UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BEATRICE B. McWATERS, et al., **CIVIL ACTION NO. 05-5488**

VERSUS

SECTION "K" (3)

FEDERAL EMERGENCY MANAGEMENT AGENCY, et al.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued," and without such consent, a district court lacks subject matter jurisdiction.[1] Plaintiffs claim that the United States has waived its sovereign immunity in the Administrative Procedure Act; that waiver does not apply, however, when another statute precludes judicial review. The Stafford Act does so. It exempts the Federal Emergency Management Agency ("FEMA") from liability for the exercise or performance of any "discretionary function or duty."[2] All of the "functions" and "duties" involved in this case are discretionary, including the decision to terminate the provision of any particular type of assistance across-the-board as to a particular disaster, whether or not such termination might unintentionally affect one class of persons more than others.

Even if sovereign immunity had been waived as to any aspect of this action, the Court would still lack subject matter jurisdiction over several of plaintiffs' claims, which have become moot. FEMA's progress in resolving applications for assistance from victims of Hurricane Katrina has mooted plaintiffs' claim regarding the pace of processing, and FEMA's waiver of the Shared Household Rule and of the requirement to use the first payment of housing assistance only for housing expenses (which waivers are well-established and widely disseminated) has mooted plaintiffs' claims regarding those requirements.

Finally, certain of plaintiffs' claims are facially without merit. Specifically, plaintiffs have no legal basis for compelling FEMA to decide applications for disaster assistance within a certain period of time. And plaintiffs have no constitutionally protectable "property" interest in such

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[1] United States v. Testan, 424 U.S. 392, 399 (1976) (internal quotation marks omitted); see FDIC v. Meyer, 510 U.S. 471, 475 (1994).

[2] 42 U.S.C. § 5148.

assistance, such that all of their due process claims, including their several claims regarding notice, must be dismissed on that basis.

For any and all of the reasons, each of plaintiffs' claims in this action must be dismissed.

ARGUMENT

I. All of Plaintiffs' Claims Are Precluded by Sovereign Immunity

Absent a valid and applicable waiver of sovereign immunity, a district court lacks subject matter jurisdiction over claims against the United States or federal officers acting in their official capacity. FDIC v. Meyer, 510 U.S. 471, 475 (1994). The Stafford Act, which sets forth FEMA's mission, does not contain any waiver of sovereign immunity.[3] The Administrative Procedure Act waives sovereign immunity in some circumstances, but it does not apply where another statute "preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Here, the APA's waiver of sovereign immunity does not apply because the Stafford Act "preclude[s] judicial review" of the actions complained of when it states that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this Act." 42 U.S.C. § 5148. Defendants have shown, in their motion to dismiss, that no waiver of sovereign immunity applies here, and nothing in plaintiffs' opposition memorandum is to the contrary. For this reason alone, all of the claims in plaintiffs' complaint should be dismissed.[4]

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[3] For this reason, the analysis of the "discretionary function exception" in the Federal Tort Claims Act cannot be applied wholesale to actions against FEMA. The FTCA contains a waiver of sovereign immunity, but the Stafford Act does not.

[4] Plaintiffs assert that defendants have not moved to dismiss certain of their asserted (continued...)

A. Plaintiffs' Arguments Do Not Establish a Relevant Waiver of Sovereign Immunity

This Court should determine that FEMA's actions constitute "discretionary functions or duties" under the Stafford Act. Courts rely on the two-prong test developed by the Supreme Court in applying the discretionary function exception of the Federal Tort Claims Act:

> The first prong is satisfied when a choice or judgment is involved in the performance of the function, and that choice or judgment is not tempered by a statute, regulation or policy which mandates a particular course of action. If this condition is met, a court then proceeds to the second prong, which provides that the discretionary function exception will apply if the activity in question is grounded in social, economic or political activity.

Sunrise Village Mobile Home Park, L.C. v. United States, 42 Fed. Cl. 392, 399 (1998) (citing Berkovitz v. United States, 486 U.S. 531, 536-37 (1988)) [hereinafter Sunrise Village]; accord City of San Bruno v. FEMA, 181 F. Supp. 2d 1010, 1014-15 (N.D. Cal. 2001) (employing Berkovitz test).

The plaintiffs here challenge FEMA's application or alleged application of certain statutes and regulations, the pace of the agency's processing of applications for assistance, its actions in relation to notifying applicants, and decisions regarding when and where to provide federal disaster assistance. These claims fall squarely within the two-pronged test in Sunrise Village and City of San Bruno. First, the actions challenged here obviously involve some degree of "judgment . . . not tempered by a statute, regulation or policy which mandates a particular course of action." Sunrise Village, 42 Fed. Cl. at 399. The Stafford Act repeatedly uses the word "may" in describing FEMA's duties. See 42 U.S.C. §§ 5170, 5170a, 5170b, 5170c, 5172, 5174, 5192. The actions and decisions challenged here are, furthermore, matters involving "policy judgment." City

