

Filed 11/25/09

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

CITY OF GARDEN CITY, KANSAS;)
FINNEY COUNTY, KANSAS;)
MARK J. DINKEL;)
GARY E. FULLER; and)
CECIL O'BRATE,)

Plaintiffs,)

vs.)

Civil Case No. 09-1258-JTM-DWB

W. CRAIG FUGATE, in his capacity as)
Administrator of the FEDERAL)
EMERGENCY MANAGEMENT AGENCY,)
an Agency of the United States Government,)

ORAL ARGUMENT REQUESTED

Defendant.)

**MEMORANDUM OF LAW IN OPPOSITION
TO MOTION TO DISMISS**

NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs challenge FEMA's decision under the National Flood Insurance Act (NFIA), 42 U.S.C. §§ 4001-4129, designating large areas within the City of Garden City and Finney County as Special Flood Hazard Areas thirty-six years after the deadline for doing so has passed.

In 2007, FEMA approached the City and County about updating flood insurance risk maps. In direct violation of the NFIA and its own regulations, FEMA failed to advise the City and County that it considered large, highly developed, and developing areas within the City and the County as potential flood hazard areas.

Local officials and individual citizens voiced strenuous objections when they learned, very late in the process, that FEMA intended to designate the ditches as Special Flood Hazard Areas. But when local officials attempted to act on the timely appeal they had been assured they had the right to pursue, they were told that the process associated with the use of the approximate methods was unappealable.

Local officials pleaded repeatedly with FEMA to reconsider its decision which it consistently refused to do until the Plaintiffs were forced to seek relief from this Court. Within days after this lawsuit was filed, and apparently to avoid having to justify its actions to this Court, FEMA rescinded its decision on a temporary basis. FEMA made it clear, however, that while it was rescinding the decision, "all engineering data and flood hazard information upon which the determination was made currently remains valid, and remains as it appears on the preliminary DFIRM."

Neither FEMA nor anyone acting on its behalf has provided the public with notice of these dramatic changes. The City and County have stepped in to partially fill this glaring gap, but the lack of notice from the Agency itself is a violation of the Fifth Amendment to the United States Constitution.

STATEMENT OF FACTS

The detailed facts are set out in the Statement of Facts section of Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction [Docket No. 4], pp. 4-22 and the supporting Exhibits. They are incorporated herein by reference for purposes of responding to FEMA's Fed. R. Civ. P. 12(b)(1) motion only.

also asserts that because of its rescission after the lawsuit was filed, Plaintiffs have now failed to exhaust administrative remedies. *Id.*, p. 11.

FEMA does not challenge the Court's initial jurisdiction. Instead, it argues that because of its post-Complaint actions, the Court "no longer" has jurisdiction. *Id.*, p. 2. Stated another way, FEMA asserts, without argument and without citation to any authority, that an administrative agency can consistently and systematically refuse to provide an administrative remedy and then have the case dismissed as moot when the agency is brought before the Court to give account. FEMA cites no authority for the proposition that providing an administrative remedy only after being sued, and which provides less than complete relief, renders a case moot.

The case is not moot because the Plaintiffs seek relief over and above the belated opportunity to appeal. The NFIA requires that FEMA tell local officials which areas within their community will be studied at the very beginning of the process. This allows local governments and individual property owners to have input into the deliberative process. FEMA's failure to provide the Plaintiffs with this critical procedural protection, which is mandated by the NFIA, infected the process from the beginning and cannot be remedied in a 90-day appeal period that merely rewinds the statutory process a short way. Plaintiffs' concerns were set out in a letter to FEMA dated September 8, 2009, to which the agency has not provided a substantive response and which they failed to address in their Memorandum. The September 8, 2009 letter is attached to FEMA's Memorandum as Government Exhibit A.

The bottom line is that this Court's consideration of this claim at this time will have a real world impact.

dismiss, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.

(Emphasis added; internal citations and quotations omitted.)

In this case, FEMA asserts that the case is moot and that Plaintiffs failed to exhaust administrative remedies. These are matters that should be considered under Fed. R. Civ. P. 12(b)(1) rather than under 12(b)(6) and defendants are precluded by the "usual rule" from submitting documents outside the pleadings for consideration under the later section. Plaintiffs have no objection to submission of documents outside the pleadings for 12(b)(1) purposes, but strenuously object to submission or consideration of anything outside the pleadings for purposes of 12(b)(6).

Plaintiffs assert that they have been prejudiced by FEMA's actions. This is a factual issue that cannot be resolved in a motion to dismiss. Instead, all inferences must be drawn in favor of the accuracy of the Compliant and the truth of Plaintiffs' assertions. *Alvarado v. KOB-TV, L.L.C.*, *supra*. For this reason, Plaintiffs have not focused on quantifying the prejudice that they have suffered as a result of FEMA's failure to follow proper statutory procedures. Nevertheless, the evidence will clearly show that FEMA's violation of the statute has caused, and if allowed to continue, will cause substantial harm.

