IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BEATRICE B. MCWATERS, ET AL.	**CIVIL ACTION NO.: 05-5488**
Plaintiffs,	
VERSUS	**SECTION "K" (3)**
FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.	
Defendants.	

PLAINTIFFS' POST HEARING BRIEF

INTRODUCTION

FEMA's bureaucratic mismanagement of disaster relief has systemically failed to provide critically needed and statutorily mandated Temporary Housing Assistance ("Assistance") to thousands of Katrina evacuees. Over six months have passed since Katrina made landfall on the shores of the Gulf Coast, and through this litigation a series of facts have become evident and beyond challenge, including:

- Through the teachings of the Hurricane Pam exercise in 2004, and the advance warnings issued by the National Weather Service and the National Hurricane Service, the devastation wrought by Hurricane Katrina was "not only predictable, it was predicted." (Pl. Ex. 1).

- Severe budgetary cuts resulting from FEMA becoming a part of the Department of Homeland Security left FEMA ill-prepared to respond to the immediate needs of hundreds of thousands of Katrina victims. (Dannels, Inj. Hr'g Tr. pp. 373-374; and pp. 435-440, Feb. 24, 2006).

- Budget cuts notwithstanding, FEMA's mandate and lawful responsibilities never changed. (Dannels, Inj. Hr'g Tr. pp. 439-440).

- FEMA's concerns over costs took precedent over its concerns over lives, resulting in a plan to evict thousands of Katrina victims from the only shelter they knew - hotels - just in time for the Christmas holidays. Indeed, was it not for this Court's intervention, a new class of homeless would have been created in this country. (Order Granting In Part and Denying In Part Motions for Temporary Restraining Order ("Court Order"), Dec. 12, 2005, at p. 20).

- FEMA's "inartful" and confusing public disseminations created the impression that Katrina victims were required to apply for an SBA loan in order to qualify for temporary housing assistance. (Court Order, at p. 17).

- Due to federal budgetary cuts, FEMA was unable to fulfill its statutory obligation to plan and provide eligible victims with a stipend reflecting a fair market rent in the areas into which victims evacuated. Instead, FEMA unlawfully shifted the burden to victims to request additional money, while at the same time forcing them from hotels to out onto the streets with no means to find affordable housing. (Dannels, Inj. Hr'g Tr. pp.373-374; pp. 434-439; and pp. 454-455).

- Due to federal budgetary cuts, FEMA's delays in processing pending applications for temporary housing assistance and continuing rental assistance exceeded the bounds of reasonableness and amounted to inaction, leaving tens of thousands of victims penniless and homeless for months.

- FEMA's application (or lack thereof) of the shared housing rule unfairly and inequitably discriminated against the most disadvantaged of Katrina's victims.

The foregoing only illustrates FEMA's statutory and constitutional failings. However, this certainly is not an exhaustive list. As set forth below, and as demonstrated at trial, FEMA's actions, reactions and inactions in response to Hurricane Katrina are inexcusable and in violation of law. Accordingly, a preliminary and permanent injunction should be issued.

As the Court further noted, the consequences of that inaction impacted disproportionately those who were most vulnerable – the poor, disabled and children – despite the Stafford Act's mandate against any action that "discriminate(s) against victims based on grounds of economic status, but also violate(s) the intent of Congress in providing for disaster aid to assure an orderly and continuing means of Assistance and alleviate the suffering of those most affected by Hurricane Katrina." (Court Order, at p. 22; and s*ee* 42 U.S.C. § 5151). Indeed, the evidence established that FEMA's initial response to Katrina

was inept. As the Court stated, "Unfortunately, it seems as if inaction has been the *leit motif* of the response (of FEMA) to the most severe natural disaster in the Nation's history." (Court Order at p. 10).

FEMA continues to follow policies that violate its non-discretionary duties. The defendant agency has failed to promulgate minimally rational, workable guidelines allowing evacuees to receive, or continue to receive, Assistance for the period specified by law. FEMA additionally refuses to calculate housing assistance based on (even minimally-calculated) fair market rent for the areas involved. Instead, FEMA has adopted an arbitrary standard of a national average, and then has refused to properly adjust these payments. FEMA has also refused to allow Katrina victims to spend any of their Assistance to pay for utilities costs. Perhaps they believe that Katrina evacuees get free utilities, or can get by without them. Next, FEMA has continued to apply its illegal "shared housing" rule, as they have placed numerous roadblocks in the way of evacuees who attempt to demonstrate that "rule" should not apply to them because they established separate households after the disaster. Finally, FEMA has continued to cause Assistance applicants to believe that they have to apply for an SBA loan, in direct violation of the Court's December 12 injunction. Accordingly, the injunction should be made permanent.

At trial, Donna Dannels, Acting Deputy Director of the Recovery Division and Chief of the National Processing Service Center admitted that FEMA's lack of speed in processing applications was caused by budget cuts, staffing shortages and poorly trained walk-in workers hired after the disaster. (Dannels, Inj. Hr'g Tr. p. 373-374). Unprepared for the sheer volume of applications and gross inadequacies within the system, Ms. Dannels acknowledged that FEMA knew what would happen in a disaster of this magnitude in terms

of the ineffective response. She testified that, "FEMA was not provided the resources that would be necessary to be able to respond and register and process this volume of activity." (Dannels, Inj. Hr'g Tr. p. 374). Moreover, Ms. Dannels confesses that FEMA lacked a contractor for the "interaction with the applicant on the recertification." (Dannels, Inj. Hr'g Tr. p. 374). As a result of FEMA's failure, plaintiffs suffered denial and delays in assistance to which they were legally entitled.

The preponderance of evidence adduced at the hearing prove that FEMA's failures denied several of the named plaintiffs and many other members of the class – all pending or eligible evacuees – Assistance, continued rental assistance, an increase in housing Assistance of the fair market rent plus utilities, trailer assistance, separate housing for household members in a different location and rental housing Assistance without the prerequisite of completing an SBA loan application. All actions violated the Stafford Act and the Fifth Amendment Due Process Clause to the United States Constitution.

FEMA has made and continues to make decisions at the highest levels in violation of the law. The intransigence on the Shared Household Rule, the misapplication of the SBA Loan problem, the absence of restructured Fair Market Rents six months after the hurricane, and the failure to promulgate clear rules about continued eligibility, even in the face of a congressional demand, cannot be blamed on low-level bureaucrats. Indeed, citing a lack of resources for inaction, if anything, underscores the need for this Court's continuing oversight.