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[4](...continued)
causes of action. See Pls' Opp. at 17 n.8. The defense of sovereign immunity applies, however, to all of plaintiffs' alleged causes of action.

of San Bruno, 181 F. Supp. 2d at 1015; see Burgos-Montes v. Municipality of Yauco, 294 F. Supp. 2d 141 (D.P.R. 2003) (dismissing municipality's third-party complaint against FEMA for alleged failure to provide promised funding). Second, if the extent to which FEMA supervises a contractor is "grounded in social, economic and political policy," see Sunrise Village, 42 Fed. Cl. at 399, then surely the same should be said about how it applies the Stafford Act in relation to a given disaster, the pace of its processing of applications, the extent to which it provides notice to applicants, and which types of assistance it chooses to provide and when to provide them.[5]

In attempting to establish that the acts complained of here are not discretionary, plaintiffs cite two cases, decided in the 1980's, for the proposition that an agency is liable for "the manner" in which it carries out a decision, though the decision itself is discretionary. See Plaintiffs' Memorandum in Opposition to Defendants' Motions [sic] to Dismiss at 10 [hereinafter Pls' Opp.]. But those decisions, whatever their merit at that time, do not accurately reflect the current state of the law. In United States v. Gaubert,, the Supreme Court explained that where the applicable regulatory scheme "allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." 499 U.S. 315, 324 (1991). The Court explicitly rejected plaintiffs' proposed distinction between the decision to undertake acts and the decisions made in carrying out those policy choices, explaining that the discretionary function exception of the Federal Tort Claims Act protects discretionary decisions

[5] Even if plaintiffs' complaint were correctly read as pleading a claim regarding the amount of assistance provided to each applicant, determining the amount of assistance would be another aspect of FEMA's "discretionary function or duty" in providing disaster assistance. 42 U.S.C. § 5148. FEMA's regulations, further, state that the amount of rental assistance will be "based" on the Department of Housing and Urban Development's current fair market rates and on the "location of the rental unit," but the regulations do not indicate precisely how FEMA is to determine assistance amounts "based on" those criteria. 44 C.F.R. § 206.117(b)(1)(i)(B).

of government employees whether at the "policy or planning level" or the "[d]ay-to-day management" level. Id. at 325.[6]

Recent decisions by the Fifth Circuit also recognize that the discretionary function exception protects both larger policy decisions and the actions taken by government employees in carrying out those decisions. In Baldassaro v. United States, 64 F.3d 206 (5th Cir. 1995), the court, following Gaubert, held that the discretionary function exception protects not only a decision to have a merchant marine "composed of the best-equipped, safest, and most suitable vessels," but also specific decisions regarding ship design, including "whether to install detachable sea rails on vessels." Id. at 211. The court recognized that although "almost any exercise of governmental discretion could be overly parsed so as to focus on minute details of sub-decisions to the point that any relationship to policy would appear too attenuated," that is not the proper inquiry and would "obscure[ ] the very purpose of the discretionary function exception." Id.; see also, e.g., Guile v. United States, 422 F.3d 221, 231 (5th Cir. 2005) (discretionary function exception protects decision to hire contractor, choice of contractor, and degree of oversight of contractor, as well as decision to place armoires in patient's room); Theriot v. United States, 245 F.3d 388, 402 (5th Cir. 1998) (decisions to rely on charting to mark underwater sill and to notify the public "through the Notices to Mariners rather than by physically marking the location of the sill at the site was within the discretionary function exception" to the Suits in Admiralty Act). Clearly, therefore, FEMA's discretionary acts in determining how to provide assistance, including the types of assistance to provide, how long to provide it, and the extent and manner of providing

[6] Indeed, in Autery v. United States, 992 F.2d 1523, 1527 (11th Cir. 1993), the Eleventh Circuit noted that the reasoning of Denham v. United States, 834 F.2d 518 (5th Cir. 1987), one of the decisions cited by the plaintiffs here, was "squarely rejected" by the Supreme Court in Gaubert.

notice of the assistance, would fall within the discretionary function exception to the Federal Torts Claim Act, and are likewise within the non-reviewability provision of the Stafford Act.

Plaintiffs' reliance on a distinction between "acts" or "decisions" and the "manner" of carrying out those decisions is also contrary to the language of the Stafford Act. The Act's non-liability provision does not say that FEMA shall not be liable for discretionary decisions, but that it shall not be liable for any claim "based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty." 42 U.S.C. § 5148 (emphasis added). Thus, FEMA is immune from liability for every act performed in the exercise of any discretionary function or duty, not only for its discretionary decisions.[7]

In addition to relying on this (irrelevant) distinction, plaintiffs seek to rely on the APA's provision authorizing a court to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1); see Pls' Opp. at 10-12. That provision, however, is subject to the caveat that the APA does not apply where another statute "preclude[s] judicial review." 5 U.S.C. § 701(a)(1). The APA does not, therefore, waive sovereign immunity for a claim that an agency has "unreasonably delayed" acting, where some other statute — such as, here, the Stafford Act — "preclude[s] judicial review."

