(c)

WET DEBRIS IN WETLANDS, WATERWAYS AND DRAINAGE AREAS

270. Relator asserts that FEMA's determination to deny all funding for wet debris removal work is correct, in accordance with law, regulation and policy, and that the Parish's claim for additional funding should have been denied. Contrarily, the Parish argues that FEMA's eligibility determinations related to wet debris were wrong. The Parish asserts that the wet debris work performed in the Parish after Hurricane Gustav was Hurricane Gustav-generated, FEMA-eligible work, legally performed, performed by the most experienced debris experts in the State, documented well beyond the requirements necessary to determine FEMA eligibility and performed precisely according to the requirements set forth in the debris contracts. *See, e.g.,* Exhibit 264 –Request for Arbitration, Pages 37-38, 57-58 & 78-87. The Parish also asserts that all of this work was necessary to eliminate life and safety threats on improved property. *See* Exhibit 264- Request for Arbitration, Pages 56-78. Finally, the Parish argues this Panel should believe that FEMA's review and determinations related to wet debris were fatally flawed and FEMA misapplied regulations and policies. *Id.* As will be thoroughly explained below, the reality is that the Parish's wet debris removal operation itself was fatally flawed from the procurement of the contracts, through the performance of work, failure to obtain legally-required permits, and to the narrative of events the Parish presents to this Panel in its Arbitration Request. Accordingly, FEMA's determinations are correct and the Parish should be denied all additional funding claimed for its wet debris removal and monitoring work.

A. FEMA's Denial of Livingston Parish's Claimed Wet Debris Work Is Correct, Since the Parish Did Not Demonstrate That the Claimed Work Was the Result of a Major Disaster Event Pursuant to 44 C.F.R. § 206.223(a).

271. The Parish's claim that all of the work it completed to remove wet debris located in the Parish's wetlands and drainage areas is fatally flawed and cannot be established as being the result of Hurricane Gustav pursuant to 44 C.F.R. § 206.223(a). Pursuant to 44 C.F.R. §

206.223(a)(1), an item of work must first "be required as a result of the emergency or disaster event" in addition to meeting other eligibility criteria, *see infra*, to be eligible for reimbursement under FEMA's Public Assistance program. For a multitude of reasons, Livingston Parish has failed to demonstrate that the work was eligible and as having been required as a result of Hurricane Gustav.

1. The Parish has a history of reoccurring flooding events.

272. The Parish admits that Livingston Parish has a history of flooding dating from before Hurricane Gustav, that the Parish experienced flooding even after Hurricane Gustav, and that the Parish will continue to flood, regardless of its wet debris removal operations at issue here. The Parish states, "The abundant waterways, combined with Livingston Parish's low-lying topography and relatively flat terrain, make the Parish particularly vulnerable to flooding." *See* Exhibit 264- Request for Arbitration, Page 34 (also noting that Parish has experienced "numerous floods since Hurricane Gustav"). Further, the Parish states that Hurricane Gustav produced a "risk of flooding," but has provided no evidence that Hurricane Gustav generated the wet debris the Parish removed from its natural waterways, canals and ditches. *See id.* Natural topographical conditions that make an area prone to flooding, regardless of a declared disaster event, do not result in eligible work, if the work is not "required as a result of the emergency or disaster event." *See* 44 C.F.R. § 206.223(a)(1). Unfortunately, the Parish endures topographical conditions which are prone to flooding; however, this does not mean that debris can be claimed as eligible work under FEMA's Public Assistance program unless that debris can be linked as resulting directly from the disaster event. *Id.*

273. It is well documented that 60-70% of the Parish is located in a floodplain and recurrently floods regardless of disaster activity. *See, e.g., (Exhibits in possession of Relator)*

Exhibit 194- Louisiana State University, AgCenter, Livingston Parish Flood Map (effective Apr. 3, 2012) (showing that a majority of the Parish is in a 100-year flood plain), *also available at* http://maps.lsuagcenter.com/la_floodmaps/. *See also (Exhibits in possession of Relator)* Exhibit 195 - FEMA, Flood Insurance Study of Livingston Parish and Incorporated Areas, Flood Insurance Study Number 22063CV00A (Apr. 3, 2012) (explaining the existence and severity of flood hazards in the Parish and explaining the Parish's history of flooding). The Parish admits that it has endured "frequent flooding over the years, including four major floods during the 1990s," in addition to flooding from Hurricane Katrina in 2005, and other intervening weather events. *See Exhibit 264-Request For Arbitration*, Page 34. Weather documentation supports the Parish's claims of consistent flooding throughout the Parish. *See, (Exhibits in possession of Relator),* Exhibit 196- NOAA, Record of Climatological Observations, Livingston Parish, 2005 to 2010. Further, the Parish submits its own documentation in support of FEMA's argument through photographs taken in December 2009, photographs and information for Tropical Storm Lee in 2011, flooding events in 2011 and 2012 (from even as little as 3 inches of rain), and flooding from Hurricane Isaac in August 2012. See Exhibit 264-Request For Arbitration, Pages 64-77. The Parish acknowledges that "[s]ince Hurricane Gustav hit the Parish, several other storms have caused flooding in the Parish." *See id.* at Page 64. Further, the Parish acknowledges that "[a]ll of the flooding shown above originated from a waterway from which the Parish had cleared Gustav debris. These waterways, therefore, pose an immediate risk of flooding even without debris from Gustav." *See id.* at Page 77 (emphasis added).

274. To provide a specific example of the recurrent flooding that occurs naturally from the Parish's topography, consider the Parish's application for a flood mitigation project for the Colyell Creek Basin. As acknowledged by the Parish, "[s]hortly after Gustav, the Parish

applied for a grant from FEMA to widen and deepen West Colyell, Middle Colyell and Little Colyell Creeks, as well as some of their tributaries, in order to alleviate their frequent flooding." See Exhibit 264-Request For Arbitration, Page.64. As explained in the Parish's May 15, 2009 application for FEMA's Hazard Mitigation Grant Program ("HMGP"):

> The existing drainage system is undersized and not capable of handling the runoff experienced with large rain events....In its current design the water from the previously mentioned creeks flows to Colyell Bay to empty into the Amite River. These narrow creeks back-up water causing flooding of surrounding communities. Major and significant flooding has occurred in Livingston Parish seventeen times over the past century with little change to the natural drainage within the Parish.

See, (Exhibits in possession of Relator), Exhibit 197, Page 4 – Livingston Parish's HMGP Application, May 15, 2009. In its HMGP application, the Parish provides an estimated project cost of $987,785 to address the issues with West Colyell Creek and proposes to "widen and deepen the drainage canals." *Id.* at Page 5. In the Parish's recent supplement to its HMGP application, the Parish additionally states that it believes that an extension of the proposed project into the southern portions of the Parish would be beneficial. *See, (Exhibits in possession of Relator),* Exhibit 198–West Colyell Creek – Flood Mitigation Project HMGP # 1603-063-0007 Supplemental Information for Livingston Parish, September 3, 2013. In its Arbitration Request, the Parish provides pictures (which it notes were taken from its HMGP application) of flooding from Little Colyell Creek, Middle Colyell Creek and West Colyell Creek in support of its argument that those waterways presented an immediate threat to lives or improved property. *See* Exhibit 264-Request For Arbitration, Pages 64-66. The Parish's 2009 application is not even the first time that the Parish has attempted to address the recurrent flooding problems caused by the Colyell waterways by applying for a HMGP grant from FEMA; the Parish had also performed a cost-benefit analysis of the issue dating from 2006 concluding the same. *See, (Exhibits in*

possession of Relator), Exhibit 199–Middle Colyell Creek & Tributaries Drainage Project HMGP# 1603-063-007 (including a 2011 FEMA funding letter and benefit-cost analysis dating from 200. However, as discussed, while the Colyell waterways may present a threat of flooding, such flooding cannot be said to have necessarily been required as a result of Hurricane Gustav pursuant to 44 C.F.R. § 206.223(a). Similarly, pre-storm 2008 and post-work 2010 aerial photos of Renninger Lateral also show a road that is flooded in both pictures. *See, (Exhibits in possession of Relator),* Exhibit 200 – Renninger Lateral 2008 and 2010 close up aerial photos of flooded road. As with the Colyell waterways, it would appear that the natural topography of that part of Renninger Lateral would make a determination that work in that area was specifically required because of Hurricane Gustav difficult.

275. Accordingly, the Parish has proven FEMA's point, that is, that the Parish routinely floods regardless of a disaster event. As a result, it is difficult to determine what, if any, debris results when a disaster does occur, unless maintenance and proper documentation is established. Further, what the Parish does not seem to correlate with its own statements is that with recurrent, natural flooding activity, it was critical for the Parish to demonstrate to FEMA that only Hurricane Gustav, directly-created wet debris that posed an immediate threat was identified, documented and submitted to FEMA. *See* 44 C.F.R. § 206.202(d). Any of the persistent flooding events could have moved debris or created a potential for a blockage, if a blockage even occurred. The Parish failed to do so; therefore none of the wet debris claimed could be established as directly resulting from Hurricane Gustav as required by 44 C.F.R. § 206.223(a). Further, the Parish's expectation that Federal taxpayers take responsibility for funding wet debris removal and monitoring operations, when the wet debris has not been established as having been caused by a disaster, and in an area that consistently floods, is without merit and fiscally irresponsible.

Relator asserts that for all the reasons above, the wet debris claimed by the Parish could not be established as Hurricane Gustav-generated debris and is therefore ineligible.

2. The Parish has a poorly functioning natural drainage system.

276. In addition to being prone to regular flood events, both FEMA and the Parish recognize that the Parish has a poorly functioning natural drainage system. As quoted by the Parish, FEMA identified that the Parish's "natural drainage system is not fully developed" and even the upland areas have poor natural drainage. *See* Exhibit 264-Request For Arbitration, Page 34. As is described in more detail in the 2012 Flood Insurance Study the Parish quoted:

> The parish has a relatively flat terrain, which is on a coastal terrace of comparatively young geological age.... The natural drainage system is not fully developed, and even most of the uplands are classified by the Natural Resources Conservation Service (NRCS) (formerly known as Soil Conservation Service) as "poorly drained." Many of the smaller streams in the southern part of the parish have indefinite channels in broad swales that are covered with water after heavy rainfalls. These swales are known locally as "slashes."

See Exhibit 195 - FEMA, Flood Insurance Study of Livingston Parish and Incorporated Areas, Flood Insurance Study Number 22063CV00A (Apr. 3, 2012). Clearly, natural drainage problems, which cause or exacerbate flooding, are not a result of a major disaster event, and therefore, FEMA cannot fund debris caused by natural drainage issues pursuant to 44 C.F.R. § 206.223(a)(1).

3. The Parish failed to establish Hurricane Gustav was the origin of removed wet debris.

277. Even if there was eligible debris in the Parish's waterways, which Relator asserts the Parish has failed to establish, the Parish has also failed to establish that the debris that was removed was deposited by the Hurricane Gustav major disaster event, in accordance with 44 C.F.R. § 206.223(a)(1). For example, for the debris removal work conducted by IED both within

and outside of the GDDs, FEMA notated in PWs 5594 and 5590,[59] respectively, that the Parish had failed to provide any evidence to establish that the debris in the streams and drainage areas were generated as a result of Hurricane Gustav. *See* Exhibit 107- PW 5594; Exhibit 104-PW 5590. Specifically, FEMA notes in both PWs that FEMA became aware of the magnitude of the wet debris removal work claimed inside of the drainage districts in the spring of 2009, only *after* the Parish's contractors had begun the wet debris removal work in the fall of 2008. *See* Exhibit 107- PW 5594, Page 4; Exhibit 104- PW 5590, Page 5. A debris task force consisting of eight[60] experienced debris management professionals conducted site visits from mid- June to mid-October of 2009. *Id.* As a result of these site visits, the Parish claimed that it had removed 168,401.78 Cubic Yards ("CY") of wet debris from approximately 190 miles of waterways within the gravity drainage districts and 37,879 CY of wet debris from 234 miles of waterways outside of the drainage districts. *See* Exhibit 107- PW 5594, Page 4. Exhibit 104 – PW 5590, Page 4. Further, vegetative debris was alleged to have been removed from 108 waterways inside the drainage districts, and from 68 waterways outside of the drainage districts. *See Exhibit* s 107-PW 5594; Exhibit 104-PW 5590. After reviews of the documentation submitted, FEMA could not ascertain how the Parish was able to distinguish and document the presence of disaster-generated debris, versus previously existing debris, based on the insufficient documentation submitted.

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[59] The PWs at issue had multiple identifiers: (a) PW 5590 (for wet debris removal by IED, outside of the GDDs) was also labeled GV2-188; (b) PW 5591 (for wet debris monitoring by PEC, outside of the GDDs) was also labeled GV2-187; (c) PW 5593 (for wet debris monitoring by AFA, inside of the GDDs) was also labeled GV2-186; and (d) PW 5594 (for wet debris removal by IED, inside of the GDDs) was also labeled GVS-185.

[60] Originally, six debris specialists were tasked to validate the Parish's wet debris work, but this number was increased to eight as the work continued. *See, Exhibit* 23– Jeffrey Jones Affidavit.

278. Moreover, the documentation in the record establishes that the Parish and its contractors actually knew that some of the debris was ineligible and not disaster-related debris, but they intended to lump in the ineligible debris with the potentially eligible debris and submit it all to FEMA regardless. For example, in a meeting[61] held on or about November 25, 2008[62] (the "November 25, 2008 Meeting"), Brian Fairburn (BF), the Parish's OHSEP Director; Ted York (TY), an engineer with AFA; and David Green (DG) of IED, discuss how to justify the clearance of non-disaster generated debris and submit that work to FEMA for reimbursement:

> 1:44:46 BF: the stuff that's in the creek that's not Gustav or Ike storm generated debris you can't approve that
> 1:44:53 TY: well now you know
> 1:44:56 DG: But it's all Gustav, we have asked that question, he said it's all Gustav it's all related
> 1:45:05 TY: he said if it's impeding the flow of the ditch it's all Gustav.
> 1:45:07 BF: I understand but they want to see the new storm generated debris _____ underneath that the yardage itself is denied
> Unidentifiable portion of recording
> 1:45:29 BF: You following what I'm saying? Just so. This right here is in the creek and its stopping it up, but its old stuff. This is the storm generated debris. When you identify that storm generated debris you also put in the cubic yards, of that right there. And when this was moved they're not gonna know that was there, because they take that as well and it's captured in the yardage. You see what I'm saying? It's a twofold deal.

[61] As noted earlier in the Statement of Facts, FEMA's copy of the audio for the November 25, 2008 meeting is longer than the audio provided by the Parish. *See supra.* FEMA has produced its own transcript from the full audio, and the audio and FEMA's transcript are available as Exhibit s in this proceeding. *See Exhibit* s 69-70- Transcript of November 25, 2008 Meeting & Full Audio of November 25, 2008 Meeting. Throughout this Response, references to the November 25, 2008 meeting are citations to the full transcript and audio that FEMA has of that meeting.

[62] The meeting is referred to by the Parish as having occurred on November 26, 2008, although the transcript the Parish references is from November 25, 2008. *See, e.g.*, Exhibit 264- Arbitration Request at Page 36; *id.* at Page 36, Note 92. FEMA's Jeffrey Jones' notes of the same meeting also use a November 26, 2008 date. However, as the transcript dates used by the Parish and also in FEMA's full transcript of the same meeting use the November 25, 2008 date, the meeting is referred to as the "November 25, 2008" meeting in this Response. *See Exhibit* s 69-70- Transcript of November 25, 2008 Meeting & Full Audio of November 25, 2008 Meeting

See Exhibits 69-70- Transcript of November 25, 2008 Meeting at Page 20 (emphasis added); Full Audio of November 25, 2008 Meeting. The above conversation clearly identifies that the purpose of the debris removal work was to clean ditches, as well as to remove old debris not related to Hurricane Gustav, which is clearly ineligible work under FEMA's Public Assistance program.

279. A similar conversation occurred at an April 2, 2009 meeting of which FEMA employee, Jeffrey Jones, was in attendance. In that meeting, Mr. York admitted that much of the debris being removed might actually have been left over from Hurricanes Katrina/Rita and was not Hurricane Gustav-created debris. *See, (Exhibits in possession of Relator),* Exhibit 201- April 2, 2009 Meeting Minute Notes. Further, Parish President Mike Grimmer, in a July 7, 2009 meeting with representatives for the Parish, its contractors, GOHSEP and FEMA made statements addressing eligibility concerns that had been brought to his attention:

> Mr. Grimmer then made several other statements about things that had been brought to his attention: 1 AFA monitors said that they were **never told to separate debris, canal or bank**, ... 3. Several residents are saying that their trees were taken as timber. Mr. Grimmer said that it appeared there were many things done illegally and he wanted to uncover these wrong doings and see that the necessary actions were taken.
>
> Mr. Bonura [Jeff Bonura, of BBEC/PEC] asked Mr. Grimmer to sign the monitoring PW and allow it to go through the system. Mr. Grimmer said that he was uncomfortable doing so because the debris contractor would ask if the work was not eligible to be paid, how could the Parish pay the management company. Mr. Moore [Ronald Moore of FEMA] also added that all the PWs were being updated because much of the work appeared to be ineligible and if the work was ineligible the monitoring would be ineligible. Bonura backed off saying that he did not want to put the Parish in an uncomfortable situation.

See, (Exhibits in possession of Relator), Exhibit 22- Data Report for Case Management File, Meeting at Parish Offices, July 7, 2009. Thus, the Parish's own contractors and Parish President admitted that wet debris removal work was ineligible.

4. The Parish did not provide FEMA with evidence of routine maintenance of their waterways.

280. The Parish is required to demonstrate it performed routine maintenance of waterways for which it now claims FEMA reimbursement. *See, (Exhibits in possession of Relator),* Exhibit 202- Public Assistance Guide, FEMA 322/June 2007 at Page 33 (discussing the use of maintenance records to establish that the requested work is disaster-related). This lack of maintenance is clearly demonstrated by the necessity for the contractor to cut numerous access roads and clean ditches throughout the Parish to access the waterways and drainage areas to remove alleged blockages that the Parish later claimed had been caused by Hurricane Gustav-generated debris. *See (Exhibits in possession of Relator)* Exhibits 203 and 204 – Example aerial photos evidencing access roads (Durango Lateral, Perkins Road/Bo Harvey, and Renninger Lateral); Examples of photos of access roads. For example, IED representative David Green (DG) stated in the same meeting on November 25, 2008,

> 1:47:54 DG you can't pick and choose to discriminate which area you are going to clean and which lateral ditch you are not going to allow to back up and it's acceptable to allow these to back up but unacceptable to allow those to back up. **It's all a hazard. The Parish has identified it's a done deal cleaning it out. I'm going to go make sure my guys aren't clear cutting because they were cutting some straight trees on the side of the ditch that didn't appear to be eligible** so I'm going to talk to my crews about that now, who, let's identify maybe a dozen or two dozen places we're not working that are just maybe, you send one crew of guys that go around and identify, say okay, here's, and that way it covers gravity drainage district, one, two, five and the public work area that are outside of them…

See Exhibits 69-70- Transcript of November 25, 2008 Meeting & Full Audio of November 25, 2008 Meeting. Clearly, Mr. Green believed that ditch cleaning was acceptable and would be improperly claimed as a hazard. However, ditch cleaning is a maintenance issue and is not

eligible for FEMA Public Assistance funding. *See* Exhibit 202- Public Assistance Guide, FEMA 322/June 2007.

281. Additionally, FEMA was told in a meeting with the Parish's monitoring firms that maintenance records for the streams were kept by the drainage districts. Further, in the Parish's First Appeal, dated June 14, 2010, the Parish stated, "[T]he Parish DPW [Department of Public Works] traditionally maintained drains outside of the gravity drainage districts, but did not keep logs or diaries." *See* Exhibit 108, at Page 4, n.5 – Parish's First Appeal dated June 14, 2010. As a result, according to the Parish, "traditionally maintained" meant each drain was "maintained" and pre-qualified to determine the necessity for removing immediate threats prior to the issuance of work orders. *Id.* Further, the Parish claims that it "regularly maintained the waterways within its boundaries, so any debris that it cleared would have been deposited by Hurricane Gustav." *See* Exhibit 264-Request For Arbitration, Page 91. However, the maintenance records show that the maintenance measures taken by the Gravity Drainage Districts involved mostly cutting grass and weed-eating along some of the ditches within the various districts, with some light maintenance with regard to removing debris from areas near hunting camps and in some instances dredging of ditches with a truck-hoe. *See, (Exhibits in possession of Relator),* Exhibit 205– GDD Maintenance Logs; *see also* Exhibit 112– FEMA Response to Parish's First Appeal for the Wet Debris PWs. From the maintenance logs, it appears that maintenance was infrequent, if it even took place. For example, GDD #1 provided six pages of monitoring logs to FEMA. *Id.* According to those logs, while the district has records from May 22, 2002 through May 10, 2006 (which comprise pages one to five), an 18-month gap appears before the date of the next entry on January 28, 2008, on page six, when it appears that the GDD suddenly renewed its maintenance

efforts on some of its waterways again. *Id.*; *see also* Exhibit 112, Pages 11-12 – FEMA Response to Livingston Parish First Appeal, May 13, 2011.

282. Accordingly, for all the reasons stated above, the Parish has not established that the wet debris claimed was "required as the result of the emergency or major disaster event," *i.e.* Hurricane Gustav, in accordance with 44 C.F.R. § 206.223 (a)(1). As such, the Parish's request for funding for wet debris should be denied.

B. The Parish Failed to Evidence It Had Legal Responsibility for the Claimed Wet Debris Work Pursuant to 44 C.F.R. § 206.223(a)(3) and 206.226(a).

1. **The Parish is unable to demonstrate that it had legal responsibility for wet debris located on private or commercial property**.

283. FEMA correctly denied eligibility for wet debris claimed on private property because the Parish was unable to demonstrate that it had legal responsibility for the work as required by 44 C.F.R. § 206.223(a)(3). To be eligible for financial assistance, an item of work must be the legal responsibility of an eligible applicant. *See* 44 CFR § 206.223(a)(3). Legal responsibility is demonstrated by proof of legal ownership, unless the owner has transferred that responsibility to another party. *See* Exhibit 202- Public Assistance Guide, FEMA 322/June 2007 at Pages 34-35; *see also id.* at Page 35 (listing a right-of-entry as a document necessary for Public Assistance funding for private property debris removal work). Repeatedly, the work performed in this case failed to meet this basic eligibility requirement. In general, FEMA does not reimburse for the cost of debris removal from private property because it does not usually present an immediate threat to the general public. *See, (Exhibits in possession of Relator),* Exhibit 206-FEMA Disaster Assistance Policy (DAP) 9523.13-Debris Removal from Private Property, Page 2 (July 2007). Debris removal on private property is always the primary responsibility of the individual property owner, and other sources of funding, such as insurance, typically cover the

costs. *Id.* Specifically, DAP 9523.14 defines disaster-generated debris as, "Any material, including trees, branches, personal property and building material on public or private property that is directly deposited by the disaster." *Id.*

284. In extraordinary circumstances where private property debris is pushed to the public right of way and poses an immediate threat to the public, FEMA may authorize removal of private property debris if the FEMA Federal Coordinating Officer ("FCO") determines that the debris poses an immediate threat. *Id.; see also* 44 C.F.R. 206.224(b); *See* (*Exhibits in possession of Relator),* Exhibit 207 - Debris Management Guide, FEMA 325/July 2007 at Page 33; Exhibit 206- FEMA Disaster Assistance Policy (DAP) 9523.13-Debris Removal from Private Property (July 2007). If private property debris is authorized, a subgrantee must show that it has a legal basis established by law, ordinance, or code in which to exercise its authority on private property. *Id.* Generally, this is established by obtaining a Right of Entry ("ROE") from the land-owner granting a Subgrantee an entitlement to perform debris removal on private property. *Id.* Further, the Subgrantee must show that the Subgrantee has legal responsibility to take action independent of any expectation or request that FEMA will reimburse costs for private property debris removal. *Id.* Finally, there are other requirements which must be met prior to FEMA funding any work on private property, including verification that a legally authorized representative from the Subgrantee has ordered private property debris removal; a Subgrantee resolution declaring the private property debris is an immediate threat; and full indemnification of FEMA for any debris removal activities on private property for which the Subgrantee authorizes. *See id.*

285. Similarly, the removal of debris from commercial property is generally ineligible for Public Assistance grant funding, because it is assumed that commercial enterprises retain insurance that will cover the cost of debris removal. *See id.* And, only in extraordinary

circumstances as determined by a FCO, may the removal of debris from private commercial property by a State or local government be eligible for FEMA reimbursement when such removal is in the public interest pursuant to 44 C.F.R. § 206.224(a) and (b). *Id.* Industrial parks, golf courses, commercial cemeteries, apartments, condominiums, and mobile homes in commercial trailer parks are generally considered commercial property with respect to Public Assistance funding. *Id.*

286. As demonstrated, numerous requirements must be satisfied *prior* to the removal of private or commercial property debris through completion of the debris removal. However, it is critical to note that private property debris was never authorized for Hurricane Gustav and the Parish failed to satisfy all of the above requirements. If private or commercial property debris was authorized, it would have been included in the Federal Disaster Declaration and FEMA State Agreement, which delineates exactly what Federal assistance is authorized under the specific disaster. *See, (Exhibits in possession of Relator),* Exhibit 1- FEMA-1786-DR, Louisiana, Disaster Declaration. Therefore, any private or commercial property debris removal alleged under Hurricane Gustav was ineligible at its inception and remains ineligible now.