I. FEMA'S FAILURE TO PROVIDE ADEQUATE HOUSING ASSISTANCE TO THE VICTIMS OF KATRINA VIOLATES THE STAFFORD ACT AND THE ADMINISTRATIVE PROCEDURE ACT.

A. FEMA to Allow Katrina Victims to Secure Housing.

FEMA has a legally enforceable responsibility under the Stafford Act to provide meaningful housing assistance to disaster victims. Section 408 (b)(1); 42 U.S.C. § 5174(b)(1); Section 408(b)(2)(A); 42 U.S.C. 5174(b)(2)(A). Once FEMA is designated by the President to provide Assistance for qualified applicants, it must comply with the statute. *Graham v. FEMA*, 149 F.3d 997, 1007 (9th Cir. 1998) ("FEMA was obligated by its own regulations to process and to release to the FSM [Micronesia] the appropriate funds for disbursement to the plaintiffs whose appeals have been finally decided in their favor"). In *Graham*, the court cited *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (alteration in original), which held that if a "statute, regulation, or policy" mandates a particular course of action, a government employee "has no rightful option but to adhere to the directive." FEMA's only witness, Donna Dannels, recognized at trial that the agency has no discretion not to pay housing assistance. (Dannels, Inj. Hr'g Tr. p. 434).

In the case of housing assistance, the statute does mandate a particular course of action and sets the amount of Assistance to be provided:

> "The President may provide financial assistance to individuals or households to rent alternate housing accommodations, existing rental units, manufactured housing, recreational vehicles, or other readily fabricated dwellings. **The amount of assistance under clause (i) shall be based on the fair market rent** for the accommodation provided plus the cost of any transportation, utility hookups, or unit installation not provided directly by the President."

Stafford Act, § 408(c)(1)(A)(i)-(ii); 42 U.S.C. 5174(c)(1)(A)(i)-(ii) (emphasis added). This language reflects that Congress's mandate is "to help *individuals* . . . obtain disaster relief . . . [and] the Act's real beneficiaries, the individuals and families who suffer losses due to natural disasters, fall well within the Act's general policy concerns." *Graham,* 149 F.3d at 1004-05 (emphasis in the original).

FEMA has interpreted the "fair market rent" (FMR) language of the statute to mean "market-wide estimates of rents that provide opportunities to rent standard quality housing throughout the geographic area in which rental housing units are in competition." FEMA's regulations further rely upon the "Fair Market Rent" calculations that the Department of Housing and Urban Development (HUD) makes on a yearly basis for purposes of its housing voucher program. 44 C.F.R. § 206.111. The FMRs reflect the fair market rents for different regions of the country for different size apartments. 24 C.F.R. § 888.103(b)(c).

In most situations, FEMA has relied on HUD's FMR calculations. Its only witness recognized that the statute does not require FEMA to rely on those figures. Ms. Dannels testified that "[t]here's nothing in the law that requires [FEMA] to use HUD numbers or numbers compiled by HUD" to determine the proper level of housing assistance. (Dannels, Inj. Hr'g Tr. p. 465).

B. FEMA Has Breached Its Obligation to Provide Katrina Victims Assistance Sufficient to Secure Adequate Housing.

The statute directs FEMA to provide housing assistance "to rent alternate housing accommodations." Section 408(c)(1)(A)(i); 42 U.S.C. 5174(c)(1)(A)(i). In the aftermath of Katrina, FEMA did not rely on HUD's regional FMRs, which depend on the size of the apartment and the region, but instead FEMA used a national average for a two bedroom apartment, based on pre-Katrina rents set by HUD. (*See* Def. Ex. 2; and Dannels, Inj. Hr'g

Tr. p. 386); 70 Fed. Reg. 57653, 57658-59, Oct. 3, 2005. This amount totaled $2358 for three months, or $786 a month, or $26 per day. FEMA's decision to set Assistance at a level based on national average FMRs is not only arbitrary and capricious, but it violates the Stafford Act's mandate to provide emergency assistance that would actually enable victims to obtain housing.

The single payment of $2358 allocated remains inadequate for two reasons. First, the amount does not reflect the increase in housing prices attributable to the Hurricane in the affected areas. (Dannels, Inj. Hr'g Tr. p. 461). Second, it does not reflect the housing prices in different markets, including the expensive markets to which FEMA evacuated many Katrina victims. (Dannels, Inj. Hr'g Tr. p. 461).

Housing prices have increased dramatically in the areas struck by the Hurricane. Patricia Bryan Mauldin, President of From the Lake to the River Foundation, testified that she had been monitoring FEMA's web site for housing in New Orleans, and found that the average rent for a two bedroom apartment in New Orleans was exactly twice the amount FEMA had established for housing assistance. (Mauldin, Inj. Hr'g Tr. p. 177, Feb. 23, 2006). The testimony proved that the National average FMRs set prior to the disaster are clearly inadequate in areas that have high housing costs as a result of the hurricane. (*See* Pl. Ex. 7; Dannels, Inj. Hr'g Tr. p. 154-155, Feb. 23, 2006).

In addition, many areas populated by significant numbers of evacuees have housing costs reflected in the regional FMRs that are much higher than $786 a month. Indeed, a December 2005 report from the Office of the Governor of California, for example, showed that FEMA's housing Assistance was not sufficient "for most of the California counties with large concentrations of evacuees." (Godnick, Inj. Hr'g Tr. p. 66, February 23, 2006; and *see*

Pl. Ex. 2). The fair market rent in Alameda County, for example, was $557 higher than the FEMA allowance, and in San Francisco, the fair market rent was $754 higher. (Godnick, Inj. Hr'g Tr. 66; and *see* Pl. Ex. 2). According to FEMA's records, almost 17,000 evacuees were sent to California. (Godnick, Inj. Hr'g Tr. p. 66).

FEMA's own records thus reflect its recognition that the current housing costs in the areas in which evacuees are living are higher than the national average FMR. (*See* Godnick, Inj. Hr'g Tr. p. 67; and *see* Pl. Ex. 2). FEMA's recognition of the inadequacy of the Assistance provides an additional basis for finding its action arbitrary and capricious. *City of Kansas City v. HUD*, 923 F.2d 188, 194 (D.C. Cir. 1991). The D.C. Circuit found in that case, "[a]gency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decision-making, and cannot survive review under the arbitrary and capricious standard." 923 F.2d at 194, *citing Motor Vehicle Mfrs. Assn. v. State Farm*, 463 U.S.29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S.402, 416 (1971).