The fact that the Stafford Act sets no time frames for the processing of requests for assistance further belies any jurisdictional basis for such a claim. On plaintiffs' first two motions for temporary relief, this Court declined to order FEMA to process applications within a certain length of time, finding that "[t]he Stafford Act and the Regulations pursuant to it are unclear as to

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[7] The Ninth Circuit's decision in Graham v. FEMA, on which plaintiffs seek to rely, rested on mandatory language in a FEMA regulation governing grants to States and local governments that does not apply here. See 149 F.3d 997, 1006 (9th Cir. 1998); 44 C.F.R. § 13.21(g); see also Pls' Opp. at 8-9.

when FEMA should be mandated to act on these pending applications." See Order and Reasons at 18. Necessarily, if the Act is "unclear" in that regard, it does not impose a mandate, and the speed of processing applications is a "discretionary function or duty" on the part of FEMA. 42 U.S.C. § 5148.

Aside from whether the Court has jurisdiction over their statutory claims, plaintiffs contend that jurisdiction would exist for their constitutional claims. See Pls' Opp. at 12. The Supreme Court has expressly held, however, that "[t]he sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution." Lynch v. United States, 292 U.S. 571, 582 (1934) (citations omitted), quoted in Laeger v. United States, No. CIV. A. 96-2145, 1997 WL 244417, at *1 (W.D. La. Feb. 7, 1997); see Collier v. Banker's Life & Cas. Co., No. 02 C 7062, 2002 WL 31870546, at *2 (N.D. Ill. Dec. 20, 2002) ("The Constitution does not waive sovereign immunity or create jurisdiction in a federal district court absent statutory expression of Congress' intent to waive immunity and to grant jurisdiction to the federal district courts.").

Regardless of whether a claim is statutory or constitutional, plaintiffs must point to an "unequivocally expressed" waiver of sovereign immunity in "statutory text" that applies to the claim. Lane v. Peña, 518 U.S. 187, 192 (1996). Moreover, if a constitutional claim were allowed to defeat FEMA's statutory immunity from liability, then the Stafford Act's non-liability provision would be a nullity, because almost any claim can, in one way or another, be characterized as a constitutional claim. In fact, this is illustrated in plaintiffs' complaint, which pleads a matching constitutional claim for six of the statutory claims stated therein.

B. The Court's Order and Reasons of December 12 Does Not Help to Establish a Waiver of Sovereign Immunity

Plaintiffs also seek to rely on this Court's Order and Reasons of December 12, 2005, to establish a waiver of sovereign immunity. See Pls' Opp. at 7-11. Plaintiffs fail to acknowledge, however, that the Court ruled against them on sovereign immunity in certain respects. The Court considered, in turn, each of the five areas of relief requested by plaintiffs in their first two motions for temporary relief, to determine whether any provision of the Stafford Act imposed a non-discretionary duty in that area. See Order and Reasons at 13 ("[T]he issue before this Court is whether the acts or omission complained of by the plaintiffs are discretionary in nature or in fact mandated by law or regulation."). In relation to plaintiffs' claims regarding the Shared Household Rule and the use of rent assistance for purposes other than housing, the Court noted that it "ha[d] not been made aware of any mandatory provision[s]" in the Act that would permit judicial relief. See Order and Reasons at 14-16. That ruling was correct then, and plaintiffs have not, in opposing defendants' motion to dismiss, pointed to any provisions that should require this Court to change it. See Pls' Opp. at 6-12.

To the extent this Court previously suggested a waiver of sovereign immunity, defendants respectfully submit that it should not have done so, and that plaintiffs cannot, therefore, rely on the Order of December 12, 2005, to avoid dismissal of any of their claims. Regarding plaintiffs' claim on SBA loans, the Court, among other things, enjoined FEMA from "mis-communicating the nature of §5174 to any Applicant," and ordered the agency to notify past applicants that they did not need to complete an SBA loan application, to notify future applicants "that no such requirement exists," and to "publicize" the fact that only applicants for "other needs" assistance must complete an SBA loan application. See Order and Reasons at 25-26. Although the Stafford Act prohibits FEMA from denying housing assistance for failure to apply for an SBA loan, see 42

U.S.C. § 5174(a)(2), the Act does not require the agency to publicize that fact or to notify all applicants for housing assistance that they need not complete an SBA loan application. Therefore, any decision whether to provide any such notice would be "discretionary in nature," and not a proper subject of judicial relief. See Order and Reasons at 13.

