

Ten Easy Steps for a FEMA Appeal



Floodplain Management Association
Wednesday, September 7, 2011
San Diego, California

Presented by Scott Shapiro

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#1: Why Are You Doing This?

- What are you trying to accomplish?
 - You think you will win on ALL of your issues?
 - You are trying to encourage a reasonable compromise?
 - Political reasons?
 - You don't know what else to do?
 - Delay? If so, let's discuss this.
- You need to decide this before you start, because different goals demand different means.
- You also need to decide what sort of results are both reasonable and possible.

#2: Understand the Process Involved

- FEMA appeals involve two separate steps:
 - (1) Appealing to FEMA itself for FEMA to, in essence, reconsider its decision in light of information you share;
 - (2) If that is not successful, appealing FEMA's decision to the U.S. Federal Court.
- The first step is much more of a technical review where you bring to FEMA all of the information which you believe it did not consider, and should have.
- In the second step the Court is much more likely to ensure that FEMA followed the correct process, but on the merits the court is NOT likely to overturn FEMA's decision unless the decision is unsupported by substantial evidence.

#3: Hire the Right Team

- You need to consider who you need, when you will need them, and how to structure the team.
- So who do you need? Engineers (hydraulic, hydrologic, fluvial geomorphologists, civil, etc)? Surveyors? GIS specialists? Attorneys?
- When do you need them? Well, if you wait until you receive a final map, it is almost certainly too late.
- How will you structure your team? Who will be in charge? To whom will they answer (City manager? CAO? City Council? County Board of Supervisors?)
- Do you want zealots or compromisers?
- What sort of budget should you plan for?

#4: Organizing the Appeal

- Design the appeal based on the goal. For example:
 - If your goal is delay (which I caution you against doing), you would approach the appeal one way.
 - If your goal is to ultimately go for a federal court, you need to think about the record you are building during the administrative appeal, and how it will play in court.
 - If your goal is to rely on a Scientific Resolution Panel, you need to create the record which will provide a self-explanatory document for the SRP.
- In each case, understanding the entire process, and where you may be successful, is essential. Have a conversation at the beginning about what you will do, not at the end.

#5: Knowing the Timing and the Standard

- FEMA is required to publish the existence of proposed new maps in a “prominent local newspaper at least twice” during a ten day period after notification is made to the affected communities.
- A party wishing to file an administrative appeal must do so during the ninety day period following the second publication.
- The sole basis for appeal is “the possession of knowledge or information indicating that the elevations being proposed with respect to an identified area having special flood hazards are scientifically or technically incorrect and the sole relief which shall be granted in the event that such appeal is sustained is a modification of the proposed determination accordingly.”

#5: Knowing the Timing and the Standard (cont.)

- Because scientific and technical correctness is often a matter of degree rather than absolute (except where mathematical or measurement error or changed physical conditions can be demonstrated), appellants are required to demonstrate that alternative methods or applications result in **more correct estimates** of base flood elevations, thus demonstrating that FEMA's estimates are incorrect.
- To make such demonstration, the NFIP has set forth specific data requirements required to be included in an appeal.
- The appellant is required to submit detailed technical and or scientific data, and in many cases, the conclusions reached that form the basis for such an appeal must be certified by a registered professional engineer or licensed land surveyor.

#5: Knowing the Timing and the Standard (cont.)

- When a community appeals FEMA must review and take fully into account any technical or scientific data submitted by the community that tend to negate or contradict the information upon which his proposed determination is based.
- The central issue to be decided is whether or not the appeal contents prevails under either the ‘scientific correctness’ standard or the ‘technical correctness’ standard as defined in 44 CFR. 59.1:
 - “Scientifically incorrect.” The methodology(ies) and/or assumptions which have been utilized are inappropriate for the physical processes being evaluated or are otherwise erroneous.
 - “Technically incorrect.” The methodology(ies) utilized has been erroneously applied due to mathematical or measurement error, changed physical conditions, or insufficient quantity or quality of input data.

#6: Get the Details of the Appeal Correct

- Don't miss deadlines, required submittals, forms, certifications, revised maps, calculations, etc. The regulations are highly detailed and any mistake is enough to justify a decision against you.
- Some courts have held that a party may not bring a judicial appeal if the administrative appeal fails to follow NFIP procedures. See e.g., *Green Rivers Habitat Alliance v. FEMA*, 2010 WL 3168368 (August 12, 2010. 8th Cir.).
- An example of the challenge of doing this comes from something as simple as where to send the appeal:

#6: Get the Details of the Appeal Correct (cont.)