FEMA contends that while it may have set the basic rental Assistance at a level that does not enable people to actually secure housing, all the victims have to do is call FEMA's 800 number and say that the amount is insufficient. (Dannels, Inj. Hr'g Tr. p. 383, Feb. 24, 2006). This is consistent with FEMA's insistence that it will not establish written criteria that allow it to treat similarly situated individuals the same. FEMA could establish procedures to adjust initial payments of $2,358 to current, post-disaster fair market rents for the location of the evacuee and for the proper household size. Rather than take these corrective actions, FEMA claims it should have discretion to treat every application on a "case-by-case" basis. That claim is in inherent conflict with the Stafford Act, which requires

that "the processing of applications, and other relief and Assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status." 42 U.S.C. § 5151(a).

Given that 1.7 million households have registered for Assistance as a result of Hurricane Katrina, *see* Inj. Hr'g Tr. p. 360, FEMA's effort to make adjustments on a case-by-case basis, rather than providing predictable, across-the-board adjustments based on publicly-disclosed written criteria, is arbitrary and capricious, and violates the Act. The Stafford Act requires FEMA to adopt regulations governing eligibility for Assistance and to publicize those regulations. Section 408(h)(i) requires that "[th]e President shall prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance." 42 U.S.C. § 5174(h)(i). And importantly, the Act provides that "[t]he President shall promote public access to policies governing the implementation of the public Assistance program." 42 U.S.C. § 5165c(c).

Establishing written criteria and making them public will confer benefits particularly appropriate to this situation. First, it would give consistent guidance to FEMA staff, who FEMA admits are not thoroughly trained. (*See* Dannels, Inj. Hr'g Tr. p. 369-373, Feb. 24, 2006). Second, it would inform evacuees of the amount of Assistance available under the program, so that they are able to make informed rental choices based on such information. Third, applicants would be able to knowledgeably pursue Assistance when a FEMA operator erroneously informs the applicant that assistance is not available or is denied. The Court heard abundant testimony of the problems Katrina victims had as they were trying to call FEMA and speak to an agency representative who could provide a knowledgeable, reliable response. (Eaton, Inj. Hr'g Tr. p. 215-218, 226-227, Feb. 24, 2006; Bradix, Inj. Hr'g Tr. p.

240, 245-248, Feb. 24, 2006; Craft, Inj. Hr'g Tr. p. 276, Feb. 24, 2006). In addition, FEMA was clearly aware, at least by January 9, that "there was limited affordable rental resources" at the fair market rental, FMR level, and that without a "guarantee of the adjustment, it is difficult for the evacuee to determine what they could afford based on the potential of an adjustment in a few months for an unknown amount." (Godnick, Inj. Hr'g Tr. p. 67, Feb. 23, 2006; and *see* Pl. Ex. 2 at AR 02299).[1] These issues would be resolved upon issuance of adequate written guidelines on the amount and availability of rent assistance.

Even where FEMA has adjusted rents in response to individual requests, its refusal to do so for all victims in particular areas constitutes unreasonable agency delay in providing desperately needed help to Katrina victims. An agency cannot unreasonably withhold action; what is a "reasonable" amount of time depends on the situation at hand: "[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake. This is particularly true when the very purpose of the governing Act is to protect those lives." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157-58 (D.C. Cir. 1983) (finding unwarranted delay in OSHA's estimated three-year rulemaking to limit exposure to a carcinogenic medical sterilizing agent). As has been the case with FEMA and Katrina victims, "[e]xcessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans." *Cutler v. Hayes*, 818 F.2d 879, 896-897 (D.C. Cir. 1987). The complexity of the task of allocating insufficient resources does not necessarily excuse delay; especially "[i]f an agency's failure

[1] Donna Dannels testified at the hearing that FEMA had raised the general assistance rate for Louisiana and Florida to 120% of the FMR some time the prior week. Inj. Hr'g Tr. pp. 330-331, Feb. 24, 2006. FEMA has issued no public announcements to this effect.

to proceed expeditiously will result in harm or substantial nullification of a right conferred by statute." *Id.* at 898.

FEMA's delays and insistence on handling applications on a "case-by-case basis" has real world, serious consequences for Katrina victims. Plaintiff Cameron Eaton testified that she notified FEMA in November that her rent in Decatur, Georgia, would be going up to the market rate of $1,100 on January 1, 2006. (Eaton, Inj. Hr'g Tr. p. 216, Feb. 24, 2006). FEMA told her the higher rent had been approved in December 2005, only to be followed on January 4 with FEMA telling Ms. Eaton that they first needed her citizenship papers before she could receive such Assistance. (Eaton, Inj. Hr'g Tr. p. 217, Feb. 24, 2006). Ms. Eaton still did not receive assistance. Because of the delay in receiving market rate housing assistance, Eaton and her two daughters were evicted. (Eaton, Inj. Hr'g Tr. p. 219-220).

Moreover, since February 15, Katrina victims staying in hotels under the Short Term Lodging program were to receive two weeks to find affordable housing after receipt of a disposition on their temporary housing assistance applications, lest they be without a roof over their heads. FEMA's act of forcing Assistance-eligible victims out of the hotels on the grounds that FEMA provided victims with a stipend that was inadequate to secure affordable housing in those communities (say nothing about money for a broker, security deposit and first month rent) was not only arbitrary and capricious, it was cruel and inhumane. Indeed, as noted within the Administrative Record, this policy was sure to create a new class of homeless. (*See* Pl. Ex. 5 at AR 02013 and 02017).

C. FEMA's Refusal to Allow Katrina Victims to Use Their Housing Assistance to Pay Utilities Violates the Stafford Act, and Constitutes Arbitrary and Capricious Agency Action.

The purpose of the Stafford Act is to provide temporary housing Assistance so that Katrina survivors can secure housing. Yet another FEMA policy defeats this purpose by prohibiting evacuees from using FEMA housing Assistance to cover utility payments. The statute or regulation does not cover this prohibition. Moreover, it directly conflicts with the statute and with HUD's directive for FMR calculations. 24 C.F.R. § 888.111(b).

Under the Stafford Act, housing assistance is supposed to allow people to secure housing. Part of the cost of housing, as HUD recognizes, is the cost of utilities. FEMA's regulation governing fair market rent (FMR), 44 C.F.R. § 206.111, defines "FMR" consistent with HUD's definition of FMR, which specifically includes utilities. 24 C.F.R. § 888.113(a). ("Fair Market Rents are estimates of rent plus the cost of utilities, except telephone. FMRs are housing market-wide estimates of rents that provide opportunities to rent standard quality housing throughout the geographic area in which rental housing units are in competition"). As Maryann Miller Russ, a specialist in low income housing operations, and Ms. Mauldin testified, HUD's FMR figures include rent and utilities, recognizing that utilities are part of housing costs. (Inj. Hr'g Tr. p. 174, Feb. 23, 2006; and Inj. Hr'g Tr. p. 294, Feb. 24, 2006).