The same is true of all of the claims in which plaintiffs seek to compel FEMA to provide various kinds of notice. For example, plaintiffs allege that FEMA has not "provided many victims adequate information and notice regarding the availability of trailers, or how the trailer application process works," see Pls' Opp. at 3, and that FEMA does not "provide proper notice and information regarding the criteria for [continued rental assistance]" or "the availability of increased benefits for households that, because of size or other circumstances, cannot be accommodated by the standard amount of THA." Id. at 22. Since none of these types of notice is "in fact mandated by law or regulation," see Order and Reasons at 13, the Stafford Act's non-liability provision "preclude[s] judicial review" of any such claim, and the APA does not waive sovereign immunity in those circumstances. See 5 U.S.C. § 701(a)(1), (2); see also 42 U.S.C. § 5148. In fact, in amending the Stafford Act in 2000, Congress deleted a mandatory provision that formerly required FEMA to notify applicants regarding "the type and amount of any assistance for which such person qualifies." See Pub. L. No. 106-390, § 206; 114 Stat. 1557 (2000) (amending 42 U.S.C. § 5174); see also Pub. L. No. 100-707, § 408(e), 102 Stat. 4689 (1988).

In relation to plaintiffs' request for an order extending the Short-Term Lodging Program, this Court's conclusion that FEMA lacks discretion to end the hotel program was based on (1) the Stafford Act's requirement that FEMA promulgate regulations insuring the "equitable and impartial" processing of applications for assistance, "without discrimination on the grounds of . . .

economic status," 42 U.S.C. § 5151(a), and (2) Congress's statement, in the Act, of its intent to "provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities" in disasters. Id. § 5121(b). Neither provision, however, deprives FEMA of discretion regarding how long to provide any particular type of assistance. FEMA is, therefore, immune from suit on that subject.

The provision requiring the issuance of certain regulations is a directive to FEMA regarding the content of its regulations. See 42 U.S.C. § 5151(a). Although that is a mandatory directive, there has not been — and there never could be — any finding that the agency has failed to issue such regulations. See Order and Reasons at 18-19; see also 44 C.F.R. 206.11(b).[8] Moreover, such an unintentional "disparate impact" cannot be said to violate the Stafford Act or deprive FEMA of discretion regarding the duration of assistance. Cf. Alexander v. Choate, 469 U.S. 287, 301 (1985) (rejecting claim that reduction in duration of Medicaid coverage constituted actionable disparate impact discrimination under Rehabilitation Act). A contrary rule would mean that every decision to terminate a particular type of assistance would "discriminate" on the grounds of "economic status," and would thus be prohibited by the Stafford Act (assuming section 5151(a) were read as a direct command regarding the processing of applications).

Even assuming, arguendo, that this statute could be read as a direct, enforceable command regarding the processing of applications as opposed to the issuance of regulations, there would be no basis to conclude that FEMA has violated it. A decision by FEMA to terminate a particular type of assistance in relation to a certain disaster applies to everyone receiving it, "without discriminat[ing] on the grounds of" the recipients' pre-disaster "economic status," just as section

[8] The regulation enacted pursuant to this statutory authorization simply repeats the language of the statute, and cannot be read as prohibiting "disparate impact" discrimination. See 42 U.S.C. § 5151(a).

5151(a) requires. Plaintiffs have not — and could not — present any evidence of discriminatory animus on the part of FEMA. Also, although it may be true that persons with limited means are more likely to need federal disaster assistance than "persons with resources," id. at 21, there is no evidence in the record to indicate that persons sheltering in hotels are more economically disadvantaged than persons receiving any other types of assistance.

Moreover, such an unintentional "disparate impact" cannot be said to violate the Stafford Act or deprive FEMA of discretion regarding the duration of assistance. Cf. Alexander v. Choate, 469 U.S. 287, 301 (1985) (rejecting claim that reduction in duration of Medicaid coverage constituted actionable disparate impact discrimination under Rehabilitation Act). A contrary rule would mean that every decision to terminate a particular type of assistance under the Stafford Act would "discriminate" on the grounds of "economic status." Such a result would be contrary to the Act, which contemplates that disaster assistance, by its very nature, is temporary and will be terminated. Indeed, a finding that unintentional economic discrimination in the provision of government benefits violates prohibitions against discrimination based on economic status would, if carried to its logical extreme, apply to many forms of government assistance. Such a rule would make it difficult for any agency ever to terminate an aid program, given that recipients of government aid generally have fewer personal resources than non-recipients.[9]

[9] Further, a disparate impact based on economic status would not involve a suspect classification such as to give rise to a valid claim for disparate impact discrimination as that basis. See, e.g., Anderson v. Sandoval, 532 U.S. 275, 280 (2001) (finding it "beyond dispute" that Title VI of Civil Rights Act prohibits only intentional discrimination and not disparate impact claims). Nor is there any evidence here of any discriminatory intent. There is, therefore, no basis in the statutory language to support the idea that an unintended "economic disparate impact" would violate the Stafford Act.

In addition to the "equitable and impartial" language in the Stafford Act, the December 12 Order's conclusion regarding the Short-Term Lodging Program rests on Congress's statement, in the Act, that it intended to "provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities" in disasters. 42 U.S.C. § 5121(b). That is not, however, a "mandatory directive," as it is contained in the Act's "Congressional findings and declaration," which do not create substantive rights. See Order and Reasons at 22; Conboy v. AT & T Corp., 241 F.3d 242, 257 n.14 (2d Cir. 2001). That provision cannot, therefore, be the basis of a waiver of sovereign immunity.