III. The case is not moot because FEMA failed to follow the NFIA and its own regulations but proposes to give Plaintiffs an administrative remedy that fails to remedy this violation.

This case is not moot. The dispute between the Plaintiffs and FEMA is alive, ongoing, and serious. While FEMA has rescinded the Letters of Final Determination, it has made it clear that it believes the data contained in the underlying FIS and FIRM are still valid and that it still intends to impose that data in Finney County, Kansas. Government Exhibit B. Providing an

Congress also required that FEMA “establish procedures *assuring adequate consultation with the appropriate elected officials* of general purpose local governments.” 42 U.S.C. § 4107 (emphasis added).

Consultation would have allowed these communities to be involved in the study and to begin to provide information to FEMA during the deliberative process or, in the alternative, would have provided communities with sufficient time to prepare their appeal. The statute confirms this specific intent, stating:

The Director shall encourage local officials to disseminate information concerning such study widely within the community, so that *interested persons will have an opportunity to bring all relevant facts and technical data concerning the local flood hazard* to the attention of the agency *during the course of the study*.

42 U.S.C. § 4107 (emphasis added). This did not occur and could not occur because FEMA failed to follow the statutory mandate.

Harmonizing 42 U.S.C. § 4104 with § 4107, it is clear that Congress considered the relatively short 90-day appeal time provided for in § 4104 to be fair because § 4107 requires that communities be fully informed from the outset that an area is being studied and is therefore “in play.”

By failing to follow this statutory requirement, FEMA’s action was “without observance of procedure required by law.” *See*, 5 U.S.C. § 706(2)(D). Nevertheless, FEMA requests that the Court dismiss this case so it can proceed with a 90-day appeal under 42 U.S.C. § 4104. All FEMA has promised to do is restart in the middle and go forward. They have done nothing to remedy the procedural problems that infect the entire process and that have caused the Plaintiffs substantial prejudice.

The process, which was not observed here, itself offers valuable protections against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.

Id. at pp. 1129-1129.¹ The Court of Appeals noted that following the prescribed procedure would have allowed the FWS and the Bureau greater flexibility regarding suggestions and implementation. The failure to follow purely procedural requirements invalidated the substantive action even though “no jeopardy” opinions were eventually issued. The Court specifically rejected the argument that the subsequent opinions rendered the case moot. “The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal.” *Id.*, at p. 1129.

Likewise, this claim is not moot and dismissal to exhaust administrative remedies will not right this wrong when FEMA has given no indication that it will restart the process from the beginning. In fact, in its letters rescinding the March 25, 2009 Letters of Final Determination, FEMA stated: “Although the March 25, 2009, final determination is hereby rescinded, all engineering data and flood hazard information upon which the determination was made currently remains valid, and remains as it appears on the preliminary DFIRM.” Government Exhibit B.

Moreover, this procedural problem cannot be resolved during a 90-day appeal since the statute states that the “sole basis for such appeal” is the possession of “knowledge or information” that FEMA’s maps are “scientifically or technically incorrect” and the “sole relief” the agency can provide is a “modification of the Director’s proposed determination.” 42 U.S.C. § 4104(b).

¹ The contracts were rescinded and the court held that the NEPA claims were, in fact, mooted by subsequent legislation that clearly required the preparation of an Environmental Impact Statement. *Id.*, p. 1131.

FEMA also failed to inform the City and County of the development of new elevations in additional areas of the community as required by 44 C.F.R. § 66.5(f).

The City and County do not contend that FEMA wholly failed to inform the City and County of any of the information that was needed. Instead, Plaintiffs contend, and the record clearly establishes, that FEMA failed to provide the City and the County with the data they needed:

- (1) To fully understand what was going to occur,
- (2) To prepare for the dramatic changes that adding the ditches would cause,
- (3) To inform its citizens of the economic impact in a timely manner, and
- (4) To allow the City and County to gather information needed to challenge FEMA's inclusion of the ditches.

The failure to provide this vital information not only violated both the letter and the spirit of 42 U.S.C. § 4107 and 44 C.F.R. Part 66, but it has also created substantial prejudice because of the significant economic impact the FIS and the FIRM will have on the community. Statement of Facts, ¶¶ 1-4, 9, 15, 65-66, 70-72, and supporting Exhibits. FEMA clearly understands this prejudice and has a policy that protects communities from this harm by requiring that detailed, rather than approximate methods be used in developing areas. Statement of Facts, ¶¶ 17-19 and supporting Exhibits.

For the reasons set out in the Compliant and this Memorandum, FEMA should be ordered to set aside the FIS and the FIRM and start the process over in our community.

IV. Exhaustion.

There is no exhaustion requirement in this case. FEMA has repeatedly asserted that there is no appeal process, there is no relief available, and there is nothing to be done about the designation of the ditches as flood zones. Statement of Facts, ¶¶ 38, 40-42, 46-58, and supporting Exhibits. After this matter was brought to this Court, FEMA did a quick about-face.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument on Defendant's Motion to Dismiss.

Respectfully submitted,

s/David M. Traster

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2009, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system that will send notice of electronic filing to the following:

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