Nothing in the Stafford Act or FEMA's regulations prohibits Katrina victims from using their Section 408 housing Assistance to pay utilities, as part of the cost of housing. Nonetheless, FEMA prohibited victims from using any part of their Assistance to cover utilities. (*See* Inj. Hr'g Tr. 431, Feb. 24, 2006). FEMA has interpreted one of its regulations to forbid victims from using Section 408 housing Assistance for paying for utilities. The specific language of 44 C.F.R. § 206.117(b)(1)(i)(c), provides:

> "All utility costs and utility security deposits are the responsibility of the occupant except where the utility does not meter utility services separately and utility services are a part of the rental charge."

FEMA's Applicants' Guide also states that FEMA will not cover utility costs. The Court, however, should not construe this ambiguous regulation to prohibit the use of housing assistance, but instead simply as requiring that tenants be responsible for payment of utilities from a FEMA grant or other non-Stafford Act funds. "If a regulation promulgated by the agency is ambiguous, an interpretation 'which is reasonable and consistent with the statute is to be preferred.'" *Joy Technologies Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996) (internal quotations and citations omitted).

If the regulation cannot be construed in harmony with the Stafford Act, however, the statute, which requires FEMA to provide Assistance sufficient to allow victims to obtain housing, trumps the regulation. *United States v. Larinoff*, 431 U.S. 864, 873 (1977) (citing *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity"). The statute says that the President may provide Assistance "to rent alternate housing accommodations" and that the amount of Assistance "shall be based on the fair market rent." Under FEMA's interpretation, Katrina victims would be limited to renting apartments in which utilities are included or would be penalized by having to pay for utilities out of pocket, while their fellow victims, who were lucky enough to find an all-inclusive deal, would have their entire housing cost covered by the federal government (leaving aside the adequacy of FMRs for the moment). Congress could not have intended (1) to create inequities among those receiving Assistance and/or (2) to limit the alternate housing options of the victims. These, however, are the logical consequences of FEMA's policies.

The red tape and barriers to securing housing conflict directly with congressional intent:

> "Federal housing assistance, clearly mandated by Federal law, was being offered for the convenience of the Government and not to meet the critical needs of the individuals affected. From that time forward, I was convinced that somewhere along the way, FEMA had lost its sense of mission . . . State and local emergency management officials has [sic] been calling for reform for years and yet FEMA was allowed to continue to whittle away by rulemaking and regulating at the very core and substance of the Disaster Relief Act of 1974. Mr. Speaker, it is time for Congress to reassert our proper authority to ensure that the trustees of our national disaster programs are performing up to the standards which the American people deserve. The bill we bring forth today can help put Federal disaster Assistance programs back on track, back in the proper perspective."

134 Cong. Rec. H. 10850-51 (Oct. 21, 1988) (Statement of Representative Ridge, "one of the principal architects of the legislation") (emphasis added). Forbidding payment of utilities – especially now that the costs of utilities are sky rocketing – is a "whittling away at the core and substance" of the Stafford Act.

II. FEMA'S FAILURE TO PROMPTLY PROVIDE CONTINUED RENTAL ASSISTANCE WITH ADEQUATE NOTICE AND ASCERTAINABLE STANDARDS VIOLATES THE STAFFORD ACT AND DUE PROCESS.

The Stafford Act and the regulations give the President and FEMA the authority to provide Assistance, including continuing rental Assistance (hereinafter CRA), for a period up to 18-months beginning from the date the President declares the disaster. 42 U.S.C. § 5174(c)(1)(A) (i), (B)(i)(ii); *see* 44 CFR § 206.114. The President and FEMA exercised this authority in this case. Ms. Dannels on behalf of FEMA admitted that the agency must pay all eligible applicants for Assistance. ("If they are eligible, we will pay") (Dannels, Inj. Hr'g Tr. p. 434, Feb. 24, 2006).

Yet, FEMA avoided paying applicants Assistance because it found so few applicants eligible. As defendants' statistics show, of the pending hotel applicants in December 2005, only about 20% have now been determined eligible for assistance. [*See* Def. Exs. 3 and 7

(Def. Ex. 3 reflects at least 65,993 pending applications; and Def. Ex. 7 reflects 12,718 approvals or 19.3% of the pending applications)]. The same trend is now happening with CRA. FEMA systematically finds evacuees ineligible for CRA without appropriate guidelines.

Congressional Conference Committee was so alarmed by this problem that it mandated that FEMA provide it with guidelines for continuing Assistance by January 16, 2006. (Pl. Ex. 6, *Making Appropriations For The Department of Defense For The Fiscal year Ending September 30, 2006, And For Other Purposes, H.R. Rep. No.* 109-359, at p. 504). FEMA essentially ignored this mandate- in effect ignoring the evacuees- by not adopting the critically needed standards to prevent continuing abuses of discretion.

Congress mandated that the "President shall prescribe rules and regulations to carry out this section, including criteria, standards and procedures for determining eligibility for assistance." 42 U.S.C. § 5174(i). Congress further mandates that the "President shall issue … such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions [and that] [s]uch regulations shall include provisions for insuring that … the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner …." 42 U.S.C. § 5151a. Indeed, consistent with the APA requirements in 5 U.S.C. § 552(a)(2), FEMA's regulations prohibit it from relying upon any standards or criteria which are not published or indexed in its register unless the evacuees or other affected members of the public have received actual and timely notice of their terms. 44 C.F.R. §§ 5.29. 5.24.

Despite these mandates, FEMA has a notable lack of standards and criteria for determining CRA eligibility and to guide FEMA personnel to ensure that eligibility

determinations are equitable, impartial and without recurring abuses of discretion. To the extent FEMA has adopted such criteria and standards, most are not published or indexed in the FEMA register and therefore cannot be relied upon by evacuees who have not otherwise received actual or timely notice of their terms. These include, as discussed below, FEMA's recent pronouncements that it has an income test for CRA, that it may be requiring re-certification on a month-to-month rather than quarterly basis, and that it is imposing more data and other requirements for its permanent housing requirement.