II. Plaintiffs' Claims Regarding the Pace of FEMA's Processing Should Be Dismissed

The first cause of action in plaintiffs' complaint alleges that defendants have violated the Stafford Act by failing to act quickly enough on requests for assistance from victims of Hurricane Katrina. See Second Am. Compl. ¶¶ 143-47. The second cause of action is basically the same claim, presented as a claim under the Due Process Clause. Id. ¶¶ 148-53. There is no basis, however, for requiring FEMA to act on requests for assistance within any particular period of time.[10] In any event, FEMA's very substantial progress in processing applications since the Second Amended Complaint was filed has mooted these claims.

[10] In opposing defendants' motion to dismiss, plaintiffs do not respond to defendants' assertion that there is no basis, under the Stafford Act or any other law, for compelling FEMA to continue the Short-Term Lodging Program. See Defs' Memo. Dismiss at 17-19 (docket #32). They must, therefore, be deemed to have conceded the accuracy of that argument. Plaintiffs also do not respond to defendants' contention that their claim regarding SBA loan applications is factually incorrect. See id. at 21-22.

A. Plaintiffs Have No Legal Basis for Compelling FEMA to Decide Requests for Assistance Within a Certain Period of Time

The only basis for these claims, on which plaintiffs rely in opposing defendants' motion to dismiss, is the Administrative Procedure Act's authorization for a court to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1); see Pls' Opp. at 24. As another court in the Fifth Circuit has held, however, an action for "unreasonable delay" under the APA "will not lie to the extent that agency action is committed to agency discretion by law." Cross Timbers Concerned Citizens v. Saginaw, 991 F. Supp. 563, 570 (N.D. Tex. 1997). Where the statute in question gives the court "no possible means of evaluating" the alleged delay, id., there can be no viable claim for "unreasonable delay."

Here, it is undisputed that the Stafford Act does not require FEMA to act on an application for assistance within any particular length of time. Indeed, in amending the Act in 2000, Congress deleted a provision that formerly required FEMA to make eligibility determinations within seven days "[w]henever practicable." See Pub. L. No. 106-390, § 206; 114 Stat. 1557 (2000) (amending 42 U.S.C. § 5174); see also Pub. L. No. 100-707, § 408(e), 102 Stat. 4689 (1988). Therefore, this Court would have "no possible means of evaluating" the reasonableness or unreasonableness of FEMA's pace in processing applications.

Moreover, plaintiffs do not, and could not, allege that FEMA is not processing the more than 1,700,000 requests for assistance that it has received as a result of Hurricane Katrina.[11] Nor could plaintiffs allege that FEMA unreasonably delayed beginning to process those applications. Where an agency is presented with a number of requests that exceeds its capacity to process at

[11] As of February 8, 2006, FEMA had received 1,704,006 registrations as a result of Katrina. See Exhibit A hereto (printout from FEMA Web site). Defendants request the Court to take judicial notice of this number, which is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See Fed. R. Evid. 201(b).

once, a certain amount of time is necessarily required to finish processing all of those requests. Indeed, as described below, FEMA's progress in processing the relatively few remaining applications has been very substantial.

Furthermore, plaintiffs' opposition memorandum does not explain how a reasonable set of deadlines or time periods could be fixed or administered judicially, leaving unanswered defendants' argument that such would be impractical. See Memo. in Opp. to Pls' Mo. for TRO and Prelim. Inj. and Nov. 28, 2005 Mo. for TRO and Prelim. Inj., and in Supp. of Defs' Mo. to Dismiss at 15-16 (docket #32) [hereinafter Defs' Memo. Dismiss]. Any effort to impose and administer arbitrary deadlines for processing applications for disaster assistance would confront multiple obstacles, including the finite nature of FEMA's resources and the unique circumstances presented by each application, such as whether more information is needed from the applicant, whether the agency is able to contact the applicant when necessary, and whether the agency may be concerned that the application may be fraudulent.[12] It is not surprising, for these reasons, that the Stafford Act itself does not impose any deadlines.

B. FEMA's Progress in Processing Applications Has Mooted Plaintiffs' Claims Regarding the Pace of Its Processing

Additionally, FEMA has made extremely substantial progress in processing requests for assistance from Katrina victims since the Second Amended Complaint was filed. Based on reports that defendants have voluntarily provided to the plaintiffs every two weeks since

[12] The potential for fraud in federal disaster assistance programs is very real. The Government Accountability Office has recently issued a report describing various ways in which persons have obtained assistance fraudulently in connection with FEMA's assistance for victims of Hurricane Katrina. See Expedited Assistance for Victims of Hurricanes Katrina and Rita (Feb. 13, 2006), GAO-06-403T (Exhibit B hereto). The submission of a GAO report does not convert this portion of defendants' motion to dismiss into a motion for summary judgment. See Davis v. Bayless, 70 F.3d 367, 372 n.3 (5th Cir. 1995) ("Federal courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss.").