287. Despite the Parish's lack of authority to remove debris on private property, this case is riddled with numerous examples of the Parish's unauthorized wet debris removal operations on private and commercial property. FEMA is aware of at least four landowners who filed Petition for Damage claims in the Livingston Parish Judicial Court complaining of unauthorized debris removal activity on their private property. *See, (Exhibits in possession of Relator),* Exhibit 208- Parish Residents' Petition for Damage Claims. FEMA also has emails, which reflect evidence of the current ineligible work on private property. *See, (Exhibits in possession of Relator),* Exhibit 209- Email from Jeffrey Jones to Will Clark, "Resident issues"

(June 25, 2009, 2:23 PM). This email discusses and lists several residents in the Clayton Bayou area that are unhappy with the Parish work performed and states that no written ROEs were obtained, as required by FEMA. *Id.* In the email, one resident, Mr. Webb had advised he is concerned because "their house is on a ridge and now that area has been disturbed and they worry about their foundation and possible sliding down the embankment." *Id.*; *see also* (*Exhibits in possession of Relator)* Exhibit 210- Email from Will Clark to Ronald Moore and Freddy Gardner, "Livingston Parish Debris Complaints" (July 9, 2009, 1:57 PM) (listing 5 resident complaints); and (*Exhibits in possession of Relator)* Exhibit 211-Data for Case Management File, June 22, 2009 and June 29, 2009(discussing a resident whose property was along Clinton Allen waterway who had complained of stream debris work done on his property including photos of the work done and complaints by other residents).

288. Moreover, there are numerous press articles in which Livingston Parish residents attended city council meetings and repeatedly complained of the Parish's unauthorized removal of trees on private property. For example, Channel 9, WAFB, Tyana Williams attended the meeting and reported in a segment entitled *Meeting About Debris Clean Up Turns Ugly*, Posted: Aug 06, 2009 10:48 PM CDT, Updated, Aug 14, 2009 6:14 AM CDT:

> The issue began when homeowners complained to the parish that more than storm debris was being removed from their property. One homeowner said she returned home one day to find more than 20 of the trees on her property cut down. She said one of the subcontractors is responsible for damaging her property. Another said workers didn't have permission to be on his land. He says he was told they would be in a creek.
>
> The parish says it received similar phone calls from several parish residents, saying their land had been dug up. International Equipment Distributors, the company contracted to do the work, says it only received a list of 18 upset residents. In addition to the complaints, Grimmer says he stopped the work because he received no invoices for the work that was done between January and May.

> He says the parish only received a bill that went from $2 million to $50 million.

See, (Exhibits in possession of Relator), Exhibit 212- Media Articles - *Meeting About Debris Clean Up Turns Ugly*, Posted: Aug 06, 2009 10:48 PM CDT, Updated, Aug 14, 2009 6:14 AM CDT; Alice Dowty, "Property owners struggle after debris debacle," The Livingston Parish News (Mar. 15, 2012), *also available at* http://m.livingstonparishnews.com/news/article_0bffef8e-6b7d-11e1-adc6-0019bb2963f4.html?mode=jqm (reporting on a resident's complaint about work done on Kemp Lateral). This is just a sampling of numerous articles and other documentation available establishing private property debris removal complaints and clearly FEMA ineligible work.

289. The Parish also removed wet debris from commercial property within the Parish without authorization and without a determination from FEMA that the work performed would be in the public interest pursuant to 44 C.F.R. § 206.224. For example, the Parish accessed wet debris located on commercial timberland owned by the Weyerhaeuser Corporation, which resulted in $5,600.00 in property damage to the company. *See, (Exhibits in possession of Relator),* Exhibit 213- Email from Smith Day to Brian Fairburn, June 9, 2009. The email identifies that it was "the first list of locations and damages that we have found on Weyerhaeuser lands." *Id.* Regardless, the work that IED performed and that was monitored by PEC/BBEC, on the Weyerhaeuser Corporation's land, was submitted by the Parish as eligible work. *See (Exhibits in possession of Relator), Exhibits* 214 and 215 – Request for Work Order 04 (for work performed on Middle Colyell Creek); Exhibit 214- Livingston Parish Maps Nos. 95, 112 & 113 (showing clearly that Middle Colyell Creek runs entirely through Weyerhaeuser land, thus all access to Middle Colyell Creek is through Weyerhaeuser land).

290. Debris removal from the Weyerhaeuser Corporation's property, the complainants' properties, and any of the residents in the media referenced articles clearly evidences that the Parish performed FEMA ineligible work on private and commercial property and then attempted to claim that work with FEMA as disaster-eligible. The complaints prevalently discuss how the Parish failed to get permission through a ROE from the landowner, in most cases never even discussed removing debris from their private land, and in many cases causing more damage to the private property by removing the alleged debris than if they had left it. *Id.* Clearly, this debris is not eligible for PA reimbursement since the Parish presented no evidence that it had the legal authority to go on any of these properties. Further, if the Parish had been properly maintaining these waterways, as it alleges, it stands to reason that ROE's would already have been obtained and new ones would not be needed. These examples are just some of the evidence of inappropriate and incorrect work performed by the Parish on property for which it had no legal responsibility.

291. Notwithstanding Federal requirements, the Parish also had the responsibility to comply with Louisiana law to establish legal responsibility on non-Parish property prior to debris removal operations. Specifically, Louisiana law states:

- **Outside a drainage district**: Under Louisiana Revised Statute 33:1236, parish-governing authorities are authorized to construct and maintain drainage, drainage ditches, and drainage canals where needed to fully drain all of the land in their respective parishes.

- **Inside a drainage district**: In addition, Louisiana Revised Statute 38:113 states, in pertinent part: "The various levee and drainage districts shall have control over all public drainage channels or outfall canals within the limits of their districts which are selected by the district, and for a *space of one hundred feet on both sides of the banks* of such channels or outfall canals, … whether the drainage channels or outfall canals have been improved by the levee or drainage district, or have been adopted without improvement as necessary parts of or

> extensions to improved drainage channels or outfall canals, and may adopt rules and regulations for preserving the efficiency of the drainage channels or outfall canals."

See Louisiana Revised Statutes 33:1236 and 38:113.

292. In Louisiana, in all cases, the complainants are entitled to receive just compensation for any damage to private property. *See Ortego v. First American Title Ins. Co.*, 569 So.2d 101, 105 (La. App. 4th Cir. 1990). In addition, Louisiana statutes do not authorize the dumping of spoil and debris onto a private landowner's property. *See Jones v. Ouachita Parish Police Jury*, 36,552 (La. App. 2nd Cir. 12/11/02), 833 So.2d 1094, *writ denied*, 03-0082 (La. 3/21/03), 840 So.2d 553. Further, the Louisiana First Court of Appeals for the First District has held that, in a case where no drainage district was involved, that trespass had occurred and the complainant was entitled to damages when a parish's employees went on the complainants' private property without their consent or knowledge on two occasions and causing damage both times when cleaning, widening and deepening a drainage ditch. *See, (Exhibits in possession of Relator),* Exhibit 216- Daray v. St. Tammany Parish, 2009 La. App. Unpub. LEXIS 594 (La.App. 1 Cir. Oct. 9, 2009). The court emphasized that since the parish was not a drainage or levee district that the parish did not have a legal servitude to access the ditch through the complainants' private property or to damage that property. *Id.* Here, as in the case cited by the Court in *Daray*, Livingston Parish had no legal authority to go on private property, commercial property, or in drainage district areas, and is liable for trespass as well as damages. Accordingly, based on the Parish's actions, the Parish failed to comply with Louisiana law and any work performed in violation of these laws are ineligible.

2. **Another Federal agency, NRCS, had legal responsibility for the wet debris removal, thus FEMA is prohibited from funding the work pursuant to 44 C.F.R. § 206.226(a) and Stafford Act Section 312.**

293. FEMA is prohibited from funding the wet debris claimed by the Parish since the Natural Resource Conservation Service (NRCS) has legal authority over debris removal from these areas, and Section 312 of the Stafford Act prohibits duplicate funding for the same work. Specifically, 44 C.F.R. § 206.226(a) states, "Generally, disaster assistance will not be made available under the Stafford Act when another Federal Agency has specific authority to restore facilities damaged or destroyed by an event which is declared a major disaster." 44 C.F.R. § 206.226(a). Further, Section 312 of the Stafford Act requires FEMA to "assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source." *See also* Exhibit 138- FEMA 325, Public Assistance Debris Management Guide, Page 22 (stating that "[a]ny debris removal from Federal lands or facilities that are under the authority of another Federal agency or department, such as Federal-aid roads, USACE navigable waterways, and NRCS canals" is not eligible for FEMA assistance under the PA program." Here, the record reflects, and is admitted by the Parish, that NRCS had specific authority over wet debris removal operations in the Parish. *See* Exhibit 264-Request For Arbitration, Pages 35-36. The Parish states in its Arbitration Request that "at least nine different federal departments or agencies have jurisdiction over different types of debris removal." *See* Exhibit 264-Request For Arbitration, Page 36. The Parish further admits that although NRCS had legal authority to fund debris removal in the Parish, the Parish didn't want to wait because the process would take too long. *Id.*

294. Two months after Hurricane Gustav struck Louisiana, the Parish submitted its request to NRCS for federal assistance under the provision of Section 216, Pub. L. 516, for "flood drainage issues that are an imminent threat" and "debris removal funds." *See* Exhibit 64- Letter

from Parish President Michael Grimmer to Kevin Norton, NRCS from Will Clark, Chief Administrative Officer, Livingston Parish, "RE: NRCS Assistance through Emergency Watershed Protection," October 30, 2008. The objective of the EWP Program is to assist sponsors, landowners, and operators in implementing emergency recovery measures for runoff retardation and erosion prevention to relieve ***imminent hazards*** to life and property created by a natural disaster that causes a sudden impairment of a watershed. *See* Section 216, Pub. L. 516, Emergency Watershed Protection Program, EWP Recovery Number 10.923. The work cannot adversely affect downstream water rights and funds cannot be used to install measures not essential to the reduction of hazards. *Id.* In addition, funds cannot be used to perform work on measures installed by another Federal agency. *Id.*

295. The Parish advised NRCS in its request letter: "we do understand that as sponsors of an Emergency Watershed Protection project that our responsibilities will include acquiring any land rights, access and permits needed . . . ." Exhibit 64- Letter from Parish President Michael Grimmer to Kevin Norton, NRCS from Will Clark, Chief Administrative Officer, Livingston Parish, "RE: NRCS Assistance through Emergency Watershed Protection," October 30, 2008 NRCS acknowledged receipt of the program request and advised the Parish that it would send "interdisciplinary damage survey teams" to survey, evaluate and determine eligibility of various "exigency" sites within Livingston Parish which could be eligible for Emergency Watershed Protection Program (EWP) funding. *See* Exhibit 66- Letter to Will Clark, Livingston Parish, from Kevin Norton, NRCS re: EWP, November 4, 2008. NRCS performed several surveys and determined that only 6 channels, Grays Creek, Felder Bayou, Dodes Creek, Willis Bayou, Roderick Creek, and Pierre Bayou, might be determined eligible for the EWP program. *See* Exhibit 102- Letter from E.J. Giering, State Conservation Engineer to Mike Grimmer, Parish

President, "National Resources Conservation Service (NRCS) Emergency Watershed Protection Program (EWP) Assistance for Natural Disasters," November 5, 2009. The Parish deliberately told the NRCS not to survey Middle Colyell No. 3, Middle Colyell No. 4, West Colyell No. 3, and West Colyell No. 4. *See* Exhibit 264-Request For Arbitration, Appx. 6035-6037 at ¶¶ 6-7. The NRCS ultimately concluded that 14 waterways, including Beaver Creek, Colton Creek, Dixon Creek, Miller's Canal, Middle Colyell #1 to #4 and Camp Creek- *all canals where the Parish performed debris removal work it then claimed with FEMA*- were not eligible as presenting "No threat to life or property – no imminent threat." *See* Exhibit 72. Interestingly, the NRCS produced a report describing damage and a scope for work to be performed by the NRCS to address such damage (termed "Damage Survey Reports" or "DSRs") that estimated a $36,356 cost for work on Allen Canal. *See, (Exhibits in possession of Relator),* Exhibit 214- Damage Survey Report Allen Canal, November 12, 2008. However, it does not appear that the Parish decided to take the NRCS' help and preferred to send the bill to FEMA at a much higher inflated cost. *See id.*

296. NRCS has specific legal authority to fund debris removal activity for immediate threats caused by a disaster, and the Parish recognized this authority and applied for the EWP program. In fact, the NRCS completed its assessments by November 2009 and determined that of the multiple channels reviewed for exigency circumstances just six channels could pose an immediate threat. *See, (Exhibits in possession of Relator),* Exhibit 71- Email exchange between Sam Willis/NRCS and Wendall Meaux/Parish, November 26, 2008. The NRCS also advised the Parish that "nothing in Drainage District #1 and #5 will qualify for EWP" (no immediate threat) and Drainage District #2 was still in the review process. *Id.* Finally, in March, 2009, barely six

months after Hurricane Gustav, the Parish was notified that NRCS had completed its assessments. NRCS advised in its March 4, 2009 letter:

> In order for a site to meet the EWP Program eligibility the impairment to the watershed must have been created by the listed natural event (Hurricane Gustav), there must be a threat to life or property, there must be an economic benefit derived from performing the work . . . and the work must be environmentally defensible.

See Exhibit s 72-73. NRCS determined that out of the 22 sites submitted claiming debris removal was necessary to remedy an immediate threat, 14 sites were determined ineligible (no immediate threat), and eight were still in the review process. *Id.* Finally, on November 5, 2009, NRCS sent a letter to the Parish advising that a total of eight channels were eligible for the EWP program but the Panel had selected to withdraw two of the channels leaving: Gray's Creek, Felder Bayou, Dodes Creek, Willis Bayou, Roderick Creek and Pierre Bayou as eligible for NRCS EWP. *See* Exhibit 102- NRCS letter to Parish dated November 5, 2009. NRCS advised the Parish in this letter that the funds were available to the Parish for their debris removal activities for these six waterways. *Id.*

297. As such, the record clearly reflects that NRCS had legal responsibility for funding debris removal activities in the Livingston Parish watershed, and the Parish applied for and was approved funding for six waterways which were deemed by NRCS to pose an immediate threat. *Id.* For the other fourteen waterways, FEMA is also prohibited from funding wet debris reimbursement since the work was clearly not an immediate threat as determined by NRCS. Accordingly, FEMA is precluded from providing disaster assistance pursuant to 44 C.F.R. § 206.226(a) and Section 312 of the Stafford Act as this funding is provided by another Federal agency and any FEMA funding would be duplicative of NRCS EWP program funding or ineligible since it failed to pose an immediate threat to improved property.

C. The Parish's Claims for Wet Debris Removal Work (PWs 5590 and 5594) Are Not Eligible for FEMA Public Assistance, Because the Parish Failed to Evidence that the Debris Posed an Immediate Threat to Life, Public Health, and Safety, or to Improved Property Pursuant to the Stafford Act Section 403, 44 C.F.R. § 206.224 (a) and FEMA Policy.

1. The Parish failed to establish that the wet debris removed by the Parish was an immediate threat to life, public health and safety, or improved property.

298. The Parish's claims for wet debris work failed to demonstrate how the wet debris posed an immediate threat to life, public health and safety, or improved property in accordance with Federal law, regulation, and FEMA policy. Accordingly, Relator asserts on behalf of FEMA that the Parish is ineligible for any amount of reimbursement for wet debris removal in the Parish. Pursuant to the Stafford Act, the removal of vegetative debris from a natural, unimproved watercourse that has not been generated by the disaster at issue is not eligible for PA from FEMA. Section 403 of the Stafford Act[63] authorizes FEMA to fund debris removal operations, as part of "assistance essential to meeting immediate threats to life and property resulting from a major disaster." *See* 42 U.S.C. § 5170b(a)(3)(A). *See also* Exhibit 207- Debris Management Guide, FEMA 325/July 2007 at Page 43(defining eligible work as "the removal and disposal of debris that was generated by a disaster and which presents an immediate threat to the public interest.").

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[63] It should be noted that the Parish states in its Arbitration Request that it is seeking relief under Section 407 (Debris Removal) of the Stafford Act, 42 U.S.C. § 5173. *See, e.g.*, Parish's Arbitration Reqest at Pages 97, 102.) It is true that both Sections 403 and 407 address debris removal. However, "[d]ebris removal grants authorized by Section 407 are provided to states and are separate from the Category A debris removal PA assistance authorized by Section 403." *See* Congressional Research Service, "Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding," at Page13, Note75, available at http://www.fas.org/sgp/crs/homesec/RL33053.pdf. As this Panel is aware, this arbitration is before this Panel pursuant to Section 565 of the Consolidated and Continuing Appropriations Act, 2013 (the "2013 Appropriations Act"), § 565, Pub. L. 113-6, 127 Stat. 381, which provides an opportunity for the arbitration of "applications for public assistance…and the resulting decisions issued by [FEMA] for *category A debris removal* for DR-1786…" *See* 2013 Appropriations Act, §565 (emphasis added).

299. As previously explained in FEMA's implementing regulations, to receive PA reimbursement, the debris removal operation must first be required as the result of an emergency or major disaster event. *See* 44 C.F.R. § 206.223(a)(1). Generally however, even if it has been established the debris removal is a result of an emergency or major disaster event, the Subgrantee must also be able to demonstrate that the debris removal is in the "public interest." *See* 44 C.F.R. § 206.224(a). "Public interest" is defined by FEMA's implementing regulations as being necessary to:

> (1) Eliminate immediate threats to life, public health, and safety; or
> (2) Eliminate immediate threats of significant damage to improved public or private property; or
> (3) Ensure economic recovery of the affected community to the benefit of the community-at-large. . .

See 44 C.F.R. § 206.224(a) (emphasis added). As used in Section 206.224(a), an immediate threat is defined in FEMA's regulations as "the threat of additional damage or destruction from an event that can reasonably be expected to occur within five years." *See* 44 C.F.R. § 206.221 (c). Relating to flood events specifically, FEMA has published further guidance in the form of its Public Assistance Guide (the "PA Guide"), FEMA 322 (June 2007):

> For a flood, the immediate threat exists if a 5-year flooding event could cause damage or threaten lives, public health, and safety. This is not a flood that necessarily happens within 5 years, but a flood that has a 20 percent chance of occurring in any given year.

Exhibit 202 - Public Assistance Guide, FEMA 322/June 2007 at Page 66.

300. With regard to disaster-generated debris removal to protect property, 44 C.F.R. § 206.224(a) specifically notes that such work is eligible only if it protects against significant damage to improved property. *See* 44 C.F.R. § 206.224(a). "Improved property" is defined in FEMA's regulations as "a structure, facility or item of equipment which was built, constructed or manufactured. Land used for agricultural purposes is not improved property." *See* 44 C.F.R. §

208.221(d). FEMA's published policy guidance further clarifies that the scope of eligible work for threats to improved property is limited, and would not include widespread removal of debris from natural, unimproved waterways or in unimproved wilderness areas:

> Debris in a natural stream or flood channel may cause flooding from a future storm. If such flooding would cause an immediate threat of damage to improved property, removal of the disaster-related debris only to the extent necessary to protect against an immediate threat would be eligible. However, not all public property clearance will necessarily be eligible. For example, removal of fallen trees in an unused forested or wilderness area would not be eligible.

See Exhibit 202 - Public Assistance Guide, FEMA 322/June 2007 at Page 68 (emphasis added). This limited scope for eligibility is also emphasized in FEMA's Public Assistance Policy Digest (the "PA Digest"), FEMA 321 (Jan. 2008):

> Examples of ***ineligible*** debris removal activities include:
> - Removal of debris, such as tree limbs and trunks, from natural (unimproved) wilderness areas
> - Removal of pre-disaster sediment from engineered channels
> - Removal of debris from a natural channel unless the debris poses an immediate threat of flooding to improved property from a flood that has a 20% chance of occurring in any one year.

See, (Exhibits in possession of Relator), Exhibit 217 - Public Assistance Digest, FEMA 321/January 2008 at Page 31(emphasis in original).

301. In this case, FEMA has multiple documents which demonstrate that the Parish's wet debris removal work is ineligible for FEMA grant funding because there is simply no immediate threat of any kind posed. *See, (Exhibits in possession of Relator),* Exhibit 218- Jeffrey Jones, Meeting Notes, Apr. 29, 2009; *See (Exhibits in possession of Relator),* Exhibit 219- Example of Work Performed in Unimproved Areas; *See (Exhibits in possession of Relator),* Exhibit 220 – Maps of Livingston Parish showing waterways versus where work was performed. Further, in the separate Gravity Drainage District (GDD) PWs for GDD #1 and GDD #2, the

GDDs performed debris removal operations in their districts immediately after Hurricane Gustav, so there were no immediate threats for which the Parish could later perform its own debris removal operations at GDD locations. *See, (Exhibits in possession of Relator),* Exhibit 221- PW 1048 for GDD #1 and PW 1024 for GDD #2. Further, and notably, for GDD #1, the Parish submitted contract work orders to FEMA for reimbursement for work alleged to alleviate an immediate threat in GDD #1, however, when the GDD #1 became aware of the work orders, the Chairman advised that the work orders claimed "were not prepared by the District, signed by the District or authorized by the District. *See, (Exhibits in possession of Relator),* Exhibit 222- Letter from Roy Zachary, Chairman of Livingston Parish Gravity Drainage District #1, to Carla Richard, Appeals Manager for Disaster Recovery Division, GOHSEP, "Re: Livingston Parish Gravity Drainage Dist. #1 Hurricane Gustav Debris" (Aug. 2, 2011).[64] The Parish failed to provide an explanation to FEMA as to why it was claiming reimbursement for GDD #1 work clearly not completed or authorized.

302. Additionally problematic was that the Parish actually created ditches and roads in some instances, even in unimproved areas. *See, (Exhibits in possession of Relator),* Exhibit 223- Aerial photos of Kemp and Renninger Laterals showing rerouted waterways. For example, in a field interview conducted by FEMA employee Roger Gabor, with a Parish resident about work done on his property, the resident had advised that the "drainage ditch running through his property was non-existent prior to this work being done. The contractors cut timber and brush to create a ROW and dug a ditch about 8" wide and 18" deep." *See, (Exhibits in possession of Relator),* Exhibit 224- Email from Roger Gabor to Ronald Moore, "Field Notes 7/10/2009" (Jul.

[64] See also Alice Dowty, "Drainage Board disowns FEMA appeal documents," The Livingston Parish News (Aug. 20, 2011), available at http://m.livingstonparishnews.com/news/article_2e04a6ee-ca59-11e0-a97f-001cc4c03286.html?mode=jqm.

11, 2009, 10:19 AM). In the email, Mr. Gabor notes that no ROE had been obtained and that all the property was unimproved. *Id.* The creation of ditches and roads, where none existed before, is not necessary to remove an immediate threat and is unequivocally ineligible work under the FEMA Public Assistance program.