The Fifth Circuit Court of Appeals has made clear that due process requires that agency decisions must be guided by written, ascertainable standards rather than being left to unbridled bureaucratic discretion. "The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964). In addition to preventing unbridled abuses of discretion, written ascertainable standards help to inform aggrieved citizens of the reasons for the action taken against them and also provide a basis for judicial review of the agency decision making. *Matlovivich v. Sec'y of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978); *see also United States v. Atkins*, 323 F.2d 733, 742 (5th Cir.1963) (vague standards do not inform the aggrieved and preclude effective judicial review).

Courts have consistently required written ascertainable standards in public benefit programs. *See, e.g., Holmes v. New York City Housing Auth.* 398 F.2d 262, 265 (2d Cir. 1968) ("[d]ue process requires that selections among applications [in a housing program] be made in accordance with ascertainable standards"); *White v. Roughton*, 530 F.2d 750, 754 (7

Cir. 1976) (state welfare program's use of unwritten personal standards of eligibility struck down because "fair and consistent" application of eligibility requirements made as "written standards and regulations"); *Martinez v. Ibarra*, 759 F.Supp. 664, 668 (D. Colo. 1991) (due process denied when the procedure for reviewing Medicaid application "is never articulated in clear, written standards" and no "significant regulations" constrains the organization conducting medical evaluations); *Lightfoot v. District of Columbia*, 339 F.Supp.2d 78, 90 (D.C.C. 2004) (rejecting, in the absence of ascertainable standards, defendants' "trust us approach" and their assertion, as in the present case, that they will act to address the needs of those who complain).

As the District of Columbia Court of Appeal found in *Aikens v. District of Columbia Department of Housing and Urban Development*, 515 A.2d 712 (D.C. Cir. 1986) without specific rules governing benefits and placing beneficiaries on clear notice of what is required of them, agencies violate due process rights. In Aikens, the court held that the termination of section 8 housing assistance based upon a vague written rule requiring income verification for periodic re-certification violated due process. *Id* at 719. FEMA's regulations on continuing eligibility provide no guidance and leave room for unbridled discretion to discontinue benefits of evacuees at the whim of bureaucratic administrators, many of whom are untrained or inexperienced, as Ms. Dannels testified. (Dannels, Inj. Hr'g Tr. pp. 368-373, Feb. 24, 2006). The CRA criteria are contained in 44 CFR § 206.115 and essentially provide that FEMA may provide CRA for up to 18 months "based on need, and generally only when adequate, alternate housing is not available or when the permanent housing plan as not been fulfilled, through no fault of the applicant." 44 CFR § 206.114. There are no other published

criteria and, unlike any other public benefit programs that have volumes of rules and criteria relating to eligibility, FEMA's CRA program is bereft of guidance.

Far worse than in *Aiken*, FEMA has no published guidelines or regulations stating when or how evacuees must seek re-certification. Must they do it monthly, as indicated in recent FEMA correspondence with evacuees, or quarterly as indicated in prior communication? Must they seek re-certification before the month or quarter ends or at the end of the period? With whom are they to seek re-certification and what is the procedure? None of this is explained in any published regulations or criteria. (*See* Pl. Ex. 5 at AR 00472-73, AR 00482-86, AR 00493-94 (reflecting changing and unpublished internal FEMA memos on recertification)). Instead, FEMA is making it up as it goes and systematically denying CRA to evacuees who do not comply with its unpublished and misunderstood rules.

FEMA regulations state that "[a]ll applicants requesting continued rent assistance must establish a realistic permanent housing plan no later than the first certification for continued assistance." 44 C.F.R § 206.105(b)(1); *see also* 44 C.F.R § 206.111 (providing vague and confusing definition of "permanent housing plan"). However, what is a "realistic permanent housing plan?" What if evacuees want to return to their pre-disaster communities but there is no affordable housing remaining? Does that mean that if they find affordable housing in another part of the country that they must establish a permanent housing plan and are no longer eligible for Assistance? Does the plan require that they have to make numerous calls to find affordable housing and, if they do not, FEMA can terminate their Assistance? What are the consequences for persons with disabilities who cannot find or are not able to look for accessible affordable housing?

FEMA's forms regarding continuing Assistance make no inquiry into whether the evacuees have disabilities or are elderly or illiterate. These evacuees may not be able to read the forms or understand automated messages supposedly sent to them; nor may they be able to work. Indeed, many of those registered with FEMA have mental disabilities, are illiterate, or are elderly. Therefore, these applicants in need of Assistance may not be able to undertake periodic re-certifications. This entire population is at serious risk of not surviving a single, let alone, many periodic re-certifications in violation of their rights to due process and have their applications processed equitably and impartially. 42 U.S.C. § 5151a. The designed system fails for many evacuees.

Since evacuees seeking continuing Assistance have already qualified and met the eligibility requirements for initial Assistance, they clearly have protected due process interests. Defendants admitted that, if these initial criteria have been met, then they must pay. (Dannels, Inj. Hr'g Tr. p. 434, Feb. 24, 2006). Plaintiffs share the same status as other recipients in public benefits programs, including those set forth above, whose need and expressed interest in continuing receipt of Assistance was sufficient to require that the agency adopt and follow written ascertainable standards in administering their Assistance. *See also Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976) (finding for recipients of general assistance, perhaps the lowest form of public assistance, that "the

establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process."); *Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972) (the "legitimate claim of entitlement" may derive from an independent statutory or regulatory source … such as rules or understanding that secure benefits); *Weston v. Cassata,* 37 P.3d 469, 477 (Colo. Ct. App. 2001) (cert denied) (discussing due process rights under the new non-entitlement, public benefits scheme). The fact that FEMA has attempted to limit the criteria for continuing Assistance to a few, vague standards does not mean that there is no entitlement for Hurricane victims; it only means that defendants must adopt more specific standards before FEMA can terminate the Assistance.[3]

The effects of FEMA's lack of uniform standards and unreasonable delays in processing evacuees' requests for continuing Assistance compound the existing despair from the natural disaster of Hurricane Katrina with a human caused disaster by FEMA's incompetence. Plaintiff Cameron Eaton, whose home was completely ruined by the hurricane and rendered uninhabitable, relocated to Decatur, Georgia, where she soon registered and applied for Assistance from FEMA in September. She received an initial direct deposit in her bank account from FEMA of $2,000 for emergency Assistance within a week after she applied. (Eaton, Inj. Hr'g Tr. pp. 213-214, Feb. 24, 2006). Next, Ms.