December 19, 2005, only 5.67% of the Katrina applications that were pending on that date were still pending on February 13, 2006. See Declaration of Donna M. Dannels (Exhibit C hereto).[13] Specifically, the numbers of requests for housing assistance, other than direct assistance, from Katrina victims that were pending as of the date of each report, are as follows:

December 19, 2005	65,993[14]
January 3, 2006	31,338
January 16, 2006	18,943
January 30, 2006	11,284
February 13, 2006	3,742

Id. Thus, any viable claims regarding the pace of FEMA's processing that plaintiffs may have had when they filed their Second Amended Complaint have since become moot.

III. Plaintiffs Have No Protectable "Property" Interest in FEMA Assistance for Purposes of the Due Process Clause

In arguing that they have a constitutionally protectable "property" interest in federal disaster assistance, plaintiffs cite this Court's decision in Conerly v. Town of Franklinton, No. Civ.A. 03-1507, 2005 WL 1501421 (E.D. La. June 20, 2005). See Pls' Opp. at 18-20. The decision in Conerly, which turned on statutory language quite comparable to that of the Stafford Act, actually illustrates why the Act does not create a "legitimate claim of entitlement" in disaster assistance. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The due process issue in Conerly was whether a domestic restraining order, and the Louisiana law regarding its

[13] Since mootness deprives a court of jurisdiction, defendants' mootness arguments are presented under Rule 12(b)(1) of the Federal Rules of Civil Procedure rather than Rule 12(b)(6). See Parole Comm'n v. Geraghty, 445 U.S. 395, 396-97 (1980).

[14] Also, defendants estimated that 68,500 such applications were pending on December 12, 2005 (Exhibit C hereto).

enforcement, conferred a constitutionally protectable expectation that the person who secured the order would be protected from the person against whom the order was entered. 2005 WL 1501421, at *2, *5-*6. The plaintiff in Conerly relied on a Tenth Circuit decision, Gonzales v. Castle Rock, 366 F.3d 1093 (10th Cir. 2004), which had held, based on a Colorado restraining order and statute, that "a procedural due process claim existed where the police failed to enforce a temporary restraining order." Conerly, 2005 WL 1501421, at *5. This Court examined the language of the Colorado statute, including its provision that the police "shall arrest" someone who has violated a restraining order and that a "police officer shall use every reasonable means to enforce" such an order. Id. at *6.

This Court then contrasted the language of the Colorado statute with the language of the Louisiana restraining order and statute. The Louisiana order, the Court noted, "has mandatory language," like the Colorado order. Id. at *7. "However, it also has permissive language"; specifically, the order said that anyone who violates it "may be arrested, jailed, and prosecuted." Id. (emphasis in original). "Similarly," the Court continued, "the Louisiana statutes governing violations of restraining [orders have] both mandatory and permissive language": The statute states that "[l]aw enforcement officers shall use every reasonable means" to enforce restraining orders, but that, upon violation of such an order, a court "may hold the defendant in contempt of court and punish the defendant by imprisonment in the parish jail." Id. (emphasis in original). "[T]he word 'may,'" the Court observed, "is not mandatory, but rather implies that a peace officer's power to arrest without a warrant is discretionary." Id. (quoting Ardoin v. City of Mamou, 685 So.2d 294, 299 (La. App. 3 Cir.1996)). Thus, in light of this critical distinction — that is, the use of the word "may" in the Louisiana statute and order — the Court held that "there is no property interest protected by the Due Process Clause of the Fourteenth Amendment." Id.

Like the Louisiana order and statute in Conerly, the Stafford Act contains both objective language — that is, criteria regarding eligibility for disaster assistance — and permissive language regarding the provision of such assistance. Indeed, the Stafford Act's language is even "permissive" than the language at issue in Conerly. The Act sets forth who may receive disaster assistance for "individuals and households": those "who, as a direct result of a major disaster, have necessary expenses and serious needs [that they] are unable to meet . . . through other means." 42 U.S.C. 5174(a). And the same section sets forth the criteria for housing assistance (as a subset of assistance for "individuals and households"): those "who are displaced from their predisaster primary residences or whose predisaster primary residences are rendered uninhabitable as a result of damage caused by a major disaster." Id. § 5174(b)(1).

But the Stafford Act "also has permissive language." Conerly, 2005 WL 1501421, at *7. It says, for example, that the President "may" declare a major disaster, 42 U.S.C. § 5170, and that FEMA "may" provide financial assistance or direct services to individuals and households, id. § 5174(a)(1), "may" provide housing assistance, id. § 5174(b)(1), "may" provide financial assistance to address other needs, id. § 5174(e), and "may" provide other essential assistance. Id. § 5170b(a). As this Court said in Conerly, "the word 'may' is not mandatory, but rather implies that [the function in question] is discretionary." 2005 WL 1501421, at *7. Thus, like the statute and restraining order in Conerly, the Stafford Act does not confer any "property interest protected by the Due Process Clause." Id.