303. Further, although the Parish signed contracts for the roadside debris removal and monitoring work even before Hurricane Gustav made landfall in Louisiana at the end of August 2008, the Parish waited until well *after* Hurricane Gustav to put in place the paperwork to complete the wet debris removal and monitoring work and then waited *three months after* Hurricane Gustav to begin the wet debris work. *See* Exhibit 264 – Request for Arbitration, Appx. 6172, at ¶ 81 – Affidavit of Brian Fairburn, sworn to July 15, 2011. *See* also (*Exhibits in possession of Relator),* Exhibit 225 - PEC Contract Amendment No.1 (Feb. 12, 2009); Exhibit 60- Contract Addendum 1 to Debris Removal Agreement between IED, Inc. and Livingston Parish, September 25, 2008; Exhibit 59- Cooperative Endeavor Agreements, Livingston Parish with GDDs Nos. 1, 2, and 5, September 25, 2008; Exhibit 61- AFA Debris Management and Monitoring Services Agreement, Livingston Parish Debris Management and Monitoring Services for Cleaning of Drainage Canals and Ditches, September 26, 2008. If this wet debris work was necessary to limit an immediate threat to life, health or safety or improved property, then it stands to reason that the Parish would have contracted for the debris removal work before Hurricane Gustav — as it did for the roadside debris removal and monitoring work—or shortly thereafter. Common sense dictates that if wet debris was such an immediate threat resulting from Hurricane Gustav, as suggested by the Parish, the Parish would have asked for bids and begun the wet debris work, rather than waiting months to begin. Relator asserts that the Parish's own conduct does not support that the wet debris posed an immediate threat.

2. **The documentation submitted by the Parish's monitors also failed to establish the existence of immediate threats posed by the wet debris.**

304. In addition to the issues discussed previously, the documentation provided by the Parish's monitors consistently failed to establish the existence of any "immediate threat" to life, public health, safety or to improved property as required under 44 C.F.R. § 206.224.

a. Examples of the insufficiency of documentation to prove eligibility.

305. For example, consider a few of the photos[65] highlighted by the Parish in its Arbitration Brief as "extreme examples" supposedly demonstrating that FEMA's position is untenable, shown below.

- Listed as a "before" photo on page 54 of the Parish's Arbitration Brief:



[65] It should be noted that the Parish did not identify in its Arbitration Brief what was the associated work for the photos it used. As a result, the photos are used solely for demonstration purposes here.

The corresponding "after" photo, also on page 54:



See Exhibit 264-Request For Arbitration, Page 54. While the above photos, taken together, clearly show that work was performed, it is not evident whether eligible debris was removed or even if it is the same wet. There are no indications given from the photos whether the waterway shown is the same waterway in both pictures. Assuming however, that both photos do show the same waterway, it is also not apparent from the "before" photo whether the debris shown was generated by Hurricane Gustav, as required by 44 C.F.R. § 206.223(a). As discussed earlier, the wet debris work performed by the Parish did not begin until 3 months after Hurricane Gustav and it is uncertain whether any of the wet debris removed by the Parish was created by the disaster. *See supra* Part II(A). Also, the photos do not establish that the debris shown in the "before" photo was an immediate threat to life, public health, safety or to improved property. Rather, the photos appear to show a waterway that is located in unimproved, natural woodland. The removal of debris such as fallen trees, tree limbs and trunks from waterways in a natural, unimproved or unused forested or wilderness area is not eligible for FEMA PA funding. Exhibit 217 - Public

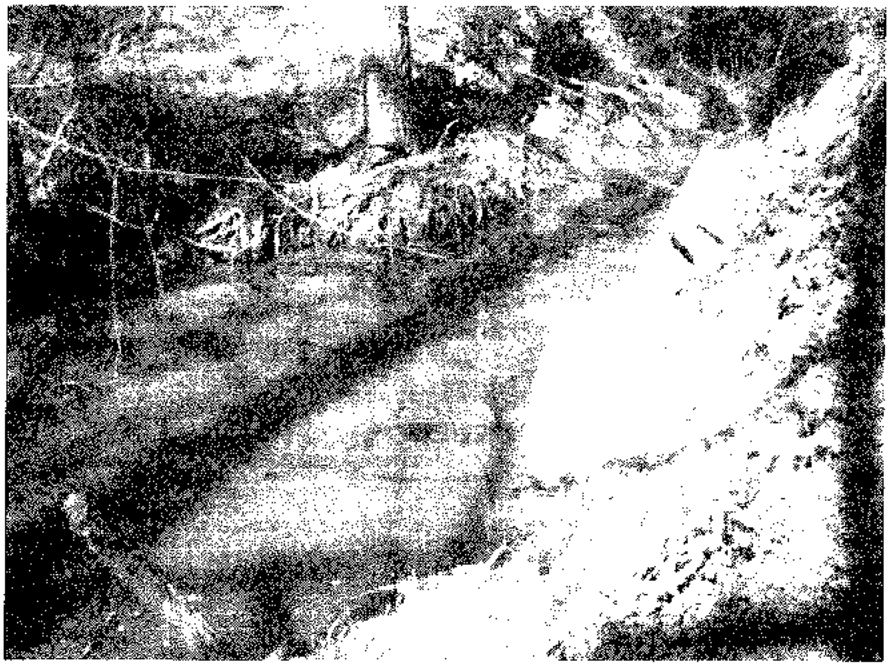
Assistance Digest, FEMA 321/January 2008 at Page 31; Exhibit 202- Public Assistance Guide, FEMA 322/June 2007 at Page 68.

306. Finally, work performed for the "removal of the disaster-related debris only to the extent necessary to protect against an immediate threat" is considered eligible by FEMA. Exhibit 202- Public Assistance Guide, FEMA 322/June 2007 at Page 68. As the "after" photo demonstrates however, the Parish's contractor, IED, did not limit itself to the removal of debris "only to the extent necessary"; rather, the Parish's contractor removed all debris in the waterway and also appears to have removed a significant amount of live vegetation from the waterway's banks. Such work is ineligible under FEMA's regulations.

- Listed as a "before" photo on page 56 of the Parish's Arbitration Request:



The corresponding "after" photo on page 56:



See Exhibit 264-Request For Arbitration, Page 56. Similarly, the photos shown above fail to demonstrate eligible work. As with the previous set of photos — and as is the case for all the pictures used by Parish as "extreme examples" on pages 54 to 56 of its Arbitration Request — it is unclear whether the debris removed was generated by Hurricane Gustav; the work performed appears to have been done in a natural, unimproved wooded area; and it is not apparent how the debris constituted an immediate threat to life, public health, safety or to improved property, pursuant to 44 C.F.R. § 206.224(a). Furthermore, the "before" photo shown above does not appear to show any actual impediment to the flow of water in the waterway in question, as the fallen tree shown in the photo is not even in the waterway. While the Parish states in its Arbitration Request that the photos serve as "extreme examples" that the Parish presumably believes show obviously eligible work, the photos instead (particularly without more context) are examples of insufficient documentation or even of ineligible work –which is precisely FEMA's point.

b. Work Order No. 27 (East Hog Branch) Example

307. Given the volume of wet debris work performed by the Parish, FEMA has numerous examples of wet debris that do not support a finding of eligibility on the basis of "immediate threat" under 44 C.F.R. § 206.224(a). However, as an example, consider the documentation submitted by the Parish for wet debris work performed at East Hog Branch, which was monitored by PEC/BBEC. In a standard form letter that was used by PEC/BBEC to request work orders for waterways outside of the GDDs, Jeffrey Bonura of PEC/BBEC wrote, "East Hog Branch drains a large portion of populated Livingston Parish…The Parish identified flooding in several locations caused by East Hog Branch backing up due to trees and branches knocked over into Hornsby Creek from Hurricane Gustav, and debris backed up into the fallen trees and branches." *See* (*Exhibits in possession of Relator),* Exhibit 226 Letter from Jeffrey Bonura/BBEC to Brian Fairburn, "Livingston Parish Waterways Debris Removal Associated with Hurricane Gustav Contractor Work Order No. 27 East Hog Branch (LA 442 North to LA 1036)," February 23, 2009) ("Request for Work Order No. 27"). In the letter, Mr. Bonura also stated, "The Parish informed us that the flooding of East Hog Branch since Hurricane Gustav is unprecedented, and that when debris was observed by the Parish in the creeks and rivers prior to Hurricane Gustav, the Parish's Public Works crews would have removed the debris." *Id.* As discussed previously, when asked for documentation of the Parish's maintenance efforts for the waterways outside of the GDDs, **the Parish stated that none were available, but that its Department of Public Works traditionally maintains those drains**. *See* Exhibit 108-, Livingston Parish First Appeal of PWs 5590, 5591, 5593, and 5594, June 14, 2010, at Page 4, Note 5.

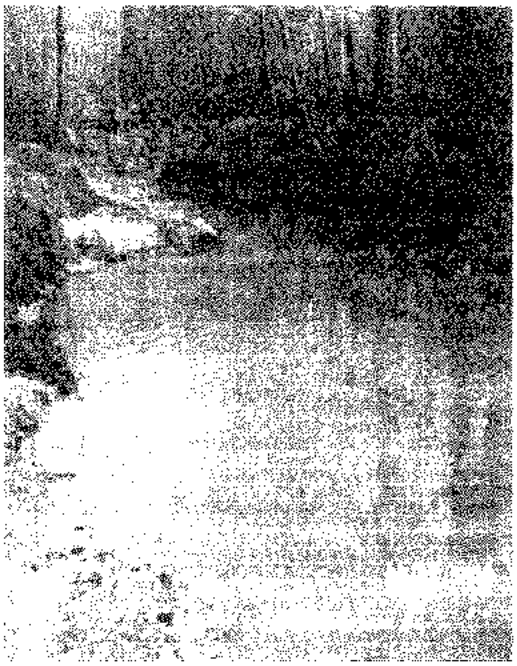
308. Included with Mr. Bonura's request for Work Order No. 27 were maps of East Hog Branch and a spreadsheet documenting a field survey performed by Jay Johnson of McLin & Associates, a subcontractor for PEC/BBEC, on February 12, 2009. In the field survey, Mr.

Johnson included his handwritten notes of the GPS coordinates of debris observed and notes the numbers of supporting photos. *See* Request for Work Order No. 27. at Pages 6-10. A look at the field survey and its supporting photographs however, does not show eligible wet debris. For example, at GPS coordinates N 30° 33' 45.9" / W 90° 42' 42.7" , Mr. Jones notes "3 obst (2 maj.)". *See id.* In his supporting photographs, Mr. Jones documented the three presumable obstructions, of which two he deemed major obstructions. However, as opposed to showing eligible debris, the photos show a moss-covered log, which indicates that the log had likely fallen into the waterway long before Hurricane Gustav five months prior; a long branch and another fallen tree. From the photos, it is again not apparent that the debris was generated by Hurricane Gustav and would be eligible under 44 C.F.R. § 206.223(a). In addition, although the trees are in the water, it does not appear that the trees obstruct the waterway so completely as to create an immediate risk of flooding:





See, (Exhibits in possession of Relator), Exhibit 227, Pages12 & 14 – Work Order No. 27 Assessment Photos. Even giving the monitor the benefit of the doubt however, it is evident that the Parish's contractor, IED, cleared East Hog Branch of everything in the waterway, regardless of eligible or ineligible debris, as the example "after" photo of East Hog Branch submitted by PEC/BBEC shows. It should also be noted that it appears that the wet debris removed by IED is on the bank of the river in the back of the picture:



See, (Exhibits in possession of Relator), Exhibit 228 – Work Order No. 27, March 5, 2009 "Creek Cleanout" Pictures, Page 32. The corresponding monitor logs also fail to provide more information on whether the monitors made any analysis of what debris was eligible, and instead reads more as timesheets. *See, (Exhibits in possession of Relator), Exhibit* 229 – Frank Smith, Barowka & Bonura Engineers and Consultants, LLC Resident Inspector Daily Report, March 5, 2009; David Miley, Professional Engineering Consultants Corporation Resident Inspector Daily Report, March 5, 2009; Kenu Turk, McLin & Associates, Resident Inspector Daily Report, March 5, 2009.

309. The pictures submitted by the Parish in support of Work Order No. 27 also seem to show that the wet debris work was performed in unimproved, natural woodland. As noted earlier, such work is not eligible for FEMA PA reimbursement. *See, e.g.*, Exhibit 217 - Public Assistance Digest, FEMA 321/January 2008 at Page 31; Exhibit 202- Public Assistance Guide, FEMA 322/June 2007 at Page 68. As alleged in Mr. Bonura's February 23, 2009 request for Work Order No. 27, the Parish performed (undocumented) maintenance on East Hog Branch, leading to his conclusion that flooding was occurring as the result of Hurricane Gustav-created debris. *See* Exhibit 225– Request for Work Order No. 27. However, in Mr. Jones' assessment photos for Work Order No. 27, it does not appear that East Hog had any access road that would have allowed Parish workers to perform regular maintenance along the stream when he performed his assessment on February 12, 2009. *See, e.g.,* Exhibit 226- Work Order No. 27 Assessment Photos, at Pages 16 and 24 (showing banks of East Hog Branch with no obvious access way). When FEMA sent Debris Specialists to validate the Parish's work in the summer and fall of 2009, the Debris Specialists observed that an access pathway had been cleared approximately 20 feet wide adjacent to the stream, where none had been previously. *See, (Exhibits in possession of Relator),* Exhibit 230 – Stream / Waterway Eligibility Summary Report, East Hog Branch, September 1, 2009, at Page 1. In addition, the Debris Specialists determined that based upon the distance between the work performed and the nearest observed structures, the waterway was considered to pose no immediate threat of flooding to improved residential or commercial property. *Id.* at p.2.

310. The issues discussed above are characteristic of the problems that were found by FEMA in its review of the Parish's supporting documentation for its wet debris work. The

photogenic documentation[66] provided by the Parish's monitors consistently: did not demonstrate that the wet debris removed constituted blockages that would have impeded the flow of the waterway in question and created an "imminent threat" of flooding, *See (Exhibits in possession of Relator),* Exhibit 231– Sample photos that do not demonstrate blockages/threat of flooding; and failed to show that the work had been performed anywhere but in unimproved, natural woodland, *See, (Exhibits in possession of Relator),* Exhibit 232– Sample photos of work performed in unimproved, forested areas. Further, many of the monitor's logs appear to be just diaries of the monitors' day and do not provide more information regarding what, if any, analysis of wet debris eligibility may have been performed by the monitor. *See, (Exhibits in possession of Relator),* Exhibit 233 – Examples of Daily Monitor Reports. And, in the rare instances where a monitor's log does show that the monitor may have actively identified and spoken out regarding the removal of non-eligible wet debris, the logs do not reflect that the monitor's expertise was heeded. *See, (Exhibits in possession of Relator),* Exhibit 234 – Daily Monitor Reports of Jeff White

311. In addition, the documentation provided by the monitors often led to the identification of other problems. For example, at Clinton Allen Lateral, it appears as if the Parish's contractor may have cut trees (creating debris). *See, (Exhibits in possession of Relator),* Exhibit 235– Photos of cut trees from Clinton Allen Lateral. In addition, the Parish's wet debris work led to a complaint by a private property owner leading to a site visit by FEMA's Jeffrey Jones. *See* Exhibit 211- Data for Case Management File, June 22, 2009 (discussing a resident whose property was along Clinton Allen waterway who had complained of stream debris work

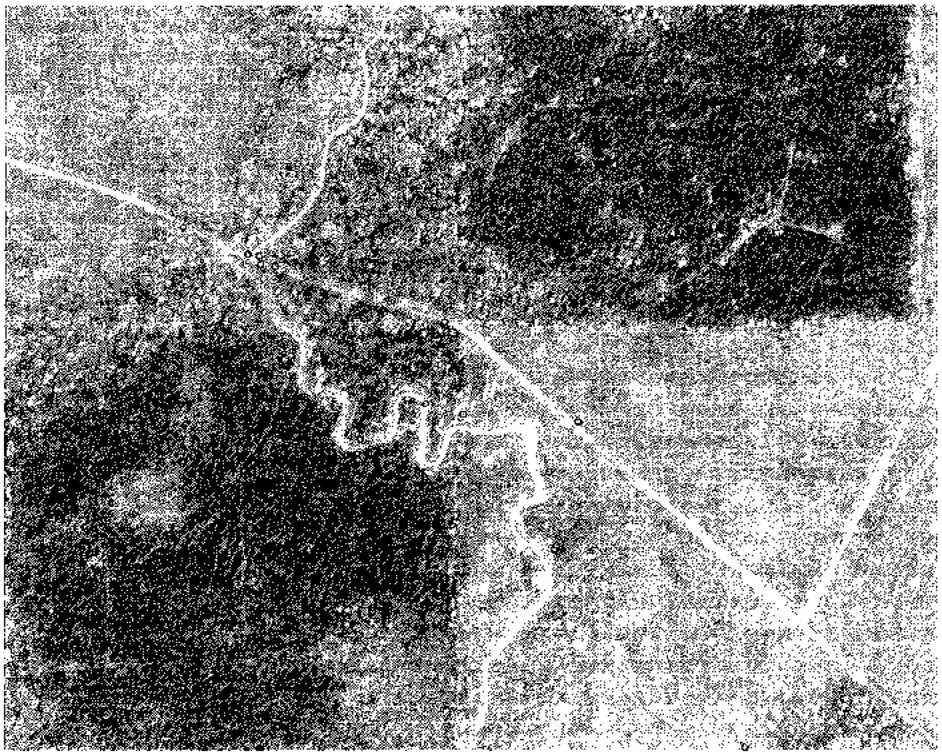
[66] Due to the large volume of work at issue, FEMA has numerous examples demonstrating the issues with the Parish's documentation. However, to facilitate the Panel's review, FEMA has drawn examples representative of the documentation submitted by the Parish's monitors.

done on his property and stating that no right of entry had been obtained). On his site visit, Mr. Jones observed no eligible debris. *Id.* In addition, the Parish failed to obtain legally required USACE permits for the work represented in the Clinton Allen debris book, before the wet debris work was performed. In 1998, Gravity Drainage District 1 filed for and obtained a USACE permit to clear the exact stretch of Clinton Allen Lateral where work was performed by IED. *See, (Exhibits in possession of Relator),* Exhibit 236–1998 USACE permit for Clinton Allen Lateral (identifying area where work was to be performed as wetlands). *See also id.* at p. 10 (project plan map identifying section of Clinton Allen Lateral covered by the permit); See *(Exhibits in possession of Relator),* Exhibit 237, p. 8-10 – Clinton Allen Lateral debris book (AFA maps showing section of waterway where work was performed). **As such, the work performed on Clinton Allen Lateral was in violation of Federal environmental laws.** *See* discussion *infra* at Part V(D).

3. **In many cases, wet debris was created by the Parish, but then never removed, creating exacerbating conditions.**

312. In numerous cases, it is apparent that the Parish cut and compiled debris, for which Relator asserts is not eligible, and then failed to remove the debris resulting in ineligible debris removal work claimed and the exacerbation of conditions in the event of future flooding. The Parish routinely cut and then stacked debris along the tops of canal banks, and the debris remained on the banks even after the work ended in 2010. *See, e.g., (Exhibits in possession of Relator),* Exhibit 238- Letter from John Shires to Mike Grimmer, "Re: Status of Livingston Parish Canal Debris Removal Project and IED, Inc. Canal Invoices," (Feb. 11, 2010). One of the most egregious examples of this conduct occurred in the Renninger Lateral waterway area. Aerial photographic documentation taken in 2008 (pre-Hurricane Gustav) and then in 2010 (post storm), shows evidence of a visible access road that was not present along Renninger Lateral in

2008 and of areas of cut debris lying on the banks of the lateral, months after the work was initially begun (and never completed):



Picture 1. Close up of 2010 aerial photo (modified) of Renninger Lateral, after the Parish concluded its wet debris work.

The red circled areas show visibly evident debris, leftover from the Parish's wet debris removal operations, along the banks of Renninger Lateral.

See also (Exhibits in possession of Relator) Exhibit 239- Parish's Documentation of Work ("Debris Book") for Renninger Lateral.

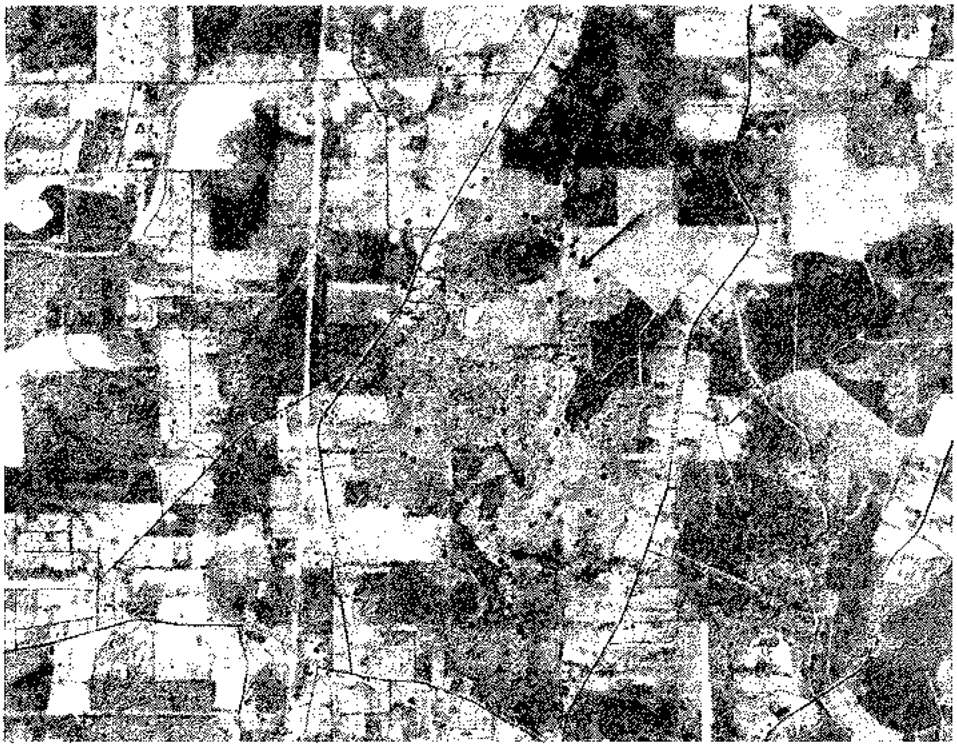
313. As discussed earlier, only the removal of disaster-generated debris is eligible for reimbursement under FEMA's PA program, pursuant to 44 C.F.R. § 206.223(a). Any debris created by the clearing or cutting of roads to access any disaster-created wet debris however, would not have been generated by a major disaster event and is *not* eligible. Further, as late as July 2009, AFA was acknowledging that its monitors had not separated eligible from ineligible debris in the field. *See, (Exhibits in possession of Relator),* Exhibit 22- Data Report for Case Management File, Meeting at the Parish Offices, July 7, 2009(FEMA's Jeffrey Jones noting that at the meeting, AFA monitors said they were never told to separate debris). *See also* Exhibit 78- Email from Jeff Bonura/BBEC email to Will Clark/Parish (May 8, 2009) (PEC/BBEC monitor

noting that AFA did not "separate debris, canal or bank."). Using IED's work, as monitored by AFA, on Renninger Lateral again as an example, when aerial photos are examined, the access roads that the Parish's contractors cut to allegedly access wet debris become even more apparent:



Picture 2. 2008 aerial photo of Renninger Lateral (modified), taken before Hurricane Gustav.