---

[3] Plaintiffs in Section 403 funded apartments through the state and local governments have especially protected due process interests since they have leases, up to a year due to FEMA's initial representations that it would provide longer term funding for these apartments. Now, in the forthcoming transition to the Section 408 Assistance, FEMA currently states that it will only provide short term funding-- leaving evacuees, landlords and local governments without promised funding to carry out their lease terms. The evacuees' possessory, leasehold interest, disrupted by FEMA, is a protectable due process interest which no one can terminate without adequate notice and ascertainable standards. *See Greene v. Lindsey*, 456 U.S. 444 (1982); *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 135 (2002). Indeed, where as here, due process requires that agencies transitioning public benefit recipients from one category to another related category of assistance, do so in a manner that requires not only written ascertainable standards, nonetheless, continuing Assistance consistent with those standards. *See, e.g., Chu v. Noot*, 696 F.2d 594, 601-02 (7th Cir. 1982); *Youakim v. McDonald*, 71 F.3d 1274, 1291 (7th Cir. 1995); *Cosby v. Ward,* 843 F.2d 967, 984-85 (7th Cir. 1988); *Budnicki v. Beal, 450 F.Supp. 546 554 (E.D. Pa. 1978).*

Cameron received the first quarterly check for $2,358 by the end of October, and she applied the amount to past rent. She then requested CRA because she needed to inform her landlord by December 1st whether she would continue the lease. In the midst of this pressure awaiting a determination by FEMA of her request for CRA while she was facing eviction, FEMA demanded that she prove her citizenship. (Cameron, Inj. Hr'g Tr. p. 217, Feb. 24, 2006). After scrambling to locate documents to prove her citizenship, she remained "in limbo with them [FEMA] the whole time waiting and waiting and waiting." (Cameron, Inj. Hr'g Tr. p. 219). After delays of three and a half months by FEMA, eviction from one apartment, and living in another apartment part of the time without plumbing, she finally received money for CRA around February 21, 2006, two days before she testified in this hearing. (Cameron, Inj. Hr'g Tr. p. 219-220).

It is no surprise Ms. Eaton had to wait approximately 111 days to receive continued rental assistance. Between FEMA and the fatigued Plaintiff Eaton, who suffered through unreasonable delays in receiving CRA, which one has the greater ability to bear the responsibility? FEMA should undertake that burden of the loss because, as the Stafford Act created the agency with the missive, "to provide an orderly and continuing means of Assistance by the Federal Government [ ] to alleviate the suffering and damage which result from such disasters…." 42 U.S.C. § 5121 (b). Again, Ms. Dannels agrees that FEMA bears this responsibility to alleviate the suffering to victims of Hurricane Katrina. (Dannels, Inj. Hr'g Tr. p. 471, Feb. 24, 2006).

Plaintiff Pamela Bradix, is still waiting for CRA two months after submitting her application. Ms. Bradix was evacuated by airplane from New Orleans after the disaster to near Kelly Air Force Base in San Antonio. (Bradix, Inj. Hr'g Tr. p. 237, Feb. 24, 2006). She

registered for Assistance in September, received a $2,000 initial payment and rental Assistance for $2358 soon thereafter. After spending the $2358 on furniture and other necessities, she applied for CRA in December 2005. She needed rent to remain in the apartment after February 28. Since FEMA or someone else paid her rent in the apartment, it appeared that Ms. Bradix was placed in the Section 403 housing program where local community service agencies secured apartments for evacuees and paid the rent. FEMA reimbursed the local agencies for the rent paid. (Bradix, Inj. Hr'g Tr. pp. 248, 249). As of the time of her testimony in court on February 23, Ms. Bradix had not received any notice of her determination from FEMA for continued Assistance. (Bradix, Inj. Hr'g Tr. pp. 248, 255-257). Plaintiff Dorothy Craft has been waiting for first time Assistance since November. FEMA evacuated Ms. Craft to Chicago where she and her husband knew no one. (Craft, Inj. Hr'g Tr. pp. 265, 272, 281, Feb. 24, 2006).

The plaintiffs ask this Court to intervene to protect the statutory and constitutional rights to temporary housing assistance, due process, and to end the arbitrary and capricious conduct by the defendants.

III. FEMA'S APPLICATION OF ITS SHARED HOUSEHOLD RULE CONTINUES TO BE ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE STAFFORD ACT.

After Katrina, FEMA denied Assistance to tens of thousands of otherwise eligible evacuees based on FEMA's "Shared Housing Rule." Several of the named plaintiffs in this case were denied Assistance due to this Rule. Under this Rule, FEMA typically provides benefits to a pre-disaster household only as a unit; no more than one set of benefits will be given to all individuals believed to be members of the pre-disaster household.

This Shared Household Rule is based upon the unrealistic and unlawful presumption that pre-disaster shared households will (and must) remain shared households after a major disaster. (*See* Pl. Ex. 5, at AR 00750). In truth, many Katrina victims who were previously members of shared households were not able to relocate together, as evacuees, in newly shared households. When disaster separates a household, FEMA's own policy authorizes it to "provide assistance for more than one residence." 44 C.F.R. § 206.117(b)(1)(i)(A).

Shortly before the Court hearing on December 9, 2005, FEMA revealed for the first time a September 19, 2005 Memorandum to its Regional Directors and Acting Regional Directors providing guidance on the Shared Household Rule. The Revised Rule provided an explanation of how persons separated by Katrina could all receive benefits. (*See* Pl. Ex. 5 at AR 00302; and Dannels, Inj. Hr'g Tr. p. 407). The Court discussing this memo stated:

> …it appears that FEMA's position is that if persons were members of the same household, living in the same boardinghouse, sharing an apartment, or other similar living arrangement, and as a result of Hurricane Katrina are now residing or occupying different premises, they would each be entitled, if eligible under all other criteria, to receive Temporary Housing Assistance. . . Noting that the Memorandum was directed to 'Regional Directors' and 'Acting Regional Directors' for Regions I-X and not the general public or evacuees, the Court agrees that the September 19, 2005 Memorandum is not abundantly clear and that plaintiffs have demonstrated that sufficient notice has not been given to potential eligible persons who have not received Assistance or have been denied Assistance as a result of being incorrectly linked with other persons.