Notwithstanding the above, plaintiffs assert that once FEMA "began providing assistance disbursements to hurricane [Katrina] victims, a duty was created on the part of defendants to administer the assistance program in a non-negligent manner." See Pls' Opp. at 20. Since plaintiffs have not brought a tort action against FEMA, they err in stating this argument in terms

of "duty" and "negligence." What plaintiffs apparently mean to say is that FEMA's provision of disaster assistance to Katrina victims created a "legitimate claim of entitlement" — that is, a legitimate, constitutionally-enforceable expectation that the assistance would continue. But plaintiffs have not pointed to any "statute, regulation, contract, or the like" that creates any such expectation, and the absence of any such expectation is fatal to their due process claim. See Blackburn v. City of Marshall, 42 F.3d 925, 941 (5th Cir. 1995).

To the contrary, in fact, FEMA's regulations require applicants to return to the agency periodically to justify their need for continued assistance by satisfying additional criteria. See 44 C.F.R. § 206.114. Further, the continuation of assistance, like the initial provision of assistance, turns on discretionary terms. See id. § 206.114(b)(4) ("FEMA may certify pre-disaster owners for continued rent assistance") (emphasis added). Given these regulations and requirements, the commencement of disaster assistance does not create a "legitimate claim of entitlement" to continued assistance.

Nor does such a legitimate expectation arise out of the FEMA regulation that says it is FEMA's "policy . . . to provide an orderly and continuing means of assistance." 44 C.F.R. § 206.3. Contra Pls' Opp. at 21. This section is, first, merely a paraphrase of the "findings and declarations" section in the Stafford Act, which cannot create substantive rights. See Conboy v. AT & T Corp., 241 F.3d 242, 257 n.14 (2d Cir. 2001); 42 U.S.C. § 5121(b). In any event, this section of the regulations does not speak of a "continuing means of assistance" to individuals at all, but rather of a "continuing means of assistance . . . to State and local governments in carrying out their responsibilities." 44 C.F.R. § 206.3 (emphasis added). Thus, even on its face, this regulation does not create any expectation directly in individuals — let alone an expectation that rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

IV. Several of Plaintiffs' Other Claims Have Become Moot

In addition to plaintiffs' claims regarding the pace of processing, others of their claims have also become moot. Specifically, FEMA has waived the Shared Household Rule for victims of Hurricane Katrina — permitting a household to receive assistance for more than one residence if household members were separated due to the disaster. FEMA has also waived, in relation to an applicant's initial assistance, the requirement that housing assistance be used only for housing expenses. Plaintiffs' arguments against mootness are incorrect. See Pls' Opp. at 12-17.

Plaintiffs rely on Los Angeles County v. Davis, where the Supreme Court said:

> [J]urisdiction, properly acquired, may abate if the case becomes moot because
> (1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

440 U.S. 625, 631 (1979) (citations and internal quotation marks omitted). Plaintiffs' assertion that defendants' mootness argument is "specious" seems to imply that a finding of mootness is nearly impossible, but it is not. See Pls' Opp. at 12. Indeed, the Court in Davis held that plaintiffs' claims had become moot when defendant abandoned the challenged practices "during the pendency of [the] litigation," notwithstanding that both the district court and the court of appeals had acted on the case. Id. at 627. The Court found that there was no "reason to believe[ ] that petitioners would significantly alter their present hiring practices if the injunction were dissolved." Id. at 632.

FEMA's waiver of the Shared Household Rule, and of the requirement to provide receipts showing exhaustion of housing assistance in order to recertify for continuing assistance for the first time, is reflected in documents submitted with defendants' motion to dismiss (docket #32).

FEMA's announcement and implementation of those waivers are also reflected in the Administrative Record submitted in this case (docket #89). See Vol. 1, Tab 8, AR00290; Vol. 1, Tab 14, AR00302; Vol. 1, Tab 15, AR00305; Vol. 2, Tab 38, AR00351; Vol. 2, Tab 66, AR00472; Vol. 2, Tab 69, AR00482; Vol. 2, Tab 70, AR00485; Vol. 2, Tab 73, AR00493; Vol. 3, Tab 98, AR00736; Vol. 3, Tab 99, AR00738; Vol. 3, Tab 101, AR00742; Vol. 3, Tab 106, AR00750.

The nature of both of these developments is such that there is no reason to expect that FEMA might retract them, and every reason to expect that FEMA's current policies have "eradicated" the alleged harms on which plaintiffs' challenges are based. See Davis, 440 U.S. at 631. FEMA has announced these changes publicly, and has processed applications and paid benefits based on them. The waiver of the Shared Household Rule did not occur "in defensive response to this lawsuit" as plaintiffs' contend, see Pls' Opp. at 13, but was announced and implemented as of September 19, 2005, approximately a month and a half before the lawsuit was filed. See Admin. Record, Vol. 1, Tab 14, AR00302; see also Vol. 2, Tab 38, AR00351. There is, in short, no "reason to believe[ ]" that FEMA will "alter" these present practices. Davis, 440 U.S. at 632.