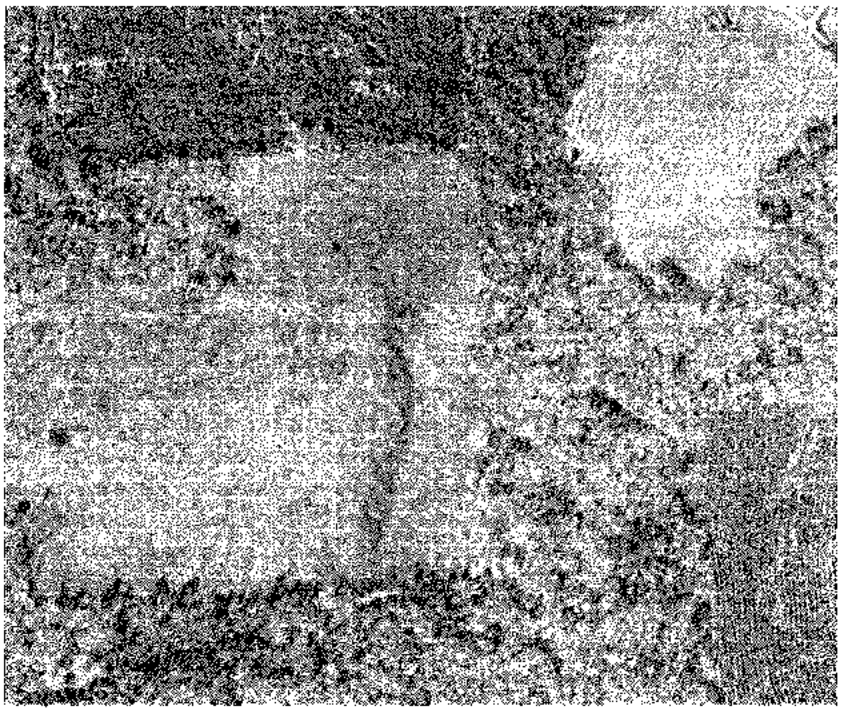
Red dots indicate where the IED performed wet debris removal work.



Picture 3. 2010 aerial photo of Renninger Lateral (modified), taken after the Parish concluded its wet debris work in 2009.

Red dots indicate where IED performed wet debris work.

The black arrows indicate some places where the access roads cut by IED are clearly visible.



Picture 4. Close up view of a section of Renninger Lateral, from a 2008 aerial photo of Renninger Lateral, taken before Hurricane Gustav.



Picture 5. Close up view of the same section shown in Picture 4, from a 2010 aerial photo of Renninger Lateral, taken after the Parish concluded its wet debris work in 2009.

This issue was also apparent with other waterways in the Parish. *See also* Exhibit – 203 (Examples of 2008 and 2010 aerial photos for Renninger Lateral, Durango Lateral, and Perkins Road/Bo-Harvey Lateral); *See, (Exhibits in possession of Relator),* Exhibit 241-Affidavit of Corey Delahoussaye. Other documentation on the Renninger Lateral demonstrate that the Parish claimed thousands of dollars in work for this Lateral, but the work cleared was not at the coordinates identified in the work orders, was on commercial timberland property, wetland property, the Parish had no right of entries, and the work was performed without permits. *See, (Exhibits in possession of Relator),* Exhibit 242- Renninger Lateral Landowner Information (including the only right of way obtained, from AFA debris book). Lastly, the Parish's own President at the time, Michael Grimmer, prepared a PowerPoint presentation, presented at an August 6, 2009 Parish Council meeting, which incorporates all of the issues argued above and clearly supports FEMA's position that the wet debris operations claimed by the Parish were ineligible. *See, (Exhibits in possession of Relator),* Exhibits 243 and 244- Video of August 6,

2009 Parish Council meeting; Michael Grimmer, PowerPoint (presented at August 6, 2009 Parish Council meeting).

4. **The Parish's claims for wet debris left on the banks of the Parish waterways is incligible, because the scope of work for the debris removal was not completed.**

314. In addition to creating exacerbating conditions by leaving debris on canal banks, in such instances, the Parish's contractors also failed to complete their scope of work by not hauling the debris to Temporary Debris Storage and Reduction Sites ("TDRS"). Federal regulations at 44 C.F.R. §§ 206.204(c) and (d) place time restrictions on project completion and set forth requirements for Subgrantees to request extensions for project completion. The project completion deadlines for the Public Assistance Program are set from the date that a major disaster is declared and apply to all projects under the Public Assistance grant. 44 C.F.R. § 206.204(c)(1). Specifically, for Category A (debris removal), the project completion deadline is 6 months. The Parish's completion deadline for the wet debris project worksheets was March 2, 2010. *See, (Exhibits in possession of Relator),* Exhibit 245– Time Extension Letter. Parish President Michael Grimmer suspended all debris removal operations in the Parish on May 14, 2009. *See* Exhibit 36-Affidavit of Michael Grimmer. Relator asserts that a large amount of debris still remains on the banks of the Parish's waterways, and the Parish has not stated any intent to remove that debris since Mr. Grimmer's May 14, 2009 instruction. *See* Exhibit 264- Request for Arbitration, Page 84 ("[S]ome debris removal tickets may be missing because debris had not been removed when the work stopped. The Parish is not requesting funds for any work to be completed in the future.").

315. Because the work remains incomplete after five years, FEMA is not authorized to pay for any associated wet debris removal or monitoring work. The Parish's own contractors admitted that the work was incomplete. Specifically, on March 24, 2009, John Shires of PEC,

emailed Brian Fairburn, the Parish's Director of GOHSEP, a proposed letter to IED regarding delays in removing debris, from the "cleaning of the drainage canals." In the email, Mr. Shires noted, "Initially, in order to expedite the cleaning of drainage canals it was agreed that the debris would be piled along the bank of the canal to be removed at a later date." *See,* Exhibit 74– Shires email to Fairburn, Re: letter to IED, March 24, 2009. However, "[t]o date, only approximately 3200 cubic yards of debris has been load[sic] from the banks the canals where it had been left to TDSRS [Temporary Debris Storage and Reduction Sites]." Mr. Shires also noted that this constituted "incomplete" work under IED's contract, for work associated with the "Wetlands Fee." Mr. Shires informed IED "We cannot recommend payment for incomplete work." *Id.* A similar letter was sent to Mr. Grimmer in 2010, well after the wet debris work had ended, also stating that PEC could not recommend payment for work because some debris still remained on the banks of the Parish's canals, and because permits had not been obtained. See Exhibit 239- Letter from John Shires to Mike Grimmer, "Re: Status of Livingston Parish Canal Debris Removal Project and IED, Inc. Canal Invoices," (Feb. 11, 2010).

316. The fact that the Parish did not complete its scope of work for a large portion of its wet debris operation also belies the Parish's claims that such work can be claimed as Category A debris removal[67] as "emergency work." As opposed to addressing any immediate threat that may have been caused by Hurricane Gustav-generated wet debris, instead, the Parish created exacerbating conditions by leaving debris on the banks of its waterways that remain on those

[67] As this Panel is aware and has been noted previously, this arbitration is before this Panel pursuant to Section 565 of the 2013 Appropriations Act, Pub. L. 113-6, 127 Stat. 381, which provides an opportunity for the arbitration of "applications for public assistance…and the resulting decisions issued by [FEMA] for *category A debris removal* for DR-1786…" *See* 2013 Appropriations Act, §565 (emphasis added).

banks five years after Hurricane Gustav and raising the question of whether any "immediate threat" from such wet debris ever truly existed.

5. **The Parish's claims for wet debris removal on private and/or commercial property are ineligible, because the Parish failed to establish that the debris removed posed a threat to the public or to improved property.**

317. As clarified earlier, in extraordinary circumstances where private property debris is pushed to the public right of way and poses an immediate threat to the public, FEMA may authorize removal of private property debris if the FEMA Federal Coordinating Officer determines the private property poses an immediate threat. *See* 44 C.F.R. 206.224(b); Exhibit 207 - Debris Management Guide, FEMA 325/July 2007 at Page 33; Exhibit 206- FEMA Disaster Assistance Policy (DAP) 9523.13-Debris Removal from Private Property (July 2007). If private property debris is authorized, a Subgrantee must show that if has a legal basis established by law, ordinance, or code in which to exercise its authority on private property. In this case, private property debris removal was never authorized by FEMA in accordance with the above cited law, regulation and policy. In addition, even if private property debris had been authorized, the Parish failed to properly document the eligible debris, there is overwhelming evidence that debris removal operations were not authorized by private landowners or ROE's obtained, and the documentation demonstrates that no immediate threat to life or improved property occurred.

318. FEMA's experienced debris specialists performed a 100% validation of the Parish's wet debris operations and found that the Parish had conducted widespread wet debris removal in natural, unimproved canals and streams in wooded, unimproved tracts of private property which presented no immediate threat to life, public health and safety or improved property. *See* Exhibit 91– Examples of FEMA Stream/Waterways Eligibility Summary Report, various dates. Federal regulation, 44 C.F.R. § 206.224(a), specifically notes that such work is

eligible only if it protects against significant damage to improved property. *See* 44 C.F.R. § 206.224(a). Unimproved natural canals and streams clearly do not meet the definition of "a structure, facility or item of equipment which was built, constructed or manufactured." *See* 44 C.F.R. § 208.221(d).

6. **The Parish's technical evaluations also fail to support that the wet debris that was removed posed immediate threats to life, public health and safety, or to improved property.**

319. As noted above, FEMA may provide reimbursement for debris removal when it is necessary to eliminate immediate threats of additional damage or destruction from a flooding event that can reasonably be expected to occur within five years or, that has a 20 percent chance of occurring annually. *See* 44 C.F.R. §§ 206.221(c), 206.224(a); Exhibit 202 - Public Assistance Guide, FEMA 322/June 2007 at Page 66. In support of its claims that the wet debris was an immediate threat, the Parish offers technical evaluations in the form of three hydraulic studies, which were conducted after the Parish had already performed the wet debris removal. *See* Exhibit 264-Request For Arbitration, at Pages 62-63.

320. However, as described in FEMA's Response to the Parish's First Appeal for the Waterways Debris PWs, the hydraulic studies performed by the Parish's monitors, AFA and PEC, of Gill King Lateral and Story Bayou are problematic and do not support the Parish's position. *See* Exhibit 112– FEMA Response to Livingston Parish First Appeal, May 13, 2011. For example, while the AFA study on Gill King Lateral did find that a five-year rain event would cause the flow to be out-of-bank assuming that 40, 60, 80 and 100 percent of the channel were blocked by debris, the study also found that the five-year rain event would be out-of-bank with no debris in the channel. *Id.* at Page 5. Similarly, while the PEC study on Story Bayou also claims that a five-year rain event would cause the flow to be out-of-bank, it too found that the five-year rain event would cause out-of-bank flow with no debris in the channel. *Id.*

321. Likewise, the Parish's new study of West Colyell Creek by Forte & Tablada is also problematic for the same reasons. *See* Exhibit 264-Request For Arbitration, at Page 63. As acknowledged by the Parish, the study of West Colyell Creek also found that there would be "likely flooding of improved property" even with no debris in in the channel. As with after-the-fact studies, the Parish's evaluations do not comment on what impact the specific blockages and debris that was removed would have had in a five-year rain event. In addition, it should be noted that the studies were of only three streams out of the many that are the subject of the Arbitration, and as such do not necessarily represent the other waterways where the Parish removed debris. Accordingly, the Panel should give this argument short shrift.

7. **The Parish's arguments of reliance upon FEMA's assurances that work was eligible as an immediate threat are incorrect and unsupported by the facts.**

322. The Parish's arguments of reliance upon FEMA contractor statements are incorrect, and without merit. The Parish claims that at the beginning of the wet debris removal and monitoring projects, the work was eligible and FEMA did not raise eligibility concerns throughout its involvement. *See, e.g.* Exhibit 264- Request for Arbitration, Pages 36-51, 58-60. This is not true. Moreover, while FEMA was indeed in communication with the Parish at multiple points of the wet debris removal projects, FEMA could not, nor did it, make any promises regarding the eligibility of the work. This was especially true since FEMA didn't get involved in the Parish's assessments of eligibility until after the work had started, and because most of the initial recommendations in the field were performed by FEMA contractors who have no legal authority to make decisions on behalf of FEMA and require later FEMA personnel oversight, review, and approval.[68] *See,* Exhibit 23- Jeffrey Jones Affidavit. In fact, FEMA was not even made aware of the Parish's wet debris operations claimed for Hurricane Gustav until

[68] *See infra* discussion regarding the Debris Specialists' responsibilities.

FEMA contractors went out to West Colyell Creek after being asked by the USACE to take a look and then asked the Parish for a subsequent meeting. *See* Exhibit 23- Jeffrey Jones Affidavit; Exhibit 68- Jones notes of the trip to West Colyell on 11/25/08. FEMA contractor Jeffrey Jones notated on this trip that he saw no eligible debris, did not see evidence that any debris had been removed from the creek and just saw that access roads had been cut. *Id.*

323. On November 25, 2008, during a meeting requested by FEMA, FEMA provided extensive information and clarification to the Parish. Mr. Jeffrey Jones of FEMA was in attendance at this meeting.[69] In support of the Parish's argument, it submits *portions* of the transcript of this meeting; however, a check of the Parish's transcript against the actual, full-length audio of the meeting, which FEMA's transcript reflects, reveals that the Parish has clearly taken multiple statements out of context. *See. e,g.*, Exhibit 264-Request For Arbitration, Pages 36-37, 51-52, 59, 98-99; *See* Exhibit 264-Request For Arbitration, Appx. 8118-8144. Even more mysteriously, neither the Parish's transcript of the meeting, nor any of the audio clips it provides of the meeting, reference the last twenty minutes of the meeting. FEMA has rectified this error and provides accurate information herein. First, the Parish claims in its Arbitration Brief that Mr. Jones states, "You can take photographs with your GPSs and that'll be fine. FEMA will accept that," is not accurately presented. *See* Exhibit 264-Request For Arbitration, Pages 37, 51-52. The transcript related to this conversation is between Mr. Brian Fairburn (BF) and Mr. Freddie Gardner (FG) and is accurately reflected below:

> 27:21 - BF: So basically what you just said was I can ride that drainage canal and I can say this is a hazard ... and as long as they take pictures, gps coordinates, and use proper methods of getting it out there, then it's allowed the cost.
> 27:39- FG: Yes
> 27:40- BF: Then can I get that in writing?

[69] Mr. Jones is in fact a highly experienced, qualified, and outstanding debris specialist contractor who has performed debris assessments, and made recommendations to FEMA, on multiple disaster events for many years.

27:42- FG: Yes
27:44- BF: and when can I get it?
27:46- FG: Today

See Exhibits 69-70- Transcript of November 25, 2008 Meeting & Full Audio of November 25, 2008 Meeting. Therefore, the quotations attributed to Mr. Jones, FEMA contractor were actually made by GOHSEP's Freddie Gardner. *Id.*; Arbitration Request, Pages 51-52.

324. Taken in context, what Mr. Jones said, and what seemed to have been understood by all participants by the end of the meeting, is that FEMA evaluates and reimburses after work is complete. *See* Exhibit 68- Mr. Jones notes from November 25, 2008 meeting. Mr. Jones never implies that only a photo or GPS makes the work eligible. *Id.* In fact, Mr. Jones states clearly and multiple times that FEMA can send out people to assist the Parish in reviewing the work for eligibility, often as soon as the next day. *See, e.g.*, Exhibit s 69-70- Transcript of November 25, 2008 Meeting at 35:03, p.6; 56:22-57:03, p.12; 1:03:56-1:04:17 & 1:05:57, p.15; 1:07:02-1:0750, p.16; Full Audio of November 25, 2008 Meeting. Further, as to "immediate threat," Mr. Jones explained, "Like we said if you have 100 miles, the immediate threat should be a pile here, a pile here; a pile here - if you go and clean the whole [sic] stretch you'll have a difficult time proving, not only to me, but to the auditors that that was an immediate threat." Exhibit 69- Transcript of November 25, 2008 Meeting, at 40:58, at Page7; see also Exhibit 19 - Shires letter to Grimmer dated June 22, 2009.

325. In addition, at this November 25, 2008 meeting, it's clear that Parish Councilman, Jimmie McCoy, shuts down the (accurate) advice given by David Templet, an environmental consultant at the meeting, as to permitting issues, which seems to have contributed to the Parish's failure to obtain permits and states "We're not going to do that." *Id. See* Exhibit 69- Transcript of November 25, 2008 Meeting, at 48:30.

326. One of the most egregious errors of the Parish was its failure to include the last twenty minutes of the November 25, 2008 meeting, which clearly had important clarifying information necessary for this Panel. *Id.* at Pages 18-23. In the last 20 minutes (after some of the attendees may have left the room/meeting), it appears that AFA engineer Ted York (TY), Parish Councilman Jimmie McCoy (JM), the Parish's OHSEP Director Brian Fairburn (BF), Parish Councilman Don Wheat (DW), IED attorney David Green (DG), Rock Malone (RM) of IED, and IED attorney Smith Day (SD) formulated a "game plan" to deal with FEMA. This **"game plan"** is transcribed below:

> 1:39:10 BF: Ya'll hold on now, we have a game plan, yep
> 1:39:28 BF: we are asking permission for too much stuff, there are too many questions going to FEMA. You are going to start getting denied, so this is the game plan, go in identify all of your emergency stuff. Like I told him, on the, the clean-up part of it, when you identify that emergency whether it be 10 foot, 100 yards, 200 yards, whatever the case may be, they can't see nothing underneath. It's tougher for them to haul it out because its debris. But they can't see what you taken out. You follow with I'm saying? Identify, what, and then do those spot checks like they're talking about, with the identification with the mitigation process like what they're talking about to cover your behind. When you do that, put that with your documentation on your end as the monitor, get with Smith, so he can put his documentation together. Now for the after affects to fight FEMA for the reimbursement.
> 1:40:19 DG: Yea, We have almost asked, I agree with Brian, we've almost asked for permission too many times they said yes yes yes yes.
> 1:40:30 BF: I think I can, tell me if I can, tell me if I can
> 1:47:18 DG: We've almost, I think at this time I think we need to back track and not have too many more real big meetings and ask for permission too many more times…we need to get about 24 hotspots that we identify and they need to be samples in different areas. Because we're working those hotspots we know their hotspots. Like they said the Parish has made determinations by and through its engineers perfectly qualified in estimating and determining what will flood and what will not…If you have 15 lateral ditches coming into a 3 mile area that you have to clean up that area because it's going to back up those lateral ditches and flood those areas

> 1:47:49 BF: flood there 75 homes and these 75 homes. All that needs to be in your description.
> 1:47:54 DG: you can't pick and choose to discriminate which area you are going to clean and which lateral ditch you are not going to allow to back up and it's acceptable to allow these to back up but unacceptable to allow those to back up. It's all a hazard. The Parish has identified it's a done deal cleaning it out. I'm going to go make sure my guys aren't clear cutting because they were cutting some straight trees on the side of the ditch that didn't appear to be eligible so I'm going to talk to my crews about that now, who, let's identify maybe a dozen or two dozen on places we're not working that are just maybe, you send one crew of guys that go around and identify, say okay, here's, and that way it covers gravity drainage district, one, two, five and the public work area that are outside of them, say, these are examples of areas where we no longer have hotspots. These are not all of the hotspots, but these are examples. Please come out and do a site visit. You don't ride to where our crews are working. You ride to those locations… Get a list for them to see and agree. Ok we'll proceed. And we'll write on our paperwork, Smith will write some language on our paperwork that says these are simply examples of hot spot areas. There may be more this is not to include all of them, there may be many more. This is a model by which for them to approve.

Id. at Pages 18, 21. Thus, what the above **"game plan"** clarifies is that the Parish and its contractors specifically intended to manipulate documentation and information it would submit to FEMA in order to claim debris that was ineligible and neither Hurricane Gustav related nor an immediate threat.

327. Also at the November 25, 2008 meeting, there was discussions about NRCS's authority, how the Parish could proceed with NRCS and FEMA, and specific guidance was provided by the Grantee, GOHSEP. Freddie Gardner of GOHSEP stated:

> To put it in simple terms, if the Parish declares there's an immediate threat of flooding to private or public improved property, remove the threat. FEMA is not going to object to that, if they do, the states going to push back and say it's got to be done. I don't care who owns the ditch or who's responsible for it, it needs to be removed, [t]hat threat needs to be removed. The parish makes that determination whether it's an immediate threat or not. The state can't make it and FEMA is not going [to] make it. That's Ya'll's

> decision to make. Second step of it is submit those three drainage districts to NRCS and say are you going clean them up- are you capable? If not give us a reply back as soon as possible so we can ask FEMA to fund the cleanup. That's it. That's it in a nutshell.

Id. at Page 3, 26:23. Thus, clearly the Grantee instructed the Parish at this meeting that the Parish was required to make decisions on what debris it believed created an immediate threat because neither the Grantee nor FEMA would, or could, make those initial determinations on what would be submitted to FEMA for final eligibility review. The Grantee's advice is consistent with regulatory requirements for the Subgrantee, *i.e.* the Parish, to ensure it has identified all eligible work it wants FEMA to consider. *See* 44 C.F.R. 206.202(d).

328. The record also demonstrates that the Parish, its contractors, and the state knew precisely who had responsibility for identification of work, the Subgrantee, and who made the final eligibility determination, FEMA. *See* Exhibit 69 - Transcript of November 25, 2008 Meeting, at Page 6, 38:59 (Parish Councilman Jimmie McCoy stating that the contractors, and not anyone else, should be making the assessments in the field); *id.* at 39:26 (GOHSEP's Freddie Gardner stating that only FEMA made eligibility determinations and that "the whole hundred miles is not a threat. That's not realistic"). Accordingly, despite the Parish's repeated attempts to say that Jeffrey Jones, a FEMA contractor, identified debris and told the Parish that the debris was eligible, and the Parish's repeated confusion as to who made certain statements at the November 25, 2008 meeting (incorrectly attributing statements to Mr. Jones that belonged to GOHSEP staff or others), a careful reading of the transcript and review of the audio of the meeting leaves no doubt of the fact that the Parish knew full well that it was responsible for identifying debris it believed was eligible and knew of it was to notify NRCS first since NRCS had specific authority over the watershed. Then later, if NRCS fell through, the Parish should seek final eligibility determination from FEMA. *Id.* Further, the record also demonstrates

repeatedly that Parish contractors were in the field identifying work for eligibility, not Mr. Jones on a daily or weekly basis, or FEMA staff, as falsely alleged. Accordingly, the Parish's assertions are without merit.

D. FEMA Is Prohibited from Reimbursing the Parish for Wet Debris Removal (PWs 5590 and 5594), Because the Parish Violated Federal Environmental Laws and Failed to Obtain Required Federal Permits.

329. When providing funds under its PA program, FEMA is required to consider a range of Federal laws, regulations and executive orders that apply to the use of Federal funds. Generally, reviews for compliance with these laws must be completed before FEMA approves funding and work is begun, because such reviews may identify steps to be taken or conditions to be met before a Subgrantee may begin work. *See* Exhibit 202 – Public Assistance Guide, FEMA 322/June 2007 at Page 128.[70] As the Parish failed in its affirmative responsibilities to obtain required environmental permits, the Parish's requested work cannot be funded by FEMA.

1. **The Parish violated Federal environmental law and ignored its known responsibility to obtain permits required to perform the requested wet debris removal work.**

330. On October 8, 2008,[71] FEMA held a kickoff meeting with the Parish to discuss FEMA's PA program and the Parish's specific recovery needs in the wake of Hurricane Gustav. *See* Exhibit 12 - Kickoff Meeting SOP, Information; *See* (*Exhibits in possession of Relator),* Exhibit 246 - Brian Fairburn email regarding FEMA Kickoff Meeting SOP, September 30, 2008.

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[70] Generally, FEMA's primary planning and review process for compliance with environmental laws is dictated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* *See also* 44 C.F.R. Part 10. However, certain work, such as emergency work (including debris removal) under Section 403 of the Stafford Act, is exempted from the full, exhaustive NEPA review through a statutory exclusion. *See* Stafford Act, § 316, 42 U.S.C. § 5159. It should be noted though, that although a debris removal project like the ones at issue in this arbitration may be exempt from the full NEPA review process, such projects are still subject to the requirements of other environmental laws that are independent of NEPA and may require some level of review (although they would have otherwise been discussed during the NEPA process). Exhibit 153- Green Sheet, at p.1.

[71] Prior to Wet Debris Removal Operations

At this meeting, FEMA discussed the environmental and historic preservation factors that the Parish needed to consider with regard to its application for FEMA funding. The Parish was also given an explanatory brochure, otherwise known as a "Green Sheet," which also discussed the Parish's responsibilities in ensuring that its recovery efforts were compliant with Federal environmental and historic preservation law and provided information regarding pertinent procedures and contact information to the Parish. *See, (Exhibits in possession of Relator),* Exhibit 153– Green Sheet. Under the first section, titled "Environmental Laws and Project Requirements," the Green Sheet states:

> The applicant is responsible for compliance with all applicable laws and regulations. Some projects with special historical or environmental issues will require additional consultation with FEMA and the appropriate state and federal agencies. It cannot be overemphasized that projects requiring an environmental review must be documented and approved prior to initializing any constructions or repair. Failure to comply with all applicable state and federal laws may jeopardize potential funding.