(Court Order, p. 14 of slip opinion)

At the initial TRO hearing in this case on December 9th, well after the September 19th FEMA memo – it was evident that FEMA was not applying this Revised Shared Household Rule. Since that hearing, the data which FEMA has provided to plaintiffs' counsel shows that approximately 44.7% of all denials of pending cases were due to denial categories, such as

duplicative status, related to the Shared Household Rule. (Def. Ex. 5-8*; and see* Def. Ex. 7 (Reflecting 14,815 denials based on IDUPA, 2,241 denials based on IAW, for total of 44.7% of the total number of denials, 38,165)). Periodic reports furnished by defendants' counsel Scott Simpson to plaintiffs' lawyers). Considerable evidence presented through Declarations also demonstrated that FEMA continued to consistently deny Assistance to separated members of a household. (*See, e.g.,* Plaintiffs' Declarations of Meredith Campbell, Michelle Davis, Courtney DeSalle, Kimberly Forrester, Kimberly Harris, Tyrone Hilton, Timothy Hood, Rosalind Jones, Rochshell Lewis, Anita McDaniel, Beatrice McWaters, Ronnie L. Mims, Keith Phillips, Charles A. Robertson, Elizabeth Simpson, Carolyn Sims, and Billy Smith). Moreover, such erroneous denials were slow to be corrected.

Since FEMA, belatedly after Katrina, effectively stated that it would apply its Revised "Shared Household Rule," the issues before the Court now are whether FEMA has: (1) truly revised its Rule for purposes of prospective application; and (2) in fact rationally applied its revised Rule retroactively to ensure uniformity of its application. (42 U.S.C. §5151a; and The Stafford Act). mandates that the "processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner …." *See also* 44 C.F.R. § 206.11. The record clearly establishes that FEMA has failed to rationally and consistently apply its Revised Shared Housing rule in an "equitable and impartial manner."

At the hearing held on February 23-24, FEMA provided further information about its current application of the Revised rule. Evacuees who had been living together and who were geographically separated to separate cities are now eligible for Assistance. If a family is too large for one unit and must find two units to house their family, they too are eligible for

payment for each unit. To be eligible, a separate household member must provide a statement explaining why the household is separated, how they were separated, and an idea on how they are going to reunite with their former household. (Dannels, Inj. Hr'g Tr. p. 404-406, Feb. 24, 2006).

Sometime after the Court's Order of December 12th, FEMA recorded an auto-dial message setting forth its (new) policy on shared housing, giving some details on what evacuees who shared a household before the hurricane should do if they were separated when evacuated and had been denied rental Assistance because of FEMA's (original) Shared Household Rule. The message indicated that a letter explaining what persons should do would be sent out in fourteen days. There was considerable delay between the Court's order and the initial use of auto-dial messages, on or about January 5. (Pl. Ex. 5 at AR 00514). Furthermore, FEMA could not say how many people, if any, received the auto-dial message. (Dannels, Inj. Hr'g Tr. p. 128, Feb. 23, 2006). Nor was Ms. Dannels aware of where their public service announcement played. (Dannels, Inj. Hr'g Tr. pp. 431-32, Feb. 24, 2006). Thus, the record is devoid of any evidence that in fact the auto-dial message reached a single member of the putative class.

The auto-dial script stated that in order to receive Assistance, each member of the separated household must submit receipts for a signed lease which show that each member of the household had paid rent at a separate location, even though at least one member of the shared household had been wrongly denied rental assistance. (Dannels, Inj. Hr'g Tr. pp. 127-130, Feb. 23, 2006; and Pl. Ex. 5 at AR 00562 and AR 00515). This is a classic Catch-22. FEMA may continue to arbitrarily deny Hurricane victims Assistance because they are unable to produce rent receipts. Yet, the lack of rent receipts was a result of FEMA's initial

wrongful denial of such Assistance, often resulting in the applicant not being able to afford to rent an apartment and in turn not having the required rent receipts necessary to get the Assistance to which they were initially entitled. (Dannels, Inj. Hr'g Tr. p. 458, Feb. 24, 2006).

The intent of Congress in the Stafford Act is to "to help individuals . . . obtain disaster relief . . . [and] the Act's real beneficiaries, the individuals and families who suffer losses due to natural disasters, fall well within the Act's general policy concerns." *Graham v. FEMA*, 149 F.3d 997, 1004-05 (9th Cir. 1998) (emphasis in the original). To place the type of Catch-22 burden described above on an applicant for housing Assistances is not consistent with this purpose and is an arbitrary and capricious application of the Revised Shared Housing rule that should be enjoined. It is not rational to require a separated member of a household, who had not initially received rental Assistance because of this rule, to be able to provide the rental receipts required from the person in order to be eligible for an exception to the rule at a later date and receive Assistance. The rational approach is to permit the person denied Assistance due to the Shared Household Rule to obtain it by showing displacement and separation from pre-disaster, household members, regardless of whether they presently live in separate cities. A person separated from a household should not have to produce rental receipts when he/ she had been wrongly denied Assistance initially.

Evidence adduced at the February 23-24 hearing also demonstrated considerable confusion and difficulty for roommates or an elderly person living with a caretaker in determining their eligibility for separated household assistance. (Court and Dannels, Inj. Hr'g Tr. pp. 126-127, Feb. 23, 2006). Essentially FEMA required roommates who evacuated to the same city would to continue to live together in the same apartment. Similarly, an

elderly woman and caretaker would be required to live together if they evacuated to same geographical area and an appropriate facility was available. Forcing roommates and elderly persons and their caretakers to continue to live with each other if displaced to the same city also is arbitrary and capricious. FEMA should be providing Assistance for appropriately sized facilities if they wish to live separately in their new location.

FEMA has been effectively speaking out of two sides of its mouth. On one side, it is telling the Court and the public that it has waived its Rule and that there is no problem. On the other side, it is giving evacuees confused messages and denying Assistance. FEMA must adopt and implement one clear, ascertainable Rule, consistent with the Stafford Act, and apply that Rule uniformly and retroactively by providing notice to wrongfully denied evacuees with an opportunity for prompt reconsideration of eligibility.

IV. THE COURT'S DECEMBER 12 INJUNCTION PROHIBITING FEMA FROM REQUIRING AN APPLICATION FOR AN SBA LOAN SHOULD BE MADE PERMANENT.

In its December 12, 2005 decision, this Court found "pursuant to 42 U.S.C. 5174(a)(2) of the [Stafford Act] that FEMA has violated a mandatory duty through miscommunication or inartful communication of the protocol for receiving Temporary Housing Assistance by causing some applicants to believe that an SBA loan application is a necessary prerequisite to receiving Temporary housing Assistance." (Court Order at p.17). The Court went on to order compliance by FEMA with the Stafford Act provision not requiring such an application. After that order, FEMA sent an auto-dial message designed to communicate that eligibility for temporary housing assistance did not require such an application. (Inj. Hr'g Tr. pp. 356-358, Feb. 24, 2006).

