

## Why FEMA's Sandy Claims Review Process Isn't Working

*Law360, New York (May 25, 2016, 11:14 AM ET) --*

Most people think of the Federal Emergency Management Agency (FEMA) as the federal agency that provides emergency governmental relief after major weather events and natural disasters. Some readers may be unaware, however, that FEMA also administers a program of national flood insurance. Under this National Flood Insurance Program (NFIP), homeowners who live in designated flood zones and have home mortgages are required to purchase flood insurance policies. Most of those policies are sold by private insurance carriers that FEMA contracts with. This is known as the “Write-Your-Own (WYO) Program.” FEMA also directly issues and administers a limited number of flood policies itself under the “NFIP Direct” program. Homeowners in these programs pay an insurance premium in exchange for a standardized flood insurance policy. The private NFIP flood carriers in the WYO program receive a portion of the premiums, but bear no actual insurance risk: all NFIP claims are paid out of the federal Treasury.[1]



Douglas J. Pepe

When a flood strikes, private NFIP flood carriers in the WYO program adjust and pay claims under the standard flood policy. Policyholders can appeal adverse private carrier coverage determinations to FEMA, or elect to sue in federal court. A complex system of statutes and regulations govern this claims adjustment and administrative appeal process in the ordinary flood context.[2] Superstorm Sandy, however, was no ordinary flood. Concerns over the administration and implementation of the NFIP following Sandy have resulted in a novel, ad hoc procedure — called the “Sandy Claims Review Process” — for the adjustment and payment of previously adjusted and closed flood claims arising from Sandy. This article addresses that process.

### Origins of the Sandy Claims Review Process

The Sandy claims review process is not a courtroom process, but it traces its origins to flood insurance claims practices that were publicly revealed during litigation arising from Superstorm Sandy. On Nov. 7, 2014, Magistrate Judge Gary Brown of the United States District Court for the Eastern District of New York issued a sanctions opinion in the pending Sandy litigation that described “reprehensible gamesmanship by a professional engineering company that unjustly frustrated efforts by two homeowners” with Sandy-related flood insurance claims “to get fair consideration of their claims.” Judge Brown’s opinion chronicled how, in the case before him, an engineering firm “secretly rewrote” a report to alter its fundamental conclusions, then the private carrier used the rewritten report as a basis to deny the homeowners’ flood claim. Judge Brown further concluded: “Worse yet, evidence suggests that these unprincipled practices may be widespread.”[3]

In March 2015, following these startling revelations, 60 Minutes broadcast an investigative report, *The Storm After The Storm*, in which the head of FEMA's flood insurance program acknowledged having personally seen evidence of "fraudulent reports" and "what could be criminal activity" by engineering firms engaged by private insurers participating in the NFIP.[4] These revelations of acknowledged fraud and suspected criminality amplified prior widespread concerns over delays and underpayments to Sandy flood claimants in the adjustment and regulatory FEMA appeal process — a process that Sen. Robert Menendez, D-N.J., who has spearheaded FEMA reform efforts, described as "unacceptable" and "tilted against the homeowner" in the way it was applied to Sandy claimants.[5] In the weeks and months following the 60 Minutes report, FEMA — in consultation with Sens. Menendez and Corey Booker, D-N.J., Sens. Chuck Schumer, D-N.Y., and Kirstin Gillibrand, D-N.Y., and advocacy groups representing Sandy claimants in both states — created what it has described as an "unprecedented" process to reopen all 142,000 Superstorm Sandy flood insurance claims not already in litigation for reconsideration.[6]

### **The Sandy Claims Review Process as Originally Conceived**

Flood insurance policyholders who were not involved in pending litigation, but were dissatisfied with the handling of their Sandy flood claims by their private flood insurance carriers and FEMA, were invited to participate in this new and unique process, involving a full and complete rereview of their Sandy flood insurance claims. The process was designed as a hybrid of sorts, involving a first level administrative "desk review" by FEMA contractors, and a subsequent alternative dispute resolution procedure. In the first step, policyholders were promised a "fair, transparent and expeditious" review of their claims by "highly skilled NFIP certified adjuster[s]" in a process that would take "less than 90 days to complete." [7] If Sandy victims found themselves in disagreement with the results of that desk review, they could request a second review by a "highly qualified third party neutral" who would conduct a "hearing involving the policyholder, the caseworker and the neutral" and make a recommendation to FEMA on their claim.[8] While FEMA reserved for itself the ability to overturn neutral decisions, it made clear that its role was "not to second guess" those decisions.[9] FEMA further promised all policyholders in writing, and in testimony to Congress, that it would "give substantial weight to the neutral's recommendation" on all issues.[10] This "substantial weight" standard — one of the most deferential in the law — is the same standard courts use when reviewing agency classification decisions.[11]