- When filing an appeal for the Cities of Burlington and Mt. Vernon, Washington, we could not get confirmation of where to send the appeal:
 - FEMA's 2009 Appeal Guide, section 3.3 says to serve the appeal on the FEMA regional office listed in appendix E. Appendix E had an old address for the regional office.
 - FEMA's 1993 guide for community officials (never revoked) provides that appeals should be sent to the Chief, Risk Studies Division, FIA, FEMA, 500 C Street, in Washington.
 - The FEMA website contained both of the Guides.
 - The Appeal Notice provided by FEMA required notice to Washington D.C. and serving the appeal on the regional office.
 - FEMA's contractor instructed us to serve the appeal on it, rather than the regional office.
- We elected to do all to play it safe.

#7: FEMA's Decision Making

- Administrative appeals are resolved either by consultation with the community, by administrative hearing, or by submitting conflicting data to an independent scientific body or Federal agency for advice.
- Historically, very few appeals went to an administrative hearing and even less to an independent scientific body.
- Now, however, the Scientific Resolution Panel presents a new opportunity.
- Regardless of the process utilized by the agency to resolve the appeal, the final determination of any appeal remains with the Federal Insurance Administrator.

#8: The Scientific Resolution Panel

- A three or five person body of independent experts picked from a panel: 3 (or 2) by the community and 2 (or 1) by FEMA.
- The Panel reviews the entire record submitted. No special materials are prepared for the Panel.
- There may be an opportunity for the community and FEMA to each do a one hour briefing before the Panel.
- The Panel proposes a resolution of either siding with the community, with FEMA, or with some of the contentions presented by the Community.
- The panel must be requested during the community consultation period, between the 60th and 120th day after the appeal.

#8: The Scientific Resolution Panel (cont.)

- See www.floodsrp.org for more information:

COMMUNITY PANELS

Panel ID: MAES042211
Panel Name: Ring's Island , Salisbury, MA
Panel Request Date: 2011-04-22
FEMA Region: I

Community Request Summary:

The basis for the Town of Salisbury's appeal is that FEMA's proposal to include a V-Zone delineation and the increase in the flood elevation from Elevation 9 (the 1% annual chance floor elevation) to Elevation 11 in the Ring's Island area of the Merrimack River is based on analyses that

- are not consistent with FEMA coastal flooding analyses;
- utilized wind data that overestimated 1% storm wind velocities;
- are based on a transect that is not representative of the Ring's Island shoreline;
- over estimated fetch distances for the Ring's Island shoreline.

Panel Decision Date:

Panel Decision Summary:

Panel Members:

- Mrs. Avalisha Fisher, P.E.
- Mr. Douglas Hamilton, P.E., D.WRE
- Mr. John Lally, P.E.
- Mr. Roger Kilgore, P.E., D.WRE
- Dr. Thomas Ballestero

FEMA Final Determination Date:

FEMA Determination Summary:

#9: Timing for Resolution of the Appeal

- The final determination by the Federal Insurance Administrator where an appeal is filed shall be made within a reasonable time.
- Until the conflict is resolved and FEMA makes a final determination and notifies the governing body of the community of such a determination, flood insurance shall continue to be available at subsidized rates.
- After the final determination and upon the effective date of a FIRM, risk premium rates will be charged for new construction and substantial improvements.
- The effective date of new FIRMs shall begin not later than six months after the final flood elevation determination.

#10: Going to Court

- Appeal must be filed within 60 days of final determination (this is during the six month effective period).
- The two most likely to-be-used standards for review by federal courts are:
 - unsupported by substantial evidence, and
 - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
- However, under both of these tests, courts rarely second guess federal agencies.
- The new maps will go into effect unless the court grants a preliminary injunction.

Two Tangential Issues

- The With and Without Levee Mapping Policy:
 - FEMA is evaluating its historical practice of performing all mapping assuming that any non-certified (and thus non-accredited) levee does not exist, even though most such levees do provide some level of protection.
 - This is delaying the mapping process for many communities.
- There is always the Congressional card:
 - Like almost all administrative agencies, FEMA is sensitive to pressure from Congress.
 - A good member of Congress can be a tremendous ally when working with FEMA, and should be included in any overall strategy when possible.

CONCLUSION

- It is important that you and the decision-making body for the community go into this with eyes wide open.
- Know what it is you are trying to achieve. Make decisions in advance of what forks you will take if given the opportunity.
- Remember that the purpose of the appeal process is to get the best data possible for the maps. This is essential for elevation of structures as well as for future flood protection projects.
- Help your community understand what an appeal is, what it means, and how it may end. Befriend a local reporter so that the story is clear and accurate.
- Good luck!

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