Id. at Page 1. The Green Sheet also listed certain projects that could "proceed without detailed review" for compliance with Federal environmental and historic preservation laws, including "Emergency Protective Actions and Debris Removal." *Id.* However, under the subheading "Some Projects require an environmental review," the Green Sheet listed projects including debris disposal and projects "[i]nvolving threatened or endangered species, wetlands or floodplains." *Id.* To specifically address recovery work in waterways, the Green Sheet includes a section entitled, "Waterways, Including Culverts and Bridges." *See id.* In that section, the Green Sheet specifically emphasized the importance of obtaining permits for any such recovery work: "Obtaining permits, prior to construction, is the responsibility of the project applicant. For any project involving work proposed or completed in a waterway, the applicant must notify and provide documentation of contact with the US Army Corps of Engineers ('USACE')." *Id.*

331. As explained in further detail, in FEMA's PA Guide, PA applicants must obtain permits (known as "Section 404 permits") from the USACE in any situation where dredging or filling is a component of the project, pursuant to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* *See* Exhibit 202 – Public Assistance Guide, FEMA 322/June 2007 at Page 132. Similarly, the USACE is also responsible for issuing permits (known as "Section 401 permits") for federally permitted or licensed activity that may result in a discharge to waters of the United States, to certify that a given project will not degrade the waters of a state or violate state water quality standards. *See* CWA, § 401, 33 U.S.C. § 1341. The Green Sheet also explained to the Subgrantee that for projects that take place in floodplains, FEMA reviews all such projects as required by Executive Order 11988 (floodplains) and that "[p]roject approvals and permits are often needed from the U.S. Army Corps and the local floodplain administrator." *See* Exhibit 153 – Green Sheet, at Page 2. Similarly, under the subsequent section, titled, "Wetlands," the Green Sheet noted that "[p]roject approvals and permits are often needed from the U.S. Army Corps of Engineers....Debris removal and work involving wetlands should be coordinated with the U.S. Army Corps and the U.S. Fish and Wildlife Service." *Id.* at Page 2. Thus, based on all of the information provided to the Parish, there could be no doubt that Federal permits were likely required for much of the claimed wet debris work. Unfortunately, the Parish failed to obtain a single permit for the wet debris operations and was even issued a cease and desist order from the USACE.

2. **The Parish willfully chose to ignore the permitting requirements and move forward with the wet debris removal.**

332. The Parish had early warnings of possible permit issues and should have been keeping abreast of that issue, yet failed to address the permitting problems in their entirety. On August 31, 2008, the Parish received a letter from the USACE, reminding the Parish that

emergency procedures were being initiated for the authorization of work in the wake of Hurricane Gustav. *See, (Exhibits in possession of Relator)* Exhibit 247- Letter from Michael J. Walsh, Brigadier General, USA, Commanding, "Emergency Permit Procedures for the States of Louisiana and Mississippi within the Boundaries of the Mississippi Valley Division," at Page 1 (Aug. 31, 2008). The letter also warned that the subgrantee must obtain approval for an emergency permit before work commences. *Id.* at Page 2.

333. The Parish specifically contracted with IED to procure all permits, licenses, certificates, or any such approvals of plans or specifications as required by Federal, state and local laws, ordinances, rules and regulations due to their claims of extensive experience in debris removal work.[72] *See, (Exhibits in possession of Relator),* Exhibit 6– IED Contract, at Part VIII(D). Specifically, In Contract Addendum 1 for the work in question, IED agreed that it would "comply with all applicable standards, orders or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738 and Environmental Protection Agency Regulations (40 CFR part 15)." Exhibit 60 – IED Contract Addendum 1.

334. FEMA's policy guidance encourages PA Subgrantees to monitor debris removal operations to ensure that the work is eligible for PA grant funding and warns that a failure to do

[72] The Parish has overemphasized the skills and expertise of its contractors in disaster work throughout its Arbitration Request, however, these same contractors failed to obtain a fundamentally important requirement of wet debris operations, namely, Federal permit compliance. As described by the Parish, the Parish chose IED as its debris removal contractor, because it is "a disaster recovery specialty firm which had been in business for nearly twenty years and which had performed post-hurricane debris removal projects in other nearby communities throughout Louisiana and elsewhere in the Southeast United States." *See* Parish's Arbitration Request, at Pages 16-17. Importantly to the Parish, IED "had earned a reputation as a knowledgeable and careful firm with extensive experience performing debris removal on FEMA-funded projects." *Id.* And, as discussed, IED's knowledge of Federal environmental law is reflected in its contracting documents. Exhibit 60 – IED Contract Addendum 1. As a contractor specializing in disaster recovery and experienced with FEMA's procedures, it is unclear how this experienced contractor, IED, could have blatantly missed its responsibility to obtain permits in compliance with environmental law.

so may jeopardize funding. *See* Exhibit 155– FEMA Fact Sheet 9580.203, Debris Monitoring, at Page 5 (May 3, 2007). In light of the USACE's early reminder of the requirement that permits be obtained prior to work, and of the Parish's obligation to monitor its debris removal operations, the Parish's alleged ignorance of the permitting problems cannot be excused.

335. In addition, the Parish's debris monitors, who claim to have extensive experience in disaster recovery, should have been aware of the Parish's permit issues. PEC/BBEC's project manager, Jeff Bonura, did send an initial inquiry to the USACE regarding permits in January 2009. *See* Exhibit 80– Email exchange between Jeff Bonura and Rob Heffner, "Livingston Parish Debris Removal" (May 22, 2009, 4:12 PM) (forwarding email chain beginning in January 2009 regarding requirements from the USACE and referencing a draft letter Mr. Heffer had sent Mr. Bonura, presumably in February 2009, for the Parish to send to the USACE to request a nation-wide permit). It is unclear however, why Mr. Bonura did not follow up on his initial January 2009 inquiry earlier, either to ensure that IED had obtained the required permit from the USACE or to inform the Parish of that requirement.

336. Further, at the November 25, 2008 meeting between representatives of the Parish, FEMA, GOHSEP and the contractors, Parish official Jimmie McCoy (JM) deliberately stated that the Parish would not involve the USACE in the wet debris removal work in response to a comment by David Templet[73] (DT), an environmental consultant:

> 48:02 – DT: Actually, technically all the work you [are] doing, if you wanted to do it lawfully, you would have to go to, just like you do with FEMA or whatever, you're supposed to send in documentation that something is immediate threat for flooding and you're supposed to notify the Corp of Engineers which in this case

[73] Upon information and belief, David Templet had worked for AFA previously as an environmental consultant. Although he was at the November 25, 2008 meeting, presumably upon AFA's or the Parish's request, it does not appear that Mr. Templet was retained by the Parish or AFA to assist in the wet debris removal and monitoring work at issue in this proceeding.

> is Martin Myers, the chief of the evaluation section, you'd have to notify him with photographs and everything showing that is an immediate threat and you could go through and do the work.
> 48:30 – JM: We're not going to do that.

See Exhibits 69-70– Transcript of November 25, 2008 Meeting; Full Audio of November 25, 2008 Meeting.

337. When asked for comment later by the local media, Mr. McCoy confirmed his position in a written statement, emphasizing, "The U.S. Army Corps of Engineers needs to be involved only in normal everyday operations. In an emergency situation, permits are not required for the removal of debris that presents an immediate threat." *See, (Exhibits in possession of Relator),* Exhibit 248– Alice Dowty, "Officials ignored permit questions on debris," *The Livingston Parish News* (Mar. 13, 2011, 1:30 AM CST), *also available at* http://www.livingstonparishnews.com/news/article_de3d5ab2-4d75-11e0-a172-001cc4c002e0.html?TNNoMobile. Accordingly, there can be no doubt that the Parish not only knowingly chose to ignore Federal permit requirements prior to any work beginning, but **the Parish opted to continue ignoring such permitting requirements until it was caught by the USACE.**

338. Given the knowledge, actual and constructive, and experience of the Parish, and its contractors and monitors, the Parish should have been, and were, aware of the environmental permitting requirements for its waterways debris removal work. *More importantly, the Parish clearly knew that non-compliance with said permitting requirements might result in non-eligibility under the FEMA Public Assistance program. Accordingly, the Parish's failure to comply with Federal law prohibits FEMA from funding the wet debris work claimed.*

3. **FEMA's decision to obligate the wet debris removal and monitoring PWs for zero dollars is consistent with FEMA's prior decisions and guidance.**

339. FEMA's long-standing position has been that a Subgrantee's failure to comply with environmental laws and reviews may serve as grounds for ineligibility. Not only is this warning clearly stated in FEMA's policy guidance, *see, e.g.,* Exhibit s 153 and 202– Green Sheet, at p. 1; Public Assistance Guide, FEMA 322/June 2007 at Page 115, but FEMA has also previously cited a lack of compliance with environmental law (and requisite permitting requirements) as grounds for denial of all assistance. For example, in *Humboldt County,* FEMA-1628-DR-CA, a Subgrantee's bridge abutment and embankment repairs were completed without having: obtained a permit from the USACE under Section 404 of the CWA; consulted with the National Marine Fisheries Service ("NMFS") to determine compliance with Section 7 of the Endangered Species Act ("ESA"); or undergone a review by FEMA. *See, (Exhibits in possession of Relator),* Exhibit 249- *Humboldt County*, FEMA-1628-DR-CA. There, as here, the subgrantee in question attempted to obtain permits only after the work had been completed. However, in *Humboldt,* the Subgrantee was unable to obtain a nationwide permit from the USACE, and therefore required consultation with the NMFS in order to comply with Section 7 of the ESA. *Id.* Moreover, because the NMFS refused to conduct an after-action consultation of the Subgrantee's project, the Subgrantee's project was deemed to be ineligible for reimbursement, because the Subgrantee had not complied with the ESA. *Id.* Similarly, in FEMA's review of the Parish's projects, it was found that the Parish had completed an ineligible scope of work in violation of the ESA. *See* Exhibit 103- Record of Environmental Consideration, at Page 3. Even if the Parish could retroactively obtain USACE permits, which it can't, and notwithstanding all of the other eligibility obstacles the Parish has been unable to satisfy, at the very least, FEMA cannot fund the Parish's waterways debris removal work because the work violates Federal law, the ESA.

FEMA's determinations to deny Public Assistance funding for failure to comply with other Federal laws has been consistently applied, as it was here for the Parish.

4. **The Parish's argument that it retroactively obtained letters from the Louisiana Department of Natural Resources, which now bring the Parish into permitting compliance for some of the waterways, is not verifiable and does not overturn Federal permitting requirements**.

340. In its Arbitration Request, the Parish states, for the first time, that of the 182 waterway segments it claims that it has now obtained letters from the Louisiana Department of Natural Resources ("LDNR") which exempt 45 streams within the Louisiana Coastal Zone from the requirement of USACE permits. *See* Exhibit 264 –Request for Arbitration, at Page 98. It does not appear however, that the Parish included the LDNR letters as part of its Appendix, and as a result it is unclear what the scope of the LDNR's exemption may cover and whether it applies retroactively to the Parish's requested work. Further, whether or not a Coastal Use Permit is required by a state is a distinct and unrelated issue to the Parish's requirement to obtain *Federal* permits through the USACE for debris removal operations in waterways. Again, the Parish attempts to confuse the issue and refocus the Panel and Parties attention on facts that are irrelevant to this case and have no bearing on the Parish's requirements to comply with Federal law and Federal permitting requirements.

E. The Parish Failed to Provide Information for FEMA's Historic Preservation Review, Thus Precluding FEMA's Review.

341. When providing funds under its PA program, FEMA is required to consider historic preservation laws in addition to Federal laws, regulations and executive orders that apply to the use of Federal funds. Generally, historic preservation reviews must be completed before FEMA approves funding and work is begun, because such reviews may identify steps to be taken

or conditions to be met before a subgrantee may begin work. *See* Exhibit 202 – Public Assistance Guide, FEMA 322/June 2007 at Page 128.[74]

342. The National Historic Preservation Act ("NHPA") provides context for consideration of potential impacts to historic properties under NEPA. The NHPA is designed to take into account the impacts of a proposed action on designated historic properties. Like NEPA, the NHPA is a procedural statute. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). The NHPA "neither . . . forbid[s] the destruction of historic sites, nor . . . command[s] their preservation." *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981). Thus, the NHPA prescribes no particular action or outcome, only that the process be undertaken.

343. Section 106 of the NHPA requires that any Federal agency taking a direct or indirect "undertaking" must consider the undertaking's effect on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]." 16 U.S.C. § 470f. Regulations set forth a four-step procedure for compliance with Section 106, which includes identification of historic properties, the assessment of whether there are adverse effects on those historic properties, and the resolution of such effects. *See* 36 C.F.R. Part 800. This process often culminates in a memorandum of agreement, which reflects the understanding of the agency, the State's Historic Preservation Office, and consulting parties, as to how historic properties are to be managed, including references to mitigation. *See* 36 C.F.R. §§

[74] Generally, FEMA's primary planning and review process for compliance with environmental laws is dictated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* *See also* 44 C.F.R. Part 10. However, certain work, such as emergency work (including debris removal) under Section 403 of the Stafford Act, is exempted from the full, exhaustive NEPA review through a statutory exclusion. *See* Stafford Act, § 316, 42 U.S.C. § 5159. It should be noted though, that although a debris removal project like the ones at issue in this arbitration may be exempt from the full NEPA review process, such projects are still subject to the requirements of other environmental laws that are independent of NEPA and may require some level of review (although they would have otherwise been discussed during the NEPA process). *See, Exhibit* 217 – Public Assistance Digest, FEMA 321/January 2008 at Page 88; Exhibit 153-Green Sheet, at Page 1.

800.6(c), 800.16(o). Execution and implementation of a memorandum of agreement "evidences the agency official's compliance with section 106." *See* 36 C.F.R. § 800.6(c). Thus, NHPA compliance for the Parish required coordination and cooperation with FEMA to identify historic properties, districts, or other historically significant sites, as well as notification of ground disturbances, in order to perform an assessment of those properties to determine if the Federal undertaking will have an adverse effect on the proposed work. *Id.*

344. The Green Sheet also discusses the importance of making sure a subgrantee's project is in compliance with the NHPA, emphasizing that "[i]t is important to document a potential historic or archaeological resource with clear color photos, precise location information, and facts about the history of the structure of the area and bring it to FEMA's attention before you begin work." *See* Exhibit 153- Green Sheet, at Page 2 (emphasis added). The Green Sheet also includes a form entitled, "Requirements for Debris Activities Involving Ground Disturbance," for applicants to submit. *Id.* at Page 7. The form states that for activities that involve ground disturbance, including the creation of temporary access roads, the Subgrantee must coordinate with and receive comments from the Louisiana Office of Cultural Development, State Historic Preservation Office ("SHPO"), "prior to the start of any ground disturbance" (emphasis in original) and noting that "[i]t is the applicant's responsibility to mail or Fax this certification to…the SHPO for approval regarding all ground disturbance activities. *Id.* The form also includes a section for a certification by a Louisiana State Historic Preservation Officer as to whether the site of the project in question is located on any known archeological site or historical property. *Id* . The Subgrantee/applicant must attach this certification to their Public Assistance Project Worksheet (PW) as part of the file's permanent documentation." *Id.* Clearly, the Parish's vehement claims that it has no responsibilities under the NHPA, and those responsibilities fall

solely to FEMA and GOHSEP are contrary to law and wholly without merit based on the law and information cited above. *See* Exhibit 264-Request For Arbitration, at Pages 95-97.

345. Further, the Parish's continued claims of "FEMA said" and "the Parish relied" are redundant and unsupported in the record by any credible neutral documentation, i.e. meeting minute notes, email, etc. In fact, the only evidence to support this assertion are two affidavits prepared by Parish representatives in this matter, who have already been established through earlier transcript segments as providing statements biased in favor of the Parish. Moreover, the Parish's statement that "the Parish's debris removal work did not affect any historic property" is a bold statement since, as the Parish has identified in its Arbitration Request, Subgrantees do not make historic preservation determinations. *Id.* Further, the "after-the-fact review" performed more than two years after the disaster event by Louisiana, after all of the work was completed, and limited to the "data submitted" (presumably from the Parish's submittal only) without FEMA coordination and consultation cannot comply with the regulatory four-step procedure for compliance with Section 106 as established pursuant to 36 C.F.R. Part 800. Nor does it comply with the specific requirements and instructions provided to the Parish in the Green Sheet. *See* Exhibit 153 - Green Sheet.

346. Frankly, the Parish's assertion that it can fail to comply with NHPA without consequence, as long as the Parish obtained approval from the state (not FEMA for whom the Parish contrarily says is responsible) years after the fact is flagrantly contrary to regulation and process. The Parish failed on all counts to comply with NHPA's Section 106 requirements as no documentation, coordination, or information was ever provided to FEMA, or is included in the record. Accordingly, the Parish's arguments are incorrect, demonstrate a misunderstanding of the requirements of NHPA despite FEMA's clear guidance to the contrary, and are without merit.

Moreover, the Parish failed in its affirmative responsibilities to comply with historic preservation laws, and the Parish's requested work cannot be funded by FEMA.

F. The Parish's Claims for Wet Debris Removal Work and Monitoring (PWs 5590, 5591, 5593 and 5594) Are Not Eligible for FEMA Public Assistance, Because the Contracts for Debris Removal and Monitoring Were Not Properly Procured and Costs Were Unreasonable.

347. Relator asserts on behalf of FEMA that the Parish's claims for waterways debris removal work and monitoring is not eligible for reimbursement from FEMA's PA program. The Parish has failed to prove that the debris was generated by Hurricane Gustav and has failed to establish that the debris removed posed an immediate threat to lives and property. In addition, the Parish's requested work is ineligible, because the Parish failed to comply with Federal environmental and historical preservation laws. Notwithstanding, the Parish's requested work is also ineligible for reimbursement, because the Parish did not comply with FEMA's procurement standards in awarding work under 44 C.F.R. Part 13.

Federal procurement standards at 44 C.F.R. § 13.36 require that, among other things:

> Subgrantees are required to maintain a contract administration system that ensures contractors perform according to the terms, conditions, and specifications of their contracts or purchase orders. *Id.* at 13.36(b)(2).
>
> Subgrantees are required to maintain records sufficient to detail the significant history of the procurement, including the rationale for the method of procurement, the basis for contractor selection, and basis for the contract price. *Id.* at 13.36(b)(9).
>
> Subgrantees are not to use time and material (T&M) type contracts, unless a determination is made that no other contract is suitable and provided that the contract include a ceiling price that the contractor exceeds at its own risk. *Id.* at 13.36(b)(10).
>
> Procurement transactions must be performed in a manner providing full and open competition except under certain circumstances. *Id.* at 13.36(c)(1). One allowable circumstance is when there is a public exigency or emergency for the requirement that will not permit a delay resulting from competitive solicitation. *Id.* at

> 13.36(d)(4)(i)(B). However, even in this circumstance, subgrantees are subject to the general requirements that:
>
> 1) A cost or price analysis must be done in connection with every procurement action, including contract modifications, *id.* at 13.36(f)(1), and
>
> 2) Profit is to be negotiated as a separate element of the price for each contract in which there is no price competition and in all cases where cost or price analysis is performed, *id.* at 13.36(f)(2).

See 44 C.F.R. Part 13.

348. FEMA's public policy guidance further establishes that time and materials ("T&M") contracts, where the contractor bills the applicant for labor, equipment, materials, and overhead, should be avoided. *See* Exhibit 207– Debris Management Guide, FEMA 325/July 2007 at Page 18; Exhibit 217 – Public Assistance Digest, FEMA 321/January 2008 at Page 23; Exhibit 202 – Public Assistance Guide, FEMA 322/June 2007 at Page 53. Such contracts may be allowed in limited circumstances, however, such as for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed. *See,* Exhibit 207– Debris Management Guide, FEMA 325/July 2007 at Page 18. The costs must be reasonable for the type of work required, and applicants must engage in comprehensive active monitoring activities to ensure contractor efficiency. *Id.* Typically, FEMA will reimburse for only 70 hours of a T&M contract. *Id.*

349. Moreover, FEMA's policy guidance in place at the time in question also emphasized that contracts may be awarded without competitive bidding only if the emergency is such that the contract award cannot be delayed by the amount of time required to obtain competitive bidding. *See, (Exhibits in possession of Relator), Exhibit* 250- FEMA Fact Sheet 9580.4, Debris Operations – Clarification: Emergency Contracting vs. Emergency Work, Jan. 19, 2001. However, FEMA's division of disaster work into "emergency" and "permanent" is based

upon the period of time that the work is to be performed and is not based upon the urgency of the work; as a result, an award of a non-competitive contract cannot be justified on the basis of "emergency work," as defined by FEMA. *Id.* As a result, non-competitive bid awards should not be made several days (or weeks) after the disaster or for long-term debris removal. *Id.*

350. When an applicant fails to use a competitive process, or uses a flawed process in violation of Federal statute or regulation, FEMA may disallow all or part of the costs. *See* 44 C.F.R. § 13.43(a). There were three contracts associated with the wet debris removal and monitoring work, all clarified and argued in the leaners and hangers argument, none of which were properly procured by the Parish under FEMA's procurement standards or under the competitive process established in the Parish's own Debris Management Plan, as is discussed below. As a result, FEMA properly determined that none of the costs associated with the wet debris removal and monitoring costs were eligible for reimbursement from FEMA's PA program, pursuant to 44 C.F.R. § 13.43(a).

1. **The wet debris removal work awarded to IED was not properly procured, because it was not competitively bid in violation of 44 C.F.R. § 13.36.**

351. The contract between the Parish and IED (the "IED Contract") is for debris management and removal services. *See* Exhibits 6, 60, 67– IED's Annual Agreement Debris Management and Removal Services, August 31, 2008; IED Contract Addendum 1; IED Contract Addendum 2. As initially executed, the IED Contract states that IED would remove "excess green waste and/or bulk refuse" from the Parish's streets, right-of-ways, public parks and public places. *See,* Exhibit 6 – IED's Annual Agreement Debris Management and Removal Services, August 31, 2008.[75] After the Parish contracted with IED for the right-of-way debris removal

[75] According to the Parish, it solicited proposals on August 31, 2008, from IED, DRC Emergency Services ("DRC") and another company for debris removal, and received bids from IED and DRC. *See Exhibit 264-Request For Arbitration* Request, Page 85. Although the Parish has not submitted any advertisement or documentation

work, it determined that wet debris removal work was also necessary. *Id.* However, the Parish did not formally solicit bids for the wet debris removal work at this time and instead chose to expand the contract by including the waterways debris removal work in the form of two contract addendums.[76] *Id.* The Parish does not publicly dispute that it did not formally solicit competitive proposals for the wet debris removal work. Rather, the Parish claims that IED submitted a supplemental proposal[77] for waterways debris removal work and compared it to a DRC Emergency Services ("DRC") proposal that had been submitted in response to the Parish's August 31, 2008 solicitation for right-of-way debris removal, before accepting the IED supplemental proposal. *See* Exhibit 264-Request For Arbitration, at Page 86. As a result, the Parish argues that its procurement process for the wet debris removal work was in compliance with 44 C.F.R. § 13.36(d)(3), because the Parish awarded the wet debris removal work based on its review of more than one proposal. *Id.* However, such an argument is disingenuous. As a reading of Section 13.36(d)(3) shows, Section 13.36(d)(3) clearly allows procurement on the basis of competitive proposals that have been solicited in response to a direct request for that proposal:

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establishing the scope of work for its solicitation, the DRC proposal included an estimate for debris removal from waterways and right-of-ways debris removal, whereas the IED proposal included an estimate for right-of-ways debris removal. *Id.* at Page 86. As it was the IED proposal that was accepted, it is clear that the original scope of work envisioned by the Parish included just right-of-ways debris removal. FEMA does not contend that the IED Contract was improperly procured as to the Parish's right-of-ways debris removal work, as described in PW54.