### **The Sandy Claims Review Process in Practice**

The Sandy claims review process that has unfolded is quite different from the one FEMA originally promised. In practice, as discussed below, the process lacks the transparency and expedition that FEMA originally publicized, and the third party neutrals are not permitted to render any legal interpretation that FEMA disagrees with.

With respect to transparency, FEMA's public statements advise Sandy victims seeking review that they may obtain access to their complete flood insurance claim file for use in the review.[12] Policyholders are told those requests will be processed under both the Freedom of Information Act (FOIA) and the Privacy Act "[t]o ensure the greatest access to the claim file permitted by law." [13] In practice, FEMA has relied on FOIA exemptions to redact policyholder files, despite the fact that the Privacy Act itself bars agencies from relying on FOIA exemptions "to withhold from any individual any record which is otherwise accessible to such individual" under the Privacy Act.[14] The result has been a cumbersome process, resulting in "significant delay" for any claimant seeking a complete copy of their claim file [15] and files that are redacted under FOIA, when those redactions are not an appropriate basis for

withholding Privacy Act materials unless a separate Privacy Act exemption applies as described above. As a consequence, policyholders have been denied prompt and unrestricted access to a complete copy of their own claim files, which comprise the basic materials used to review and analyze coverage issues on their flood insurance claims in the Sandy claims review process.

Additionally, in response to allegations of inappropriately altered flood insurance engineering reports, FEMA has mandated that all flood claim files “must contain draft engineering reports” that should be made “available to policyholders upon request.”[16] Yet, in the Sandy claims review process, FEMA does not interpret a request such as “please provide my complete claim file” to require production of the original, unaltered engineering reports. FEMA has taken the position that unless a draft engineering report is currently in its possession, it has no obligation to produce the draft or request it from the insurance carriers or engineers servicing the FEMA flood insurance program. This is surprising, since allegations surrounding draft engineering reports were at the heart of the reason the rereview process was created to begin with.[17]

With respect to expedition, the calendar does not lie. The Sandy claims review process began in May 2015. It is May 2016. The 90-days have lapsed.

Perhaps the most troubling aspect of the Sandy claims review, however, has come about in the neutral third party review process. Many Sandy victims entering the Sandy claims review were comforted by public statements made to the “Sandy Task Force” — a group comprised of FEMA and the senators and policyholder advocates mentioned previously — in April 2015. Former FEMA official Brad Kieserman advised the Sandy Task Force that any disagreements policyholders had with the FEMA rereview would be reviewed again by a “true independent arbitrator” with no connection to FEMA.[18] FEMA engaged a highly reputable dispute resolution firm to administer the neutral reviews. Those reviews were to be conducted by neutral panelists including esteemed former members of the federal judiciary. FEMA announced on its website — in a “Frequently Asked Questions” page designed for policyholders — and in other contemporaneous published guidance, that these neutrals would “make a recommendation with regard” to policyholder claims and that “FEMA will give substantial weight to the neutral’s recommendation.”[19] FEMA reiterated this highly deferential “substantial weight” standard in its initial letters inviting policyholders to participate in the Sandy claims review process.[20]

In practice, FEMA has gutted the core of the neutral process as originally publicized. In contrast to FEMA’s original promise to give “substantial weight” to the neutrals’ determinations, FEMA has since changed its published documentation to state that FEMA will only give weight to “the factual recommendations made by the neutral reviewer[s].”[21] Prior versions of FEMA’s public statements have been removed from FEMA’s website, and FEMA has relied on this change as a basis to conclude that legal determinations reached by the neutrals that FEMA disagrees with exceed the neutrals’ mandate. No published source identifies this change. Documents produced by FEMA to the author under FOIA, however, acknowledge the new standard. As a consequence, the neutrals who were supposed to serve the role of “neutral arbitrators” are now precluded from interpreting the standard flood policy or rendering any legal decision that FEMA disagrees with. If a neutral does issue such a decision, FEMA will reverse it. Many policyholders, who participated in the neutral process based on FEMA’s previously published guidance and direct letters from FEMA that were consistent with it, may be completely unaware of this after-the-fact change in the process they are currently engaged in.