FEMA has also taken various actions that serve to "eradicate" the effect of the policies that existed before the waiver of the Shared Household Rule and of the requirement regarding the use of initial housing assistance. See Davis, 440 U.S. at 631. Contra Pls' Opp. at 15-16. Specifically, FEMA sent a letter to each applicant who did not receive housing assistance because another pre-disaster household member had been assisted, explaining that the applicant could submit documentation showing that he had relocated separately from other pre-disaster household members. See Admin. Record, Vol. 3, Tab 91, AR00560. Similarly, FEMA sent a letter to all applicants who received housing assistance, explaining the documentation required to receive

continued assistance. Id. That letter was accompanied by a form for the applicant to self-certify her exhaustion of the initial award and continuing need for housing. Id. The agency also disseminated this information directly to applicants by phone, using "auto-dialer" scripts. Id. (including text of letters and auto-dialer scripts). Additionally, a FEMA news release issued on November 26, 2005, indicated that FEMA could consider separate applications for housing assistance from, among others, "Families who lived together before a disaster but who have been displaced in different geographical locations." See Admin. Record, Vol. 2, Tab 67, AR00474.[15]

Plaintiffs assert, in opposition to defendants' mootness argument, that FEMA has not taken "adequate" steps to inform its own personnel regarding these waivers. See Pls' Opp. at 14-15. That assertion is also refuted by material in the Administrative Record. On September 19, 2005, FEMA headquarters sent a memorandum notifying its regions regarding the waiver of the Shared Household Rule. See Admin. Record, Vol. 1, Tab 14, AR00302. The staff of FEMA's National Processing Service Centers ("NPSCs") were similarly notified on the same date. See Admin. Record, Vol. 1, Tab 15, AR00305. And staff of the Disaster Recovery Centers were so notified on September 27, 2005. See Admin. Record, Vol. 1, Tab 22, AR00317.[16]

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[15] This news release also corrects certain misunderstandings regarding the waiver of the Shared Household Rule reflected on pages 16 and 17 of plaintiffs' opposition memorandum. The release states, for example, that FEMA may consider separate applications from "Roommates who lived together before a disaster but who have been displaced in different geographical locations." Thus, it is not correct that FEMA assumes "that all members of a predisaster household, even roommates, will continue to live together." See Pls' Opp. at 16.

[16] Plaintiffs quote two FEMA documents which — among the many other documents that make the waiver of the Shared Household Rule very clear — could be read as foreclosing assistance for a second, separated member of a pre-disaster household. See Pls' Opp. at 14. The first such document, a memorandum dated September 27, 2005, does not relate to traditional rental assistance at all (that is, the type of assistance as to which FEMA has waived the Shared Household Rule), but rather to "transitional housing assistance," a special category of assistance that FEMA established in the immediate aftermath of Hurricane Katrina to ensure expedited assistance

(continued...)

FEMA has also disseminated to its personnel the waiver of the requirement to use the initial housing assistance only for housing expenses. Memoranda to NPSC personnel regarding this waiver were issued on November 30 and December 3, 2005. See Admin. Record, Vol. 2, Tab 69, AR00482; Vol. 2, Tab 70, AR00485. A slightly-revised memorandum on the same subject went to NPSC personnel on December 8, 2005. See Admin. Record, Vol. 2, Tab 73, AR00493.

The purported statements that plaintiffs rely on in attempting to show that certain FEMA employees did not know about these waivers — even assuming these statements can be deemed reliable despite their hearsay nature — do not establish that FEMA has failed to disseminate this information to its employees. See Pls' Opp. at 15. An agency obviously cannot ensure positively that every one of its employees and contractors will always read and heed every bulletin and directive transmitted to them; that, in fact, is one reason why appeal rights exist. Indeed, every determination letter informs the applicant regarding appeal rights, and FEMA's news releases in the wake of Hurricane Katrina have also described that right. See Admin. Record, Vol. 18, CD #8, News Release: "A Letter of Denial from FEMA May Not Be the Last Word: Missing Information Is One of the Main Reasons for Denial" (Dec. 29, 2005); News Release: "FEMA Denial Letters May Not Be Last Word" (Jan. 7, 2006).

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[16](...continued)
to families living in the hardest-hit areas. The second document, which plaintiffs refer to as "FEMA Letter," is a standard FEMA Form 90-69B Sep. 03, entitled "Declaration and Release," which FEMA has long used for all disasters. This OMB-approved form deals with several subjects, including whether the applicant is a U.S. citizen or qualified alien. It is not, therefore, specific to Katrina relief, and any statement regarding the Shared Household Rule in such a form would obviously be countermanded by FEMA's waiver of the Rule specifically for victims of Hurricane Katrina.

CONCLUSION

Accordingly, Defendants' Motion to Dismiss should be granted, and this action dismissed with prejudice.

* * *

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on all counsel of record by electronic mail on this 16th day of February, 2006.

/s/ W. Scott Simpson

W. SCOTT SIMPSON