[76] The first contract addendum ("IED Contract Addendum 1"), was signed by Parish President Michael Grimmer and Ben Northcutt of IED on September 25, 2008 and addressed debris removal from ditches and canals. Exhibit 60 IED Contract Addendum 1. IED Contract Addendum 1 stated that debris removal was to "include all eligible storm-generated materials encountered, identified and approved…" *Id.* at (I)(A)(1)(a). A second contract addendum ("IED Contract Addendum 2") was signed on November 24, 2008 by Jimmie McCoy of the Livingston Parish Council, which established rates for debris removal from ditches and canals within a designated wetlands area or otherwise deemed inaccessible to the extent that amphibious or other special machinery was required for access. Exhibit 67 – IED Contract Addendum 2, at (I)(A). It does not appear that IED Contract Addendum 2 was executed by IED. Collectively, the IED Contract Addendums 1 and 2 addressed IED's debris removal work both outside and inside of the GDDs (associated with PWs 5590 and 5594, respectively).

[77] It should be noted that to FEMA's knowledge and belief, the Parish has not provided a copy of IED's proposal for waterways debris removal work.

> **(3)** Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:
> **(i)** Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;
> **(ii)** Proposals will be solicited from an adequate number of qualified sources....
> **(iii)** Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees; [and]
> **(iv)** Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered....

See 44 C.F.R. § 13.36(d)(3) (emphasis added). The Parish failed to publicize a request for proposals for wet debris removal work in violation of 44 C.F.R. § 13.36(d)(3)(i). The Parish also failed to solicit proposals in violation of 44 C.F.R. § 13.36(d)(3)(ii). As a result, the Parish's procurement of IED's services for wet debris removal services is in violation of 44 C.F.R. § 13.36(d)(3) and of its own Debris Management Plan. As the DRC proposal demonstrates, clearly IED was not the sole possibility for the Parish for wet debris removal services. FEMA also did not authorize any noncompetitive proposals for the Parish. And, as noted previously, the Parish did not attempt to solicit wet debris removal proposals, and as a result, it is unknown whether the competition would have been inadequate to justify hiring IED.

352. The Parish seeks to excuse its failure to solicit competitive bids for the debris removal (and monitoring, discussed below) contracts, by referencing FEMA Fact Sheet 9580.4, *Debris Operations – Clarification: Emergency Contracting vs. Emergency Work*, Jan. 19, 2001. *See* Exhibit 264-Request For Arbitration, Page 87; *See (Exhibits in possession of Relator)* Exhibit 251– Fact Sheet 9580.4, January 19, 2001. Fact Sheet 9580.4 does note that applicants may use

an expedited process for obtaining competitive bids, by which applicants can develop a scope of work, identify contractors, make telephone calls for bids and receive competitive bids as a result. *See id.* However, as noted previously, the Parish did not solicit multiple bids for the waterways debris removal work, and any attempt by the Parish to re-characterize its non-competitive procurement of IED's wet debris removal services as an expedited, competitive process is, again, disingenuous.

353. Lastly, with regard to the possibility that an emergency requirement may have existed that would not permit delay, it is telling that the IED Contract Addendum was signed on September 25, 2008—weeks after Hurricane Gustav's landfall in the Parish. In addition, the Parish waited *three months after* Hurricane Gustav to actually begin the work. *See* Exhibit 264- Request For Arbitration Appx. 6172, at ¶ 81 – Affidavit of Brian Fairburn, sworn to July 15, 2011. As emphasized by FEMA Fact Sheet 9580.4, contracts may be awarded without competitive bidding only if the emergency is such that the contract award cannot be delayed by the amount of time required to obtain competitive bidding. *See* Exhibit 251- FEMA Fact Sheet 9580.4, Debris Operations – Clarification: Emergency Contracting vs. Emergency Work (Jan. 19, 2001). And, in keeping with this urgency requirement, non-competitive bid awards should not be made several days (or weeks) after the disaster or for long-term debris removal. *Id.* The Parish's procurement of IED's debris removal services fails to meet the conditions to justify an exception to the requirement that contracts be competitively bid under 44 C.F.R. § 13.36.

2. **The wet debris removal monitoring work awarded to PEC and AFA was not properly procured, because it was not competitively bid in violation of 44 C.F.R. § 13.36.**

354. The AFA and PEC debris monitoring contracts, as they relate to debris monitoring for IED's wet debris removal work inside and outside of the GDDS, respectively, are also

problematic as neither were competitively bid in violation of 44 C.F.R. § 13.36. The Parish claims that it used a competitive proposal method to award the debris removal monitoring contracts and solicited bids from four different firms in accordance with 44 C.F.R. § 13.36(d)(3). *See* Exhibit 264-Request For Arbitration, at Page 86. However, the Parish's argument here fails for the same reason as it did for the wet debris removal work awarded to IED. The advertisement for debris monitoring proposals that the Parish references notes that it is for "monitoring debris removal from public access roads, rights-of-way, and in-use city owned/maintained public property…" *See* Exhibit 264-Request For Arbitration, Appx. 6228 – Advertisement Livingston Parish, Louisiana Request for Proposals. The advertisement is not, as the Parish would have this Panel believe, an advertisement for debris monitoring services for debris removal from waterways. As established earlier, 44 C.F.R. § 13.36(d)(3) clearly requires that procurement on the basis of competitive proposals to have been the result of solicitations in response to a direct request for that proposal. As a result, the Parish's procurement of AFA's and PEC's[78] services

[78] The PEC Contract also raises other contract issues. For example, like the IED Contract, the scope of the PEC Contract was expanded in a contract amendments. *See, Exhibit* 224 – PEC Contract Amendment 1. However, unlike the AFA Contract, it does not appear that the Parish ever specifically amended the PEC Contract to note the significant expansion in its scope to include waterway debris removal monitoring. *See, Exhibit* 61 – AFA Debris Management and Monitoring Services Agreement, Livingston Parish Debris Management and Monitoring Services for Cleaning of Drainage Canals and Ditches, September 26, 2008, §2 ("Services to be provided…shall include…monitoring the debris removal from Drainage canals and ditches which are located in the Parish of Livingston.") Indeed, the PEC Contract specifically states that the contract is for "monitoring the debris removal from public access roads, rights-of-way, and in-use Parish owned/maintained public property…" Exhibit 10 – PEC's Debris Management and Monitoring Services Agreement, PEC Project No. 10683, September 8, 2008, § 2. This purpose is not amended in any of the other amendments to the PEC Contract, although the first amendment ("PEC Contract Amendment 1") establishes that overtime hours worked would be paid at 1.5 times the hourly rate and also established equipment rates for ATV and flatboat usage for "remote access where necessary." Exhibit 224 – PEC Contract Amendment 1. It should also be noted that the PEC Contract Amendment 1 was entered into on February 12, 2009, *id.*, which is well after the time when PEC began waterways debris monitoring work for the Parish. In contrast, the AFA Contract was executed on September 28, 2008. Exhibit 61 – AFA Debris Management and Monitoring Services Agreement, Livingston Parish Debris Management and Monitoring Services for Cleaning of Drainage Canals and Ditches, September 26, 2008. As a result, it is unclear whether the PEC Contract, as amended, actually serves to memorialize PEC's agreement with the Parish to perform waterways debris monitoring work and further raises issues regarding the reasonableness of PEC's claimed costs.

for waterways debris removal monitoring services is in violation of 44 C.F.R. § 13.36(d)(3) and of its own Debris Management Plan.

355. And, just as with the IED Contract, the Parish cannot attempt to correct the infirmities with its procurement of waterways debris removal monitoring services by claiming that an exigent circumstance existed that would have allowed for a noncompetitive process, as the wet debris removal did not take place until three months after Hurricane Gustav. *See* 44 C.F.R. § 13.36(d)(4).

356. Further, the PEC and AFA Contracts call for personnel to be paid at hourly rates which vary by job function. *See* Exhibits 10 and 61 – Debris Management and Monitoring Services Agreement, PEC Project No. 10683, September 8, 2008 § 6; AFA Debris Management and Monitoring Services Agreement, Livingston Parish Debris Management and Monitoring Services for Cleaning of Drainage Canals and Ditches, September 26, 2008, § 6. As noted previously, such contracts are known as time and materials contracts ("T&M") contracts. *See* Exhibit 207 – Debris Management Guide, FEMA 325/July 2007 at Page18. Under 44 C.F.R. § 13.36 and FEMA policy, Subgrantees' are not to use T&M type contracts, unless a determination is made that no other contract is suitable and provided that the contract include a ceiling price that the contractor exceeds at its own risk. *Id.* at 13.36(b)(10); Exhibit 155– FEMA Fact Sheet 9580.203, Debris Monitoring, at Page 5 (May 3, 2007). As neither of the Parish's monitoring contracts contains such a clause, the Parish did not meet Federal procurement requirements prior to executing the contracts. *See* Exhibit 45– LLA Audit, at Page 3 ("The [PEC] contract…did not contain a cost limit as required by FEMA guidance.").

357. It should be noted that while the Parish has submitted a cost analysis for the IED debris removal contract, that the Parish has not submitted any similar analysis for the AFA and

PEC contracts. 44 C.F.R. § 13.36 requires that the applicant perform a cost or price analysis in connection with every procurement action, 44 C.F.R. § 13.36(f)(1), and also requires that profit be negotiated as a separate element of the price for each contract in which there is no price competition and in all cases where cost or price analysis is performed, 44 C.F.R. § 13.36(f)(2). The Parish has provided a memorandum, prepared by Brian Fairburn (the Parish's OHSEP Director at the time in question), which shows the Parish's cost analysis for the IED Contract Addendums 1 and 2. *See* Exhibit 264-Request For Arbitration, Appx. 6175, ¶ 94 (referencing the memorandum as Exhibit J); *id.* at Appx. 6192 (the memorandum). However, the memorandum itself is undated and it appears that it was provided only as an attachment to the affidavit Mr. Fairburn submitted with the Parish's Second Appeal of the Waterways Debris Removal PWs. *See* Exhibit 264-Request For Arbitration, Appx. 6175, ¶ 94 (referencing the memorandum as Exhibit J). As a result, the record does not demonstrate that the Parish performed a cost or price analysis at the time IED's wet debris removal services were procured, to determine whether the agreed-upon rates and prices were reasonable, or how they compared to current or recent prices charged for the same or similar items. The Parish also did not negotiate profit as a separate element of price in any of the IED, PEC or AFA Contracts. It is clear that the Parish did not meet Federal procurement requirements prior to executing any of these contracts.

3. **The Parish's requested work for wet debris removal and monitoring is ineligible, and costs were not allowable or reasonable.**

358. The Parish's wet debris removal work is ineligible, and, independently, the costs are not reasonable as required by Federal regulation. Grant funds may only be used for "[t]he allowable costs of the grantees, sub-grantees and cost-type contractors." *See* 44 C.F.R. § 13.22(a)(1). For "each kind of organization, there is a set of federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principle

applicable to the organization incurring the costs." *See* 44 C.F.R. § 13.22(b). The cost principal applicable to local governments such as Livingston Parish is OMB Circular A-87. OMB Circular A-87 states in pertinent part:

> Basic Guidelines, (C)
> 1. Factors affecting allowability of costs. To be allowable under Federal awards, costs must "Be necessary and reasonable for proper and efficient performance and administration of Federal award . . . be determined in accordance with generally accepted accounting principles . . . and be adequately documented.

See, (Exhibits in possession of Relator), Exhibit 4 - OMB Circular A-87. In addition, costs must also be reasonable. Reasonable costs are defined as:

> (2) Reasonable costs. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally funded. In determining reasonableness of a given cost, consideration shall be given to:
>
> Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.... Market prices for comparable goods or services...Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government...; and Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

Id. Specific to emergency work, such as debris removal operations claimed by the Parish, 44 C.F.R. § 206.225(a)(3)(ii) states that in order to be eligible, emergency protective measures must "[e]liminate or lessen immediate threats of significant additional damage to improved property through measures which are cost effective."

359. In this case, the record reflects that the costs claimed were not reasonable. IED's wet debris removal services and AFA's and PEC's waterways debris monitoring services were not properly procured, in violation of 44 C.F.R. Part 13. Additionally, none of the contracts were

competitively bid, in violation of 44 C.F.R. § 13.36. In addition, the wet debris monitoring contracts did not contain cost ceilings, in violation of 44 C.F.R. § 13.36(b)(10). Further, Federal cost principles state that to be allowable, costs must be necessary and reasonable for proper and efficient performance and administration of Federal awards. *See* 2 C.F.R. Part 225, Appendix A, C.1.a. Further, it is FEMA's position that IED's billings were for the removal of ineligible debris, which did not pose an "immediate threat" and which violated Federal environmental and historical preservation law. As a result, IED's requested work is ineligible and its related costs are unreasonable. Moreover, it is also FEMA's position that the monitor's billings for monitoring the debris removal activities are unreasonable because their performance was ineffective.

360. In addition, Parish documentation shows that PEC and BBEC, the primary debris monitoring companies, were conducting monitoring activities outside the drainage district, while Alan Fairburn and Associates were performing debris monitoring activities inside the drainage district. However, there were discrepancies in costs for the same monitoring work between these companies. *See* Exhibit 78-Jeff Bonura/BBEC email to Will Clark/Parish dated May 8, 2009. Specifically, Mr. Bonura of BBEC states:

> "in delivering the debris monitoring costs to FEMA for the drainage district work, I noticed that the monitoring costs, as compared to the cost of the debris removal, was substantially higher than what we are spending outside of the drainage districts. We haven't been observing the work inside the drainage districts, nor have we been reviewing the invoices and documentation. We can help the Parish review the drainage [sic.] district work if you want, but cannot guaranty the results of the review of funding."
>
> "... I'm concerned for the Parish that the Parish may experience cuts in the reimbursements from FEMA related to the work."

Id. Thus, Mr. Bonura clarifies that the PEC or BBEC monitors did not monitor the debris removal activities in the gravity drainage districts, but the monitoring costs from the Parish's

additionally hired monitoring firm, Alvin Fairburn & Associates, LLC (AFA) to also "provide sufficient staff to monitor the operations of the debris removal contractor," had "substantially higher" monitoring costs. *Id.*; *see also* Exhibit 61- AFA Debris Management and Monitoring Services Agreement, Livingston Parish Debris Management and Monitoring Services for Cleaning of Drainage Canals and Ditches, September 26, 2008.

361. No explanation is provided in the record as to why AFA's monitoring costs were "substantially higher" than PEC or BBEC's for the same exact work, however, the July 7, 2009 case notes tend to clarify this discrepancy might be because AFA monitors did not "separate debris, canal, or bank." *See, (Exhibits in possession of Relator),* Exhibit 22 – Data for Case Management File, Meeting at the Parish Offices, July 7, 2009. Debris monitors have a multitude of responsibilities under FEMA policy, including contract compliance and cost reasonableness. *See* Exhibit 155 - DAP 9580.203 Debris Monitoring. Certainly, BBEC questioned the increased costs and the reasonableness of those costs for AFA for the same monitoring work BBEC and PEC was performing, as did FEMA.

362. Assuming, *arguendo*, however, that none of the above problems with the Parish's waterways debris removal and monitoring work existed, FEMA has broad discretion under 44 C.F.R. § 13.43(a) to allow and disallow reasonable costs for eligible work to an eligible applicant notwithstanding flaws with the applicant's procurement process. 44 C.F.R. § 13.43, entitled "Enforcement," authorizes a granting agency to "(a)…(2) Disallow…all or part of the cost of the activity …not in compliance" or "…(5) Take other remedies that may be legally available." The discretion to disallow costs includes the authority to determine not to disallow costs "…as appropriate in the circumstances." *Id.*

363. Information from the contractors demonstrates that the costs were not allowable or reasonable. For example, the Parish debris monitor, AFA, indicated that the debris removed from the waterways was mixed and loaded with the debris from cleared access pathways. *See Exhibit* s104-107- Wet Debris PWs; Exhibit 22- Data for Case Management File, Meeting at the Parish Offices, July 7, 2009; Exhibit 78-Jeff Bonura/BBEC email to Will Clark/Parish dated May 8, 2009. In addition, as previous transcript citations reveal, the Parish and its contractors stated: "you can't pick and choose to discriminate which you are going to clean and which lateral ditch you are not going to allow to back up and its acceptable to allow these to back up but unacceptable to allow those to back up. It's all a hazard. The Parish has identified it's a done deal cleaning it out. *See* Exhibit 69- Transcript of November 25, 2008, at 1:47:54 (David Green of IED). IED's practice of loading wet debris into a truck that already had leaner and hanger debris after clearing access pathways and ditches, all ineligible work, makes it impossible for the Parish, the contractors, and FEMA to determine how much wet debris might actually be eligible. In addition, it is impossible for FEMA to determine what is allowable or reasonable when the amount, type of debris, and location of debris cannot be delineated. *Id.* As a result, FEMA must determine those costs as ineligible.

364. The Parish contends that all of its contractor work was reasonable. *See Exhibit 264-Request For Arbitration*, Pages 87-91. For debris removal work performed by IED, the Parish explains that it originally contracted for debris removal operations on a linear foot basis. *Id.*, Pages 87-88. However, two months after IED began the work, the Parish agreed to significant rate hikes because the contractor had not "taken into account costs in removing debris from waterways that were less accessible, or where special machinery was required." *Id.* Although the Parish agreed to IED's rate increases on September 25, 2008 and November 24,

2008, it was not until months later, on February 12, 2009, that PEC thought to officially contract for its own rate increase. *See Exhibit* s 60, 67, 224- Contract Addendum 1 to Debris Removal Agreement between IED, Inc. and Livingston Parish, September 25, 2008; Contract Addendum 2, Debris Removal Agreement between IED, Inc. and Livingston Parish, November 24, 2008; PEC Contract Amendment No. 1 (Feb. 12, 2009). Essentially, the Parish suggests that despite IED and PEC's extensively claimed experience in wet debris clearance and monitoring, these contractors failed to consider several key factors in its bid pricing and when brought to the attention of the Parish, the Parish wholeheartedly agreed to pay the increased prices. At that time, the contract had already been signed, so the Parish had no legal obligation to agree to pay more, and the "mistake" was born by the contractors alone. Now, the Parish expects Federal taxpayers to pay the increased prices because the Parish agreed to pay them, despite the "error" being the contractors'.

365. Contractor underpricing which resulted in the Parish agreeing to pay more, when it had no contractual obligation to pay more, cannot be passed through to the Federal government and claimed as "reasonable" simply because the Parish agreed to pay them. This increased pricing fails to comply with the OMB Circular A-87 requirement that the "individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government." *See* OMB Circular A-87. Further, even if the cost increase itself was reasonable, the original costs continue to be ineligible and unreasonable.

366. For example, under IED's contract, higher prices were charged for wider waterways, and even higher prices were charged based on canal width depending on wetlands or inaccessible wetlands determinations. *See, (Exhibits in possession of Relator),* Exhibits 6, 60 and

67 – IED's Annual Agreement Debris Management and Removal Services, August 31, 2008; Contract Addendum 1 to Debris Removal Agreement between IED, Inc. and Livingston Parish, September 25, 2008; ; Contract Addendum 2, Debris Removal Agreement between IED, Inc. and Livingston Parish, November 24, 2008. However, many of the drainage canal tickets and photos submitted by IED as documentation for eligible work do not support the increased fees that were charged for the width of the canal where wet debris was removed. *See* Exhibit 251– Examples of Unsupported Waterways Width (photos, drainage canal tickets and invoices. In addition, almost all of the work performed outside of the Gravity Drainage Districts were charged at the higher wetlands fee, despite the Parish's other argument that much of its work was not ineligible for having been performed in wetlands without USACE permits. *See, (Exhibits in possession of Relator*), Exhibit 252– Spreadsheet of IED Invoices. As another example, IED was also compensated separately by the cubic yard (CY) for loading and hauling wet debris to disposal sites. *See, (Exhibits in possession of Relator),* Exhibit 6– IED's Annual Agreement Debris Management and Removal Services, August 31, 2008. FEMA's Debris Guide gives specific guidance on loading debris into trucks and emphasizes that debris should be compacted to ensure maximum efficiency. *See* Exhibit 207 – Debris Management Guide, FEMA 325/July 2007 at Pages 111- 115. However, many of the load tickets submitted by IED reflect higher percentages of load capacity filled with wet debris than is reflected in the corresponding photos submitted by the Parish's monitors. *See, (Exhibits in possession of Relator),* Exhibit 253– Examples of Load Tickets with Inaccurate Load Percentages and Corresponding Photos. Given also that the Parish's contractor cut numerous access roads, generating ineligible debris, *see supra*; AFA did not separate eligible from ineligible debris, *See* Exhibit 78 - Email from Jeff Bonura/BBEC email to Will Clark/Parish (May 8, 2009); and that the time lapse between debris removal and disposal

led to faded markings of eligible debris by PEC, *see id.*, IED's load tickets are inherently flawed and are unreasonable.

367. Further, the Parish failed to provide any evidence that the contractor costs claimed were equivalent to other contractors charging for the same work in order to establish reasonableness. In fact, a PowerPoint presentation prepared by former Parish President, Mike Grimmer, shows in chart format that the Parish was charging nearly twice as much for its debris removal operations than other contractors performing the same work in other Parish communities. *See, (Exhibits in possession of Relator),* Exhibit 244- Mike Grimmer PowerPoint.

368. The record also reflects that in the case of Renninger Lateral, the Parish already had in hand an estimate for work, which it clearly ignored. In 2005, GDD #2 received a jurisdictional determination from the USACE, informing the Parish that part of Renninger Lateral is a wetland subject to the USACE's jurisdiction. *See, (Exhibits in possession of Relator),* Exhibit 254 – Letter from Ronald J. Ventola/USACE to Andrew Ardoin, February 2, 2005. However, the Parish decided not to perform the work on Renninger Lateral. As stated in a letter from Charles B. Kemp, Chairman of GDD #2, to the USACE with regard to its July 13, 2009 Cease and Desist order, the USACE "permit contained a provision for the purchase of mitigation at a cost of $81,250 which was about four times the cost of doing the work and well in excess of what the district could afford." *See, (Exhibits in possession of Relator),* Exhibit 255 – Letter from Charles B. Kemp/GDD #2 to Pete J. Serio/USACE, "Violation No. MVN-2009-00804-SK," October 20, 2010. Putting aside the issue of the Parish's actual knowledge of the permits required for work on Renninger Lateral, *see supra* discussion at Part V(D) (permitting), the Parish is claiming $670,300 for the wet debris removal work alone (without monitoring) performed on the

waterway. This amount far exceeds the amount Mr. Kemp stated in his 2010 letter as the estimated cost to the GDD for the work it had forgone in 2005.

369. Furthermore, the Parish's claim that price comparisons to other Parish communities demonstrates the Parish's costs were reasonable is unfounded and is a comparison of apples and oranges. *See* Exhibit 264-Request For Arbitration at Page 89. For example, the Parish notes that Pointe Coupe Parish paid $15 per linear foot for Hurricane Gustav wet debris removal services. *Id.* However, the PW written for the work performed in Pointe Coupe Parish did not specifically include wet debris removal in its project scope. Rather, the debris removal work performed in Point Coupe was funded as part of that parish's curbside debris pickup work and is distinguishable from the Parish's situation. *See, (Exhibits in possession of Relator),* Exhibit 256 – Project Worksheet for Pointe Coupe.

370. The Parish argues that IED's debris removal costs were reasonable, given the difficulty of the work, the need to act quickly, and as compared to the costs reimbursed by FEMA for wet debris removal in Pointe Coupe Parish, Louisiana and that was paid for by the NRCS. *See* Exhibit 264-Request For Arbitration, Pages 88-89. The Parish also incorrectly claims that debris monitoring costs were reasonable because the monitoring prices are less than 20% of the Parish's debris removal costs. *See* Exhibit 264-Request For Arbitration, at Page 89. FEMA disagrees. In May 2009, PEC and its subcontractor BBEC, the Parish's monitoring companies for wet debris removal work outside the drainage districts, raised concerns regarding the costs being incurred or claimed by AFA, the Parish's monitor for wet debris removal activities inside the drainage districts. *See* Exhibit 78- Email from Jeff Bonura/BBEC email to Will Clark/Parish (May 8, 2009). Specifically, Mr. Bonura of BBEC states:

> [I]n delivering the debris monitoring costs to FEMA for the drainage district work, I noticed that the monitoring costs, as

> compared to the cost of the debris removal, was substantially higher than what we are spending outside of the drainage districts. We haven't been observing the work inside the drainage districts, nor have we been reviewing the invoices and documentation. We can help the Parish review the drainage [sic.] district work if you want, but cannot guaranty the results of the review of funding. … I'm concerned for the Parish that the Parish may experience cuts in the reimbursements from FEMA related to the work.