Transparency is absent in the neutral review process as well. When the neutral issues a decision, the decision does not go directly to the policyholders, but instead goes to a “neutral review committee” within FEMA, and then to a FEMA official, where a decision is made on the file without policyholder

input, and where new arguments and issues can and have been raised with no notice to policyholders or opportunity to be heard.[22] If a neutral decision is overturned, the policyholder is not told about the neutral opinion in FEMA's final decision letter — the author has seen one of these letters, which makes no reference to the neutral decision. Nor are policyholders provided a copy of the neutral opinion or documents supporting FEMA's review of that opinion: they must seek these documents after the fact on their own, under the cumbersome FOIA/Privacy Act process described above.[23] If and when policyholders receive the files months later, entire sections of the documents are blacked out under various FOIA exemptions asserting privileges that do not apply to Privacy Act files, vitiating the "transparency" the Sandy claims review process was intended to provide.

## Conclusion

The Sandy claims review process is far from complete, and time will tell how effective it will be in quelling public distrust over the previous treatment of Sandy claimants. Since last year, when FEMA stepped in to take control of the settlement of litigation against private NFIP carriers arising out of Superstorm Sandy, the agency has resolved the vast bulk of claims in litigation for total payments of over \$161 million on 1,587 claims.[24] This reflects an average claim underpayment in excess of \$100,000 and provides clear evidence that something was seriously wrong with the way claims and agency appeals were handled before. By contrast, the nonlitigation Sandy claims review process started with 19,289 eligible claims. Of those, only 3,973 claims have resulted in payments to date, for total payments of \$56 million.[25] This reflects an average claim payment of just over \$14,000. It remains to be seen whether the timing and payment disparity between these two categories of claimants is driven by the transparency and effective neutral oversight that the litigation process provides, and the apparent absence of those features in the Sandy claim review process in its current implementation, or by other factors.

—By Douglas J. Pepe, Joseph Hage Aaronson LLC

*Douglas Pepe is a partner with Joseph Hage Aaronson in New York.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See, e.g., 44 C.F.R. pt. 60, Appendix A.

[2] See 42 U.S.C. § 4001, et seq.; 44 C.F.R. pt. 60.

[3] See *In re Hurricane Sandy Cases (Raimey v. Wright Nat'l Flood Insurance Co.)*, 303 F.R.D. 17, 18-19 (E.D.N.Y. 2014).

[4] See *The Storm After the Storm* (March 1, 2015), available at <http://www.cbsnews.com/news/hurricane-sandy-60-minutes-fraud-investigation-2/> (last visited May 9, 2016); *FEMA: Evidence of Fraud in Hurricane Sandy Reports* (February 27, 2015), available at <http://www.cbsnews.com/news/fema-evidence-of-fraud-in-hurricane-sandy-reports/> (last visited May 9, 2016).

[5] See *Senator Menendez Press Conference* (July 29, 2014), available at <https://www.youtube.com/watch?v=LmwLOifz5TQ> (last visited May 11, 2016); see generally Andrew

Keshner, FEMA Agrees to Review Flood Claims From Hurricane Sandy, 253 NYLJ 48, at 1 (March 13, 2015).

[6] See FEMA to Review All Flood Damage Claims From Hurricane Sandy (March 12, 2015), available at [http://www.nytimes.com/2015/03/13/nyregion/fema-to-review-hurricane-sandy-flood-claims-amid-scandal-over-altered-reports.html?\\_r=0](http://www.nytimes.com/2015/03/13/nyregion/fema-to-review-hurricane-sandy-flood-claims-amid-scandal-over-altered-reports.html?_r=0) (last visited May 9, 2016); FEMA Press Release (July 17, 2015), available at <http://www.fema.gov/news-release/2015/07/17/last-day-submit-hurricane-sandy-claims-review-60-days-away> (last visited May 10, 2016).