Id. Thus, Mr. Bonura clarifies that neither PEC nor BBEC monitors monitored debris removal activities in the gravity drainage districts; however, in comparison to PEC/BBEC's costs the monitoring costs from the Parish's monitoring firm, AFA, for wet debris removal work within the GDDs also had incurred "substantially higher" monitoring costs in "provid[ing] sufficient staff to monitor the operations of the debris removal contractor." *Id.*; *see also* Exhibit 6- IED's Annual Agreement Debris Management and Removal Services, August 31, 2008. No explanation is provided in the record as to why AFA's monitoring costs were "substantially higher" than PEC's costs for the same exact work. However, the July 7, 2009 case notes tend to clarify this discrepancy might be because AFA monitors did not "separate debris, canal, or bank." *See, (Exhibits in possession of Relator), Exhibit* 22- July 7, 2009 Case Management File. Debris monitors have a multitude of responsibilities under FEMA policy, including contract compliance and cost reasonableness. *See* Exhibit 155 - DAP 9580.203 Debris Monitoring. Certainly, BBEC questioned the increased costs and the reasonableness of those costs for AFA for the same monitoring work BBEC and PEC was performing, as did FEMA.

371. FEMA documented the systemic monitoring documentation problems its environment recommendations, which states: "[T]he monitoring contractor's billings for monitoring the debris removal activities are unreasonable because their performance was ineffective. According to 44 C.F.R.§ 13.22 federal funds may be used only for allowable costs. Federal cost principles state that to be allowable, costs must be necessary and reasonable for

proper and efficient performance and administration of federal awards. *See* Exhibit 103- Record of Environmental Consideration for Waterway Debris Removal Projects, January 15, 2010; see also 2 C.F.R. Part 225, Appendix A, C.1.a.; Exhibit 251 - Fact Sheet 9580.4; 44 C.F.R. § 13.22 for reasonable costs; Exhibit 4 - OMB Circular A-87; 44 C.F.R. § 13.36(b)(10)(ii); Exhibit 207 - Debris Management Guide, FEMA 325/July 2007 at Page 19.

372. Finally, the Parish's most outrageous claim that their costs are reasonable and eligible is that "Issues Listed In FEMA's Denials Do Not Preclude Funding." *See* Exhibit 264- Request For Arbitration, p. 90. In other words, the Parish believes that as long as the costs are, in their minds, reasonable, despite FEMA's other reasons for denial, the costs should be reimbursed. This argument is without merit and contrary to the entire eligibility process of the Public Assistance program. Costs are the last item of consideration after Subgrantee and work eligibility have first been determined. *See* Exhibit 202- Public Assistance Guide, FEMA 322/June 2007 at Page 3 ("The costs incurred implementing the plans are eligible for reimbursement only if they meet PA Program eligibility criteria."). Clearly, if the underlying work is ineligible for FEMA Public Assistance grant reimbursement, the reasonableness of the costs performed for the ineligible work do not matter for PA grant purposes.

373. GOHSEP argues in its submission that 44 C.F.R. § 224(a)(2) does not speak to cost effectiveness. *See* Exhibit 113 – GOHSEP Letter to FEMA Assistant Administrator – Recovery Directorate, Livingston Parish, Second Appeal, September 12, 2011, at Page 6, GOHSEP is correct that this regulation does not speak directly to cost effectiveness or reasonableness, however, GOHSEP is incorrect that the lack of specific language in the debris removal regulation means costs do not have to be reasonable. *Id.* GOHSEP has failed to consider that this regulation is read in conjunction with the Stafford Act, 44 C.F.R. § 225, Emergency

Work, and 44 C.F.R. Part 13 which unequivocally requires that all costs under a Federal grant be cost effective and reasonable. Specifically, under Section 403 of the Stafford Act, the very definition of Essential Assistance includes emergency work and debris removal. *See* 42 U.S.C. 5170(b). Further, as clarified, Emergency Work requires cost effectiveness, as does 44 C.F.R. 13.22 and OMB Circular A-87.

374. For all of the reasons cited above, Delahoussaye asserts that contractor costs claimed by the Parish are unreasonable and ineligible for reimbursement from FEMA and fraudulent.

G. FEMA's Validation of the Parish's Debris Removal Work Substantiates FEMA's Determination to Deny Eligibility for Wet Debris.

375. FEMA performed a validation of all wet debris work and documentation submitted which resulted in zero eligible work for the Parish. Specifically, from mid-July to mid-October 2009, FEMA performed site surveys of all waterways worked by the debris removal contractor. *See Exhibit*s 112, 91 and 92 – FEMA Response to Livingston Parish First Appeal , May 13, 2011 at Page 1; Examples of FEMA Stream/Waterways Eligibility Summary Report, various dates; Survey Methodology. These inspections were conducted by four,[79] two-person teams of FEMA Debris Specialists (also known as "Tiger Teams"), who performed site visits at Global Positioning System ("GPS") coordinates provided by the Parish's debris monitoring contractors to document work performed in each waterway. *See* Exhibit 92 – Survey Methodology. All streams in which debris was removed were inspected to determine if debris removed from the waterway would have posed an immediate threat of flooding to improved

[79] Initially, three teams, of two persons, were assigned to validate the Parish's wet debris work. Later, another two person team was added. *See, Exhibit* 23 – Affidavit of Jeffrey Jones.

property, and therefore be potentially eligible for reimbursement under FEMA's regulations and policies. *Id.*

376. The comprehensive validation was prompted by concerns after FEMA's initial survey was done of the Parish's wet debris removal operations months earlier. Performed in mid-July 2009, this initial site survey encompassed approximately 20% of the GPS locations provided by AFA, the Parish's monitor for wet debris work within the GDDs, to evaluate the eligibility of the wet debris removal work performed inside GDDs 1, 2, and 5. *Id.* When none of the inspected locations were determined to meet FEMA eligibility criteria, FEMA elected to perform an enlarged assessment survey of all GPS locations provided by AFA, as well as all locations provided by the Parish's other monitor, PEC, for waterways inside and outside the drainage districts. *Id.* These inspections were performed from early August 2009 to the middle of October 2009. *Id.*

377. The FEMA Debris Specialists are contractors who have gone through extensive training in FEMA's policies and procedures regarding debris removal. *See Exhibits* 20, 23, 257 – Affidavits of Jeffrey Jones and Steve Gowen; Email from Michael McCloskey/FEMA of Request for Debris Specialists, May 29, 2009. The Debris Specialists were tasked with making physical visits to the debris removal sites, based upon GPS coordinates provided by the Parish's monitors, and to record their observations. *See Exhibits* 20 and 23 – Affidavits of Steve Gowen and Jeffrey Jones. However, the Debris Specialists were contractors and were not authorized to make eligibility determinations in the field. *See id.* Rather, the Debris Specialists recorded their observations and discussed their findings with FEMA PA leadership, to allow FEMA to make final eligibility determinations. *Id.*

378. In the field, FEMA Debris Specialist Teams prepared field survey forms which were used to record and document the waterway's physical and biological attributes, observations of the surrounding site area, and any comments obtained from interviews with local residents or others familiar with the site area. *See* Exhibit 92 – Survey Methodology. Photographs were also taken of the site location and surrounding area. *Id.* If the site location could not be reached, the general site area was photographed to document the private property issues, lack of access due to vegetation overgrowth, or other inhibiting factors preventing the site inspection. *Id.*

379. Upon returning to the office, each FEMA team, in consultation with FEMA PA staff, prepared site inspection reports to include electronic field survey forms, aerial maps from available online sources (*i.e.*, Google Maps), and a site photo log. *Id.;* Exhibits 20 and 23 Affidavits of Jeffrey Jones and Steve Gowen. Each survey form included an eligibility recommendation based on the observed field conditions, proximity to improved property, and, when available, comments from local residents on site flooding concerns. *Id.* In addition, the teams also consulted maps[80] of the Parish, which identified the locations of specific work sites, based upon the GPS coordinates provided by the Parish's contractors, relative to the locations of the Parish's waterways; Federal Highway Administration (FHWA) and local roads; floodplain areas and wetlands. *See (Exhibits in possession of Relator),* Exhibits 258, 23, and 20 – FEMA Geospatial Intelligence Unit Maps (created July to September 2009); Affidavits of Jeffrey Jones and Steven Gowen. The teams also considered whether the Parish's monitors had submitted documentation, such as photographic evidence, indicating the existence of an imminent threat to improved property. However, as discussed, *see supra*, the monitor's photos generally failed to

[80] The maps were created by FEMA's Geospatial Intelligence Unit for its Baton Rouge Joint Field Office. To create the maps, 2006 Aerials Express imagery was overlain with FHWA & FEMA roads, FEMA Q3 flood zones (100-year and 500-year), wetland data from 2007 NWI and other vector base data.

show how or if any threat existed to improved property. The site inspection reports were then used to prepare a Stream/Waterway Eligibility Summary Report for each of the named waterways. *See* Exhibit 91- Examples of FEMA Stream/Waterways Eligibility Summary Report, various dates. The Eligibility Summary Reports present the findings of the field surveys and the specific rational for the eligibility determination made for each waterway. *Id.* Based on the results of FEMA's site inspections, none of the locations or waterways were considered eligible for reimbursement under FEMA's guidelines and policy. *See id.*

380. Beyond an analysis of where the Parish's contractor IED performed work versus the proximity of improved property, FEMA's validation also considered whether the Parish's monitors had submitted documentation, including photo evidence, indicating the existence of an imminent threat to improved property. However, as discussed previously, the monitors' documentation generally failed to show how or if any threat existed to improved property.

381. Unsurprisingly, the Parish disputes FEMA's Debris Specialists' findings. The Parish alleges that FEMA changed the Debris Specialists' initial findings in the field. *See* Exhibit 264-Request For Arbitration, Pages 41-43 & 45-47. However, as discussed previously, the Debris Specialists were not tasked to make eligibility determinations in the course of their site visits; rather, the Debris Specialists were tasked to visit the Parish's wet debris removal sites, based upon the coordinates provided by the Parish's monitors. *See* Exhibits 23 and 20– Affidavits of Jeffrey Jones and Steve Gowen. Far from following any "ineligibility template," *See* Exhibit *264-Request For Arbitration*, Page 44, as described above, the Debris Specialists carefully reviewed available documentation, maps and other data in addition to their own field observations to arrive at their final Stream /Waterway Eligibility Summary Reports. *See* Exhibits 23 and 20 – Affidavits of Jeffrey Jones and Steve Gowen. The Parish also states that Debris

Specialists who observed the Parish's wet debris operations in action did not raise issues regarding eligibility, and in one instance, encouraged an individual monitor. See Exhibit 264 - Arbitration, Page 45. However, as noted, the Debris Specialists were not authorized to make eligibility determinations in the field. *See* Exhibits 23 and 20 – Affidavits of Jeffrey Jones and Steve Gowen. In addition, in several instances, although she may not have felt comfortable confronting a full crew of Parish contractors in the field, Debris Specialist Carolyn Smith noted in her logs that she did not think that the Parish's debris removal activities were eligible. *See, (Exhibits in possession of Relator),* Exhibit 259 – Carolyn Smith Validation Log.

382. The Parish also argues that the Debris Specialists based their information on outdated information. *See*, Exhibit 264 -Arbitration Brief, at Pages 49-51. However, the Debris Specialists based their site visits and surveys upon the GPS coordinates provided by the Parish's own monitors.[81] *See, (Exhibits in possession of Relator) e.g.,* Exhibit 260 – Examples of Spreadsheets with GPS Coordinates Provided by PEC. As FEMA learned only later however, in many instances the GPS coordinates that were given to FEMA by the Parish did not match the coordinates that were provided on the Parish's debris tickets. *See, (Exhibits in possession of Relator) e.g.*, Exhibit 261– Example Mapping Showing Location of Provided GPS Coordinates Versus Debris Ticket GPS Coordinates and associated Water /Stream Eligibility Survey for Work Order No. 95 (Smary Branch Lateral). It is the responsibility of the Parish, as the Subgrantee, to provide accurate and sufficient documentation of eligibility. The Parish cannot now fault FEMA for its own contractors' errors.

[81] PEC provided FEMA with spreadsheets of the GPS coordinates for the locations of IED's wet debris work outside of the GDDs. However, FEMA worked off the direct debris tickets for wet debris work done within the GDDs that was supervised by AFA. *See Exhibit* 20 – Affidavit of Steve Gowen.

383. The Parish cites *In re Hancock County Bd. of Supervisors*, CBCA 2374-FEMA (Oct. 25, 2011) in support of its argument that the Panel should give the Debris Specialists' initial, draft field surveys, more weight than FEMA's final determinations. However, it should also be noted that the Debris Specialists performed the vast majority of their field surveys and validation in the summer and fall of 2009—well after Parish President Mike Grimmer had ordered that all debris removal operations stop in the Parish in May 2009, and after the majority of the work had been completed. Unlike the assessment team in *Hancock*, the Debris Specialists did not—and were not authorized to—make eligibility assessments in the field. And indeed, the Debris Specialists would not have been able to make such assessments regardless, as in the vast majority of cases there would have been no debris removal work in progress for the Debris Specialists to observe.

H. FEMA's Initial Proposed PW, Which Included Wet Debris Removal and Monitoring, Is Not Binding and Cannot Be Treated as Such.

384. Project Worksheets are not contracts; rather, PWs are instruments upon which FEMA documents disaster claimed Public Assistance grant work (whether eligible or ineligible). *See* 44 C.F.R. § 206.202(d). In the Arbitration Request, the Parish incorrectly suggests that FEMA implicitly confirmed the eligibility of the wet debris removal work by preparing a draft version of PW 54 version 1 in April of 2009. *See, e.g.*, Request for Arbitration, at Page 40. The early draft of PW 54 version 1—which differs substantially ins scope from the version that was ultimately obligated—included wet debris removal costs by IED in the amount of around $32 million, as well as an additional $9 million for roadside and leaners and hangers debris removal. Exhibit – Draft PW 54 version 1. The Parish's argument is without merit and suggests a fundamental lack of understanding of the Public Assistance grant process and the purpose of the PWs.

385. As clarified herein, a Subgrantee's authorized local representative is responsible for representing the Subgrantee and for ensuring that all disaster eligible work has been identified and submitted to FEMA. *See* 44 C.F.R. § 206.202(d). Potentially eligible costs are recorded by FEMA personnel on Project Worksheets, or PWs. *See* 44 C.F.R. § 206.202(d). After PW completion, FEMA reviews the PW in order to make determinations on whether to approve funding for eligible costs. *Id.* Thereafter, FEMA may make Federal disaster assistance funds available (i.e., "obligate" the funds) based on the final PW. *See* 44 C.F.R. § 206.202(e).

386. A PW is not a contract between FEMA and the State and/or Subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. *See* 44 C.F.R. § 206.202(d). Rather, a PW establishes the scope of work and provides cost estimates, based on submitted costs by the Subgrantee. *See id.*; 44 C.F.R. § 206.202(e); *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

387. In this case, FEMA properly worked with the Parish to develop estimates for the claimed wet debris costs. As even a cursory review of the PWs demonstrate, the PW's clearly did nothing more than capture the Parish's desired scope of work at the earliest phase of the Parish's discussions with FEMA and in anticipation of later FEMA review for eligibility. For example, the draft PWs (PWs 5590 and 5594) for the debris removal work were prepared by FEMA without any contractor invoices from IED and were based upon information obtained from the Parish's monitors. *See, (Exhibits in possession of Relator),* Exhibits 104, 107- PW 5590; PW 5594. Moreover, as the Parish has applied for and received Public Assistance funding from FEMA for disasters prior to, and after Hurricane Gustav, the Parish cannot claim that it does not

understand FEMA's project worksheet development process and its role in FEMA's Public Assistance program. To do so is disingenuous.

I. Wet Debris Conclusion

388. Based on all of the arguments established herein, FEMA's eligibility determinations for the Parish's Wet Debris Removal and Monitoring Work Are Correct, and the Wet Debris Project Worksheets Were Properly Obligated for Zero Dollars. As discussed previously, FEMA's eligibility determinations for its requested wet debris removal and monitoring work are correct and, as a result, PWs 5590, 5591, 5593 and 5594 were properly obligated for zero dollars. First, the Parish's waterways debris removal work requested in PWs 5590 and 5594 is clearly not eligible based on a multitude of reasons. As found by FEMA's Debris Specialists in conducting their validation of the Parish's waterways debris removal work, the Parish's contractor IED conducted widespread waterways debris removal in natural, unimproved canals and streams and wooded, unimproved tracts of private property. *See* Exhibit 91- Examples of FEMA Stream/Waterways Eligibility Summary Report, various dates. The debris that was removed, as a result, could not be established as resulting from Hurricane Gustav pursuant to 44 C.F.R. § 206.223(a)(1) and did not present an immediate threat to life, public health and safety, or to improved property under 44 C.F.R. § 206.224. Moreover, the Parish failed to document the existence (and removal) of storm-generated debris, versus pre-existing debris. Further, the Parish's debris monitoring work was dependent on the debris removal work for justification, the waterways debris monitoring work by PEC and AFA is also not eligible for reimbursement under 40 C.F.R. § 1508.25(1)(iii). In addition, the debris monitors failed to sufficiently document eligible versus ineligible debris as required by their contracts. Accordingly, PWs 5591 and 5593 were correctly obligated for zero dollars.

389. Second, notwithstanding the issues with debris removal and monitoring work as performed, the Parish's requested work for waterways debris removal (PWs 5590 and 5594) is also not eligible for reimbursement because the Parish violated Federal environmental and historic preservation law. As discussed previously, FEMA provided extensive information to the Parish regarding its obligations under Federal environmental and historic preservation law. FEMA's guidance informed the Parish that it is the Subgrantee's responsibility to ensure that it is compliant with the law, that it had obtained all necessary permits, and that the Parish provided sufficient information to allow FEMA to conduct a review for compliance with historic preservation law. The Parish and its contractors had the experience and, at the very least, constructive knowledge of some of the environmental permitting requirements related to the waterways debris removal work. Notwithstanding, the Parish and its contractors ignored their known responsibilities. FEMA cannot reimburse illegal work, and as a result, PWs 5590 and 5594 (for debris removal by IED) were obligated by FEMA for zero dollars. Similarly, PWs 5593 and 5594 (for debris monitoring by AFA and PEC) are also ineligible for reimbursement as being dependent on PWs 5590 and 5594 for justification.

390. Third, the Parish's waterways debris removal and monitoring PWs were again correctly obligated for zero dollars, because IED's wet debris removal services and AFA's and PEC's wet debris monitoring services were not properly procured, in violation of 44 C.F.R. Part 13. None of the contracts were competitively bid, in violation of 44 C.F.R. § 13.36. In addition, the wet debris monitoring contracts did not contain cost ceilings, in violation of 44 C.F.R. § 13.36(b)(10). As a result, FEMA correctly determined that the wet debris removal and monitoring contracts are ineligible for reimbursement and properly obligated the PWs at zero dollars.

391. The Parish implies that FEMA "confirmed" that the wet debris removal is eligible for $42 million dollars, in preparing project worksheets in April 2009, *see,* Exhibit 264 – Parish's Request for Arbitration, p. 40, and then "reversed" its position, *see id.* at p. 42. However, the Parish's characterization of the April 2009 draft PWs is incorrect. As the Parish should be aware, given its experience with various disasters and requests to FEMA over the years, for FEMA eligibility purposes, the PW is the document, which memorializes the terms of the reimbursement grant for each project. *See* 44 C.F.R. § 206.202(d). A PW is not a contract between FEMA and the State and/or Subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. *See id.*

392. As emphasized by FEMA's regulations at 44 C.F.R. § 13.20(c),"[A]n awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a pre-award review or at any time subsequent to the award." As a result, FEMA has the authority to review PW work eligibility and costs at any time during the PW process. As such, FEMA is well within its discretion to write PW versions, or write new PWs, such as PWs 5590, 5591, 5593, and 5594, which reconciled actual costs as presented by the Parish to the eligible work completed. *See Exhibit* s 104, 105, 106 and 107 – PW 5590; PW 5591; PW 5593; and PW 5594. And, for the reasons discussed in this Response and summarized in this section, FEMA, in reconciling the actual costs presented by the Parish to the eligible work completed for the wet debris removal and monitoring work, determined that PWs 5590, 5591, 5593 and 5594 were properly obligated at zero dollars.

J. The Wet Debris Removal and Monitoring PWs Do Not Qualify for FEMA's Public Assistance Pilot Program.

393. Relator asserts on behalf of FEMA that the Parish is not eligible to participate in the Public Assistance Pilot Program because the Wet Debris PWs are not eligible in their entirety;

there was no obligation of funding after the PA Pilot Program deadline; the PWs for the wet debris were distinct from and not amendments to the PWs for leaners and hangers; and no precedential arbitration cases apply. Hence, the PA Pilot Program cost share issue does not apply. The Parish incorrectly claims that the wet debris PWs are included in the PA Pilot Program and should be allowed a 5% increased Federal share. This argument is flawed since the PA Pilot Program projects may not be approved after December 31, 2008 per the Department of Homeland Security (DHS) Appropriations Act, 2007, Pub. L.109-295. The law clearly states, "Approval in this context, is defined as being obligated." In this case, the four wet debris removal and monitoring PWs were not obligated until well after December 31, 2008. Specifically, all of the project worksheets for the wet debris removal and monitoring work (PWs 5590, 5591, 5593 and 5594) were obligated for $0 on January 26, 2010. Thus, all of the wet debris PWs were obligated after the December 31, 2008 PA Pilot Program deadline and are ineligible for participation in the PA Pilot program.

394. As further clarification, FEMA's Response to the Parish's First Appeal for PW 54 version 1 provided a thorough explanation for the denial. In that response, FEMA noted that the intent of the PA Pilot Program was not to penalize an applicant for an amendment to a PW that was obligated prior to the December 31, 2008 deadline. Rather, the Pilot Program provided that subsequent amendments to a PA Pilot Program PW obligated prior to the deadline would continue to be eligible for the increased federal cost share of 5 percent. *See* Exhibit 90- FEMA First Appeal Response for PW 54. One clear distinction in the Parish's case is that the wet debris removal and monitoring is not an amendment to PW54 (written for leaners and hangers). PW 54 was developed in response to the Parish's Request for Assistance, which was initially understood to encompass just the Parish's roadside and leaners, hangers and hazardous stumps removal work.

See, Exhibit 11- Parish Request for Assistance; Exhibit 23- Affidavit of Jeffrey Jones. Indeed, the wet debris removal work did not begin until 3 months after Hurricane Gustav. *See* Exhibit 264-Request For Arbitration, Page 38. Unequivocally, from the beginning of the Hurricane Gustav disaster, the leaner and hanger work was separate from the wet debris claim, which came months later. And, from the Parish's perspective, the work was different, leading to the Parish's President at the time, Michael Grimmer, to request that the wet debris be written into its own PWs for the Parish's ease in preparing the Parish's budget. *See,* Exhibit 36 – Affidavit of Michael Grimmer.

395. As noted in the PA Digest, examples of projects include projects with either a singular location, purpose or contractor. *See* Exhibit 217 – Public Assistance Digest, FEMA 321/January 2008 at Page 103. Furthermore, as noted in the PA Guide, "Responsible officials should consider preparing separate PWs if Special Considerations (e.g., insurance, hazard mitigation, and environmental and historic preservation issues) are of concern for individuals sites. *Id.* Compliance requirements of a particular Special Consideration issue for the one site could delay funding for other sites, if grouped on one PW." *See* Exhibit 202, – Public Assistance Guide, FEMA 322/June 2007 at Page 98 (emphasis added). Here, the wet debris PWs involve an additional contractor, can be differentiated by the location of the work (clearing waterways as opposed to right-of-ways), for a different purpose (wet debris removal versus leaners and hangers work), have entirely different cost structures given the different type of work involved (e.g., different equipment, wetlands fees, etc.) and involve environmental and historical issues not implicated in PW 54. And indeed, as this litigation shows, it has actually been to the Parish's benefit to consider the wet debris PWs separately from PW 54, given that the dispute between the

parties could have prevented the distribution of the funds that they have already received for that work.

396. Finally, the Parish's assertions related to arguments for the separation of PWs in previous CBCA cases is misguided. Arguments made in cases such as *In re St. Stanislaus College*, CBCA 2316-FEMA (May 10, 2011) and *In re Bay St. Louis-Waveland School District*, CBCA 1739-FEMA (Feb. 11, 2010) all relate to Motions to Dismiss for Lack of Jurisdiction and have nothing to do with the application or interpretation of the PA Pilot Program. *See* Exhibit 264-Request For Arbitration, Pages 100-101. Arguments which go to the CBCA's jurisdictional authority to hear multiple PWs in one hearing pursuant to its authority under the arbitration regulations at 44 C.F.R. § 206.209 are irrelevant to specific deadline and program requirements under the PA Pilot Program per the Department of Homeland Security (DHS) Appropriations Act, 2007, Pub. L. 109-295. Accordingly, the Parish's argument is without merit. As a result, even if the Panel finds that all or some of the Parish's requested waterways debris removal and monitoring work is eligible, the Parish's wet debris PWs are not eligible for the PA Pilot Program.

COUNT III: RETALIATION – 31 U.S.C. § 3730(h)

397. Delahoussaye incorporates by reference the allegations set forth above as though fully set fourth herein.

398. As set forth above, Defendants knowingly presented false or fraudulent claims for payment, or knowingly caused false or fraudulent claims for payment to be presented, to officials of the United States Government in violation of 31 U.S.C. § 3279(a)(1).

399. During the course of his employment, Delahoussaye became suspicious of and investigated Defendants practices. When Delahoussaye refused to follow his supervisor's' orders

related to the reporting of FEMA fraud whereby Defendants could justify additional and/or unnecessary work, Delahoussaye's supervisors became suspicious of him and singled him out for criticism, disciplinary action and harassment.

400. Delahoussaye spoke out publicly expressing his suspicions that Defendants practices were unethical and/or illegal. Delahoussaye was told his contract was terminated at the announcement of these allegations. Delahoussaye disagreed with the termination of the contract but was nonetheless subjected to additional criticism and unwarranted public humiliation.

COUNT IV: VIOLATION OF 18 U.S.C. § 1040

401. Defendant AFA created Excel spreadsheets to track and calculate the time to monitor debris removal from various waterways in the parish. The numbers submitted on the monitoring invoices match those on these spreadsheets.

402. An electronic copy of these spreadsheets were obtained by Corey Delahoussaye and the file properties reflect the files were created Wednesday, November 25, 2009 by Alvin Fairburn and Associates. See *(Exhibits in possession of Relator),* Exhibit 265- Spreadsheet by AFA, Drainage Districts

403. The spreadsheet should calculate the total hours worked, and subsequently billed by the project managers, project coordinators, monitor supervisors, debris monitors, clerical etc. as well as the time and distance for the all-terrain vehicles (ATVs) utilized during the work, by adding up all of the specific hours worked and miles traveled at the various waterways.

404. An examination of these spreadsheets reveal they were designed or programed in such a way as to reverse calculate from the Total hours to the individual or specific hours and distance for various waterways. Meaning the entries purporting to be the actual time worked and distance traveled by the ATVs at the various waterways is *fabricated.* The controlling input

variable is the overall total. If you change the "Total Hours" cell all of the spreadsheet cells for the hours for Project Manager, Project Coordinator, Monitor Supervisor, Monitor, Clerical and ATV hours change as well. The mileage usage of the ATVs will change to match the amount needed to reach a specific dollar value. This is a gross violation of 18 U.S.C. § 1040.

405. Letters submitted by Alvin Fairburn and Associates purporting to be from Livingston Parish Gravity Drainage District No. 1, Gravity Drainage District No. 2 and Gravity Drainage District No. 5 stating prior to Hurricane Gustav they, (LPGDD) would have removed any debris that had been discovered in their inspections. The letters were unsigned but have Livingston Parish Gravity Drainage Districts, District Managers, name listed in the letters' closing. These letters were submitted; initially by AFA to demonstrate the waterways were both inspected and maintained by the LPGDD's. Defendants have submitted over 108 letters in an attempt to justify maintenance of facilities which would be eligible under FEMA reimbursement, had these logs been truthful. However, the defendants knew these documents were fraudulent and submitted them to FEMA through appeals in connection with a major disaster.

406. Roy Zachary, Chairman of LPGDD No.1 submitted a letter to Carla Richard, legal advisor for GOHSEP, specifically disavowing the letters and stating the letters were never seen by or authorized by the District. *See* Exhibit 222 -Letter from Roy Zachary, Chairman of Livingston Parish Gravity Drainage District #1, to Carla Richard, Appeals Manager for Diaster Recovery Division, GOHSEP. "Re: Livingston Parish Gravity Drainage Dist. #1 Hurricane Gustav Debris." (August 2, 2011)

407. The verbiage and assertions contained in these later letters were submitted on AFA's own letterhead and submitted to GOHSEP by and through Easterly on September 12, 2011 as an amendment to the second appeal for the waterways. This is a violation of 18 U.S.C. § 1040.

408. Livingston Parish PW's funded work performed cleaning and restoring areas on both School Board property as well as the Parks and Recreation District properties. These properties were previously cleared and funded by through the School Board's own PW and the Parks and Recreations own PW. Yet, the Defendants billed FEMA for work they knew was both completed by the School Board and Parks and Recreations constituting fraud in connection with a major disaster.

409. Work done by Defendants at Parks and Recreation facilities was not authorized by the Parks and Recreations board nor was it necessary. One property in particular, the L.M. Lockhart center was used as an emergency shelter for the American Red Cross. *See, (Exhibits in possession of Relator),* Exhibit 129 – Documentation for work performed at LM Lockhart Park. Over 275 people were housed at the park at its peak and no clearing of debris and or immediate threats to life or property were established. However, twenty-one days after the facility was closed, Defendants went to the facility and cleared what they deemed eligible work at a cost of $88,000. There was no threat, therefore no need for clean up and the documentation to support the work contains is fraudulent and inaccurate information.

410. Testimony in the CBCA hearing of John Shires with PEC, Project Manager, stated inspectors were not trained until weeks after work had been begun on the project. Thus allowing for ineligible work to be conducted and improper documentation to be submitted for reimbursement.

COUNT V: VIOLATION OF 18 U.S.C §§ 286, 371

411. In a suit filed in 21st Judicial System in Livingston Parish, IED claims it is owed over $828,070 for leaners and hangers work performed along the waterways. By and through Shelby Easterly, Defendants knowingly billed FEMA for work they knew was ineligible and

illegal. Furthermore, IED states "Remedying the threats created in the waterways also involved removing hazardous trees and limbs that had not fallen into or near the waterways. In November 2008, the parish through OEP Director Brian Fairburn, ordered that IED remove the leaners and hangers that bordered publicly maintained waterways. Under the supervision and direction of the Parish's monitors, IED removed $828,070 worth of leaners and hangers along the waterways." This cost was added to the various appeals and to the totals asked for in Arbitration request from Defendants. David Green states in his meeting with Parish officials *See* Exhibit 69 -Transcript of November 25, 2008 Meeting; Exhibit 70 - Full Audio of November 25, 2008 Meeting;

> 1:47:54 DG you can't pick and choose to discriminate which area you are going to clean and which lateral ditch you are not going to allow to back up and it's acceptable to allow these to back up but unacceptable to allow those to back up. It's all a hazard. The Parish has identified it's a done deal cleaning it out. *I'm going to go make sure my guys aren't clear cutting because they were cutting some straight trees on the side of the ditch that didn't appear to be eligible so I'm going to talk to my crews about that now, who, let's identify maybe a dozen or two dozen on places we're not working that are just maybe, you send one crew of guys that go around and identify, say okay, here's, and that way it covers gravity drainage district, one, two, five and the public work area that are outside of them, say, these are examples of areas where we no longer have hotspots.* These are not all of the hotspots, but these are examples. Please come out and do a site visit. Said something about work crews workings those locations. Get a list for them to see and agree. Ok we'll proceed. And we'll write on our paperwork, Smith will write some language on our paperwork that says these are simply examples of hot spot areas. There may be more this is not to include all of them, there may be many more. This is a model by which for them to approve.

412. Allegations of improper billing and excessive waste was supported in documentation provided by Mary Gary on April 22, 2011, a AFA monitor supervisor *See, (Exhibits in possession of Relator),* Exhibit 262 – Report title De5. Gray stated there was, "major tampering" with these records she further stated " all three GDDs had trouble compiling these record. Jeff White was particularly, "stressed," about producing records requested by FEMA related to pre-hurricane maintenance of each area but each project had the needed records when

submitted to FEMA." This indicated to Gray the maintenance records had been fabricated. These records were provided as supporting documentation of maintenance of facilities which constitute a fraudulent claim.

413. On August 1, 2011, Roy Zachary submitted to Carla Richard, Appeals Manager – Disaster Recovery Division a letter stating, "At the Livingston Parish Gravity Drainage District #1 meeting on Tuesday, July 26, 2011, the Board was given copies of documents seeing to be contract work orders issued by LPGDD#1. The documents are unsigned, and I am attaching copies of the documents. No member of the Board had ever seen these documents before the Tuesday night meeting. The Board further confirmed that Wesley Kinnebrow, the District Manager, had not signed the documents. This letter is being sent to you so that there is no misunderstanding about the authorship of these documents. They were not prepared by the District, signed by the District, or Authorized by the district." *See* Exhibit 222- Letter from Roy Zachary, Chairman of Livingston Parish Gravity Drainage District #1, to Carla Richard, Appeals Manager for Disaster Recovery Division GOHSEP, "Re: Livingston Parish Gravity Drainage District #1 Hurricane Gustav Debris"

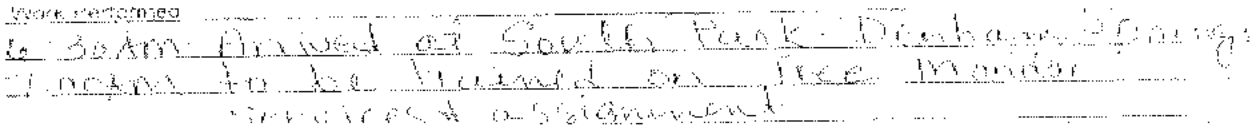
414. On September 12, 2011, A. Shelby Easterly submitted to GOHSEP and the office Livingston parish president Mike Grimmer a letter stating, "I am submitting copy of the amended electronic data submitted for the second appeal related to drains." This submission of information and substitution was an attempt to supply FEMA with misleading information regarding the maintenance of drains throughout the parish. *See (Exhibits in possession of Relator)* Exhibit 266.

415. On September 12, 2011, GOHSEP filed a second appeal response of FEMA's denial of assistance for waterway debris claims. *See, (Exhibits in possession of Relator),* Exhibit 113 – GOHSEP Letter to FEMA Assistant Administrator – Recovery Directorate, Livingston

Parish, Second Appeal, September 12, 2011. This clearly demonstrates the Defendants conspired to request claims for work, which they knew, was unauthorized and or required.

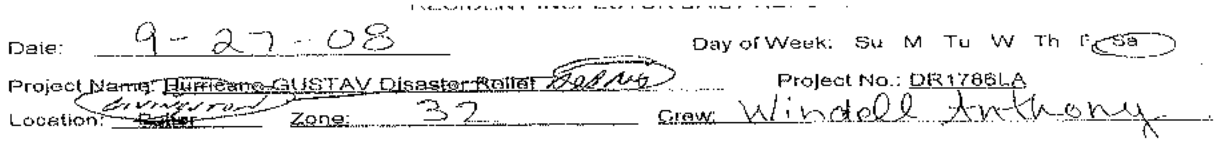
416. Once again, the information presented by the Parish in the Arbitration Request is incorrect. The record evidences that the PEC monitors were poorly trained by supervisors and arborists who clearly were not aware of FEMA eligibility requirements. Moreover, these monitors took no necessary precautions to ensure the work being done was even necessary. Additionally, the monitors were advised to document ineligible cuts and to ***knowingly submit fraudulent claims*** to FEMA. These claims have been denied repeatedly and with good cause. The fact that these documents were submitted to FEMA in several appeals is the reason for this submission of a FCA. Again, they submitted fraudulent documents in an attempt to obtain more funding from the government than necessary.

417. For example, on September 27, 2008, almost a full month into the leaner and hanger debris removal, PEC debris monitor Stephanie Stephens "Resident Inspector Daily Report" notes the following:[82]



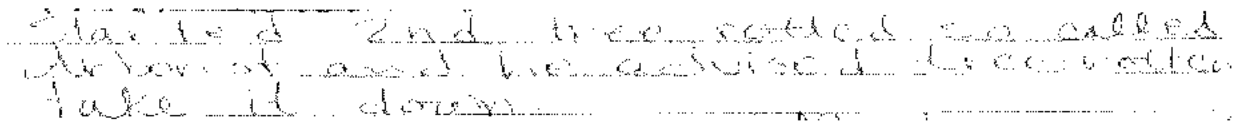
See, (Exhibits in possession of Relator), Exhibit 169 – Stephanie Stephens Resident Inspector Daily Report dated September 27, 2008. This shows PEC was still training monitors nearly half way into the leaner and hanger debris removal efforts. Furthermore, Ms. Stephens' Resident Inspector Daily Report indicates that she was being trained as a member of Wendell Anthony's crew:

[82] Beyond the fact that Ms. Stephens is being trained to monitor leaners and hangers work almost a month after the work had begun, Ms. Stephens is assigned to monitor cuts being made in South Park. As noted earlier, the Parish did not have legal responsibility for South Park so they should not have been there to begin with. *See supra.*


Date: 9-27-08 Day of Week: Su M Tu W Th F Sa
Project Name: Hurricane GUSTAV Disaster Relief Project No.: DR1786LA
Location: Zone: 32 Crew: Windell Anthony

Id. ***Mr. Anthony is the Arborist who the Parish alleges was highly experienced on FEMA reimbursed projects and was responsible for training, instructing, and supervising work crews to assure that FEMA eligibility requirements were met. Mr. Anthony has proven time and time again that he lacks the experience necessary to determine what may or may not be considered a threat to life or property. Mr. Anthony is nothing more than an opportunist who seeks to gain as much funding on work both he and his crews are aware do not meet the requirements set forth by FEMA. See Exhibit 264-Request For Arbitration at Page 25.***

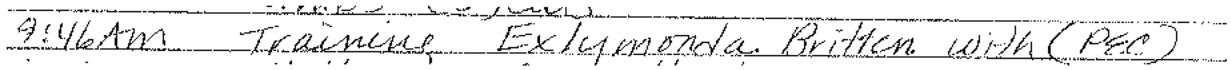
418. During Ms. Stephens training the team came across a rotten tree and Ms. Stephens notes the following:



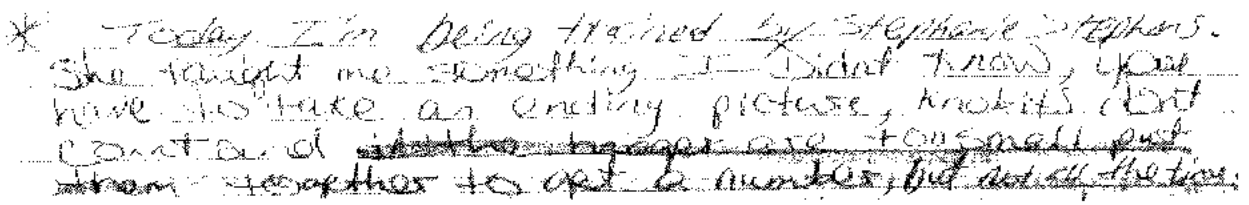
See, Exhibit 168 – Stephanie Stephens Resident Inspector Daily Report dated September 27, 2008. Later that same day Ms. Stephens documents cutting down another rotten tree as she had been advised to by the contractors Arborist, Mr. Anthony. *Id.* This not only evidences that Mr. Anthony was not well versed in FEMA eligibility, but it also shows that PEC monitors were being trained to perform ineligible work.[83]

[83] Mr. Anthony's involvement raises additional concerns. First, Mr. Anthony was hired by IED (the contractor) but was training the PEC field staff (those responsible for monitoring the contractor) on how to identify eligible work. *See, Exhibit* 23 – Affidavit of Jeffrey Jones. Second, approximately 80% of the crews working for IED were subcontractors working for Mr. Anthony. *Id.* Therefore, Mr. Anthony was training monitors for PEC to oversee and verify the eligibility of cuts being made which he would potentially receive reimbursement for. FEMA finds this to be a significant ethical and legal conflict.

419. On October 2, 2008, Ms. Stephens makes the following entry into her Resident Inspector Daily Report:


9:46AM Training Exlymonda Britten with (PEC)

See, (Exhibits in possession of Relator), Exhibit 170 – Stephanie Stephens Resident Inspector Daily Report dated October 2, 2008. Five days after having been trained herself, PEC now considers Ms. Stephens to be a senior member of the debris monitor team capable of training new monitors still coming in. *Id.* Ms. Exlymonda Britten, who was the person Ms. Stephens was now training to be a monitor just five days after having been trained herself, makes the following entry on her Resident Inspector Daily Report on that same day:


* Today I'm being trained by Stephanie Stephens. She taught me something I didn't know, you have to take an ending picture, knock it's not ... [illegible] ... together to get a number, but not all the time.

See, (Exhibits in possession of Relator), Exhibit 171 – Exlymonda Britten Resident Inspector Daily Report dated October 2, 2008. In the section FEMA has highlighted, Ms. Britten makes note that **"if the hanger[s] are too small put them together to get a number, but not all the time."** *Id.* Ms. Britten was being trained to submit *fraudulent* information to FEMA. This was not a unique situation. During FEMA's review there were multiple photographs, such as the one provided below, which confirmed this technique was implemented by PEC's monitors in Livingston Parish. Thus supporting violations of 18 U.S.C. §§ 286, 371.

420. One of the most egregious errors of the Parish was its failure to include the last twenty minutes of the November 25, 2008 meeting, which clearly had important clarifying information necessary for this Panel. *Id.* at Pages 18-23. In the last 20 minutes (after some of the attendees may have left the room/meeting), it appears that AFA engineer Ted York (TY), Parish

Councilman Jimmie McCoy (JM), the Parish's OHSEP Director Brian Fairburn (BF), Parish Councilman Don Wheat (DW), IED attorney David Green (DG), Rock Malone (RM) of IED, and IED attorney Smith Day (SD) formulated a "game plan" to deal with FEMA. This **"game plan"** is transcribed below:

> 1:39:10 BF: Ya'll hold on now, we have a game plan, yep
> 1:39:28 BF: we are asking permission for too much stuff, there are too many questions going to FEMA. You are going to start getting denied, so this is the game plan, go in identify all of your emergency stuff. Like I told him, on the, the clean-up part of it, when you identify that emergency whether it be 10 foot, 100 yards, 200 yards, whatever the case may be, they can't see nothing underneath. It's tougher for them to haul it out because its debris. But they can't see what you taken out. You follow with I'm saying? Identify, what, and then do those spot checks like they're talking about, with the identification with the mitigation process like what they're talking about to cover your behind. When you do that, put that with your documentation on your end as the monitor, get with Smith, so he can put his documentation together. Now for the after affects to fight FEMA for the reimbursement.
> 1:40:19 DG: Yea, We have almost asked, I agree with Brian, we've almost asked for permission too many times they said yes yes yes yes.
> 1:40:30 BF: I think I can, tell me if I can, tell me if I can
> 1:47:18 DG: We've almost, I think at this time I think we need to back track and not have too many more real big meetings and ask for permission too many more times…we need to get about 24 hotspots that we identify and they need to be samples in different areas. Because we're working those hotspots we know their hotspots. Like they said the Parish has made determinations by and through its engineers perfectly qualified in estimating and determining what will flood and what will not…If you have 15 lateral ditches coming into a 3 mile area that you have to clean up that area because it's going to back up those lateral ditches and flood those areas
> 1:47:49 BF: flood there 75 homes and these 75 homes. All that needs to be in your description.
> 1:47:54 DG: you can't pick and choose to discriminate which area you are going to clean and which lateral ditch you are not going to allow to back up and it's acceptable to allow these to back up but unacceptable to allow those to back up. It's all a hazard. The Parish has identified it's a done deal cleaning it out. I'm going to go make sure my guys aren't clear cutting because they were cutting some

> straight trees on the side of the ditch that didn't appear to be eligible so I'm going to talk to my crews about that now, who, let's identify maybe a dozen or two dozen on places we're not working that are just maybe, you send one crew of guys that go around and identify, say okay, here's, and that way it covers gravity drainage district, one, two, five and the public work area that are outside of them, say, these are examples of areas where we no longer have hotspots. These are not all of the hotspots, but these are examples. Please come out and do a site visit. You don't ride to where our crews are working. You ride to those locations… Get a list for them to see and agree. Ok we'll proceed. And we'll write on our paperwork, Smith will write some language on our paperwork that says these are simply examples of hot spot areas. There may be more this is not to include all of them, there may be many more. This is a model by which for them to approve.

Id. at Pages 18, 21. Thus, what the above **"game plan"** clarifies is that the Parish and its contractors specifically intended to manipulate documentation and information it would submit to FEMA in order to claim debris that was ineligible and neither Hurricane Gustav related nor an immediate threat.

422. Further, Defendants had possession of FEMA regulations, Discussed NRCS and how to "Slightly" use them to "look good", went of private property not maintained by the Parish, Picked up debris on Forested Commercial property, collected debris where no Immediate threat to improved property existed and deposited fill in wetlands without permits, a violation of 33 U.S.C. § 1319 (c)(2)(A), which Defendants knew was required.

423. Relator is in possession of several documents, audios and videos in addition the above allegations to further support his claims of these violations. See Exhibit 263.

X. JURY TRIAL

424. Plaintiff/Relator requests a trial by jury.

WHEREFORE, Plaintiff/Relator, Corey Delahoussaye, request the Court grant the following relief:

A. The Defendants, State of Louisiana Governors Office of Homeland Security and Emergency Preparedness, Livingston Parish, A. Shelby Easterly, Alvin Fairburn and Associates, Professional Engineering Consults, Barowka and Bonura Engineers and Consultants, LLC and McClin and Associates be ordered to cease and desist from violating 31 U.S.C § 3729, *et seq.*;

B. That the court enter judgment against Defendants in an amount equal to three times the amount of damages the United States has sustained because of the Defendant's actions, plus a civil penalty of not less than $5,500 and not more than $11,000 for each violation of 31 U.S.C. § 3729, ct seq.

C. That Plaintiff/Relator be awarded the maximum amount allowed pursuant to 31 U.S.C. § 3730(d) of the false claims Act.

D. That Plaintiff/Relator be awarded all costs of this action, including attorney's fees and expenses;

E. That Plaintiff/Relator be granted trial by jury; and

F. That Plaintiff/Relator recover such other relief as the Court deems just and proper.

Respectfully submitted:
PLAINTIFF/RELATOR

By: _____

Corey Delahoussaye
11443 Carries Orchard
Baton Rouge, Louisiana 70810
Telephone: (225) 281-7560
winfema@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 31 U.S.C § 3730 (b)(2) and Rule 4 of the Federal Rules of Civil Procedure, on this 29th day of May 2015, I caused a copy of Plaintiff/Relator's *Qui Tam* Complaint and written disclosure of substantially all material evidence and information Plaintiff/Relator, Corey Delahoussaye, possesses to be served upon the following:

(a) By hand delivery upon:

Honorable J. Walter Green
United States Attorney for the Middle District of Louisiana
777 Florida Street, Ste. 208
Baton Rouge, LA 70801

(b) By postage prepaid U.S. certified mail, return receipt requested, upon

Honorable Loretta Lynch
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Corey J. Delahoussaye

COREY J. DELAHOUSSAYE

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

UNITED STATES OF AMERICA et rel.
COREY DELAHOUSSAYE Plaintiff/Relator

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Corey Delahoussaye
11443 Carries Orchard, Baton Rouge, LA 70810
(225) 281-7560

DEFENDANTS

GOVENORS OFFICE OF HOMELAND SECURITY AND EMERGENCY PREPARDNESS et al

County of Residence of First Listed Defendant East Baton Rouge Parish
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

OTHER STATUTES
- ☒ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

V. ORIGIN *(Place an "X" in One Box Only)*

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
31 U.S.C. §§ 3729-3732, 18 U.S.C. § 286, 18 U.S.C. § 371, 18 U.S.C. § 1040

Brief description of cause:
FEMA FRAUD

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ◯ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
May 29, 2015

SIGNATURE OF ATTORNEY OF RECORD
Corey Delahoussaye

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____