[7] See Frequently Asked Questions, Hurricane Sandy National Flood Insurance Claims Review, at 3 (May 2015) (“May 2015 FEMA FAQs”).

[8] *Id.* at 5.

[9] FEMA, NFIP Transformation Task Force Claims Review Process Overview Briefing Book 2.0, at 33 (June 10, 2015).

[10] May 2015 FEMA FAQs, *supra* note 7, at 5; see also Statement to Congress of Brad Kieserman, Deputy Associate Administrator for Federal Insurance, The National Flood Insurance Program: Oversight of Superstorm Sandy Claims, at 7 (June 2, 2015).

[11] See, e.g., *Benjamin v. U.S. Dep’t of State*, -- F.3d --, 2016 WL 1446124, at \* 3 (D.C. Cir. Apr. 12, 2016).

[12] See FEMA, Requesting Claim Files in the Sandy Claims Review Process (July 2015), available at [https://www.fema.gov/media-library-data/1437419876807-d5c1e634e47c0d89e784d3dd871cb209/requesting\\_copy\\_claim\\_file.pdf](https://www.fema.gov/media-library-data/1437419876807-d5c1e634e47c0d89e784d3dd871cb209/requesting_copy_claim_file.pdf) (last visited May 10, 2016).

[13] *Id.*

[14] See 5 U.S.C. § 552a(t)(1); see also *Barouch v. United States Dep’t of Justice*, 87 F. Supp. 3d 10, 32 (D.D.C. 2015); *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987); United States Department of Justice, Overview of the Privacy Act of 1974 (2015 ed.).

[15] See NFIP Transformation Task Force Update, at 2 (May 13, 2016), available at [http://www.fema.gov/media-library-data/1463159950631-975069ea363fc5c3ea3e253c78a854c1/NFIP\\_Transformation\\_Task\\_Force.pdf](http://www.fema.gov/media-library-data/1463159950631-975069ea363fc5c3ea3e253c78a854c1/NFIP_Transformation_Task_Force.pdf) (last visited May 16, 2016) (the “May 16, 2016 Task Force Update”).

[16] See Memorandum for WYO Principal Coordinators and National Flood Insurance Program Servicing Agent W-15025, at 2 (June 1, 2015); see also FEMA, Moving Forward with Flood Insurance, What Policyholders Need to Know about Flood Insurance Reform, available at <https://beta.fema.gov/moving-forward-flood-insurance> (last visited May 4, 2016).

[17] See NY Times, FEMA to Review All Flood Damage Claims From Hurricane Sandy (March 12, 2015), available at <http://www.nytimes.com/2015/03/13/nyregion/fema-to-review-hurricane-sandy-flood-claims-amid-scandal-over-altered-reports.html> (last visited March 12, 2015).

[18] See Sandy Task Force Meeting at 1:22:16 (April 28, 2015), available

at <https://www.youtube.com/watch?v=iCBCVdqRw1w> (last visited May 4, 2016).

[19] See May 2015 FEMA FAQs, *supra* note 7, at 5; see also, e.g., NFIP Transformation Task Force Update, at 1 (May 14, 2015); Kieserman Testimony, *supra* note 10, at 7.

[20] See Briefing Book, *supra* note 9, at 13-14.

[21] See Frequently Asked Questions, Hurricane Sandy National Flood Insurance Claims Review at 3 (April 2016) (emphasis added).

[22] Briefing Book, *supra* note 9, at 33.

[23] See FEMA, How to Request a Copy of the Results of Your Neutral Review (May 2016), available at [http://www.fema.gov/media-library-data/1462196427308-d4ad7724b5090020f693db3681d9868c/FS\\_How\\_Request\\_Results\\_Neutral\\_Review\\_compliant.pdf](http://www.fema.gov/media-library-data/1462196427308-d4ad7724b5090020f693db3681d9868c/FS_How_Request_Results_Neutral_Review_compliant.pdf) (last visited May 16, 2016).

[24] See May 16, 2016 Task Force Update, *supra* note 15, at 5.

[25] See *id.* at 4.

---