Nonetheless, confusion continues over whether it is necessary to submit an application for an SBA loan. Persons who initially received notice that an SBA application

would be required for housing assistance remain uncertain as to what they must do to get assistance, and have a perception that they must apply for an SBA loan because of this confusion. (Mauldin, Inj. Hr'g Tr. pp. 173-74, Feb. 23, 2006). The top levels of FEMA show scant recognition of this confusion. Ms. Dannels testified that "in my 20-some years out biggest problem has been that people have not submitted their application to the SBA." (Inj. Hr'g Tr. p. 103). This fixation with the need for SBA loan applications does not recognize the confusion caused by requiring SBA loan applications for Other Needs Assistance, but not for Temporary Housing Assistance. Moreover, the wrongful denial of Temporary Housing Assistance for failure to apply for an SBA loan – which evidence at the December 9, 2005 hearing indicated was widespread – dissuades people from applying for basic benefits because FEMA has not eliminated the confusion.

Thus, despite FEMA's efforts to clarify their earlier misstatements and misapplication of the SBA loan application issue, widespread misunderstanding in the public continues. In such circumstances, continued Court supervision remains necessary. Therefore, the Court should make permanent its December 12, 2005 order enjoining FEMA from requiring applicants to complete an SBA application in order to be eligible for temporary housing Assistance.

V. PLAINTIFFS' PROPOSED RELIEF IS REASONABLE AND APPROPRIATE.

Plaintiffs have set forth their proposed relief in their Proposed Order which, as discussed below, addresses (1) permanent injunctive relief, (2) preliminary injunctive relief pending permanent relief, (3) retroactive relief, (4) an implementation plan, and (5) reporting and monitoring.

A. Permanent Injunctive Relief.

With regard to permanent injunctive relief, plaintiffs seek an order enjoining defendants from failing and refusing to adjust the amount of Assistance for qualified evacuees to reflect the current, post-disaster, fair market rent (FMR) based upon family size and geographic region in which the housing is located as mandated by 42 U.S.C. § 5174(c)(1)(A)(ii). Defendants must establish these rent levels within a reasonable date certain. Further, FEMA must establish written guidelines explaining the amounts of Assistance it will be providing; and notify evacuees about the post-disaster rent levels, adjustments to prior awards to reflect accurate FMRs for the entire period of eligibility, and the right to adjust FMRs further due to high housing costs and bedroom sizes.

Plaintiffs also seek an order enjoining defendants from failing and refusing to allow qualified evacuees to use Assistance under 42 U.S.C. § 5174(c)(1) (A)(ii) to pay for the costs of utilities. Since FEMA covers utility costs in its Section 403 Program, the proposed order will only apply to the Section 408 Program, especially where utilities are not separately metered and not part of the calculation of rent. FEMA must also notify evacuees of their right to use section 408 Assistance to pay for utilities.

Plaintiffs also seek an order enjoining FEMA from denying Assistance due to the Shared Household and SBA Rules. FEMA cannot implement a Shared Household Rule that effectively presumes that pre-disaster shared households will remain intact post-disaster. FEMA must provide written guidelines for when it will provide Assistance to an otherwise qualified evacuee member of a pre-disaster shared household who was displaced due to Katrina and is living apart from another member of the household, regardless of whether they are living in the same geographic area. For all evacuees who FEMA previously determined ineligible due to the Shared Household Rule and the SBA loan application Rule, FEMA must

notify them of the revised Rule, how they may have been improperly denied Assistance, and of a procedure for prompt re-consideration of their eligibility. As part of the procedure for prompt evaluation of reconsideration, FEMA should expedite the appeals of evacuees who were previously denied Assistance due to the Shared Household Rule and have appealed their denials.

As set forth in the Court's January 12th Order, plaintiffs seek a permanent injunction enjoining defendants from failing and refusing to give any evacuee in the Short Term Lodging Program at least two weeks from the date of receiving a determination of application for Assistance, namely either (1) approval for and receipt of Assistance, or (2) a denial determination, to remain in their presently FEMA-subsidized hotel or motel.

Plaintiffs also seek an order enjoining defendants from failing and refusing to adopt and implement written ascertainable standards for Continuing Rental Assistance ("CRA") in order to prevent abuses of discretion and gaps in the receipt of CRA for qualified evacuees. Written ascertainable standards are particularly necessary to prevent abuses in discretion in finding evacuees ineligible due to the Shared Household Rule, an alleged failure to adopt an appropriate permanent housing plan or establish a continuing need for Assistance based on income. Further, FEMA must make clear for evacuees, by appropriate notices, when and for what period re-certification for continuing Assistance is necessary.

B. Preliminary Injunction.

As to each of the aforementioned requirements, plaintiffs seek entry of a preliminary injunction pending entry of an order for permanent relief. It will likely take considerable time to resolve some of the issues pertaining to permanent relief. Interim relief is particularly

important for evacuees who are in Section 403 housing since they may be terminated from Assistance without the aforementioned protections very soon.

C. Retroactive Relief.

Retroactive relief for each of the aforementioned violations is also necessary. FEMA must remedy its prior, systemic failures to pay Assistance at post-disaster FMRs and to allow evacuees to use their section 408 Assistance to pay for utilities. FEMA must also pay retroactive Assistance to evacuees wrongfully denied or delayed Assistance due to (1) the Shared Household and SBA Rules, (2) failures to process pending applications in a timely manner, and (3) failures to provide continuing Assistance for each period. If FEMA cannot effectively provide this retroactive relief, then other remedies may be necessary.[4]

D. Plan for Implementation.

Within 15 days from the date of this Court's Order, plaintiffs further request that the Court require that defendants submit a plan, for the Court's approval, which shall provide: (1) updated, post-disaster fair market rents by geographic areas and household sizes; (2) a written policy providing for use of section 408 Assistance to pay for the utilities; (3) written ascertainable guidelines for Continued Rental Assistance (CRA); (4) revised Shared Household and SBA Rules, consistent with this Court's Order, with instructions to FEMA staff for implementation; (5) procedures for ensuring that FEMA will notify evacuees denied Assistance due to the Shared Household and SBA Rules and promptly re-consider and

[4]For example, FEMA may have lost contact with many evacuees such as those who may have been wrongfully terminated from the Short Term Lodging Program. Prior to denying intervenors' TRO motion, the Court obtained an assurance from FEMA that it had given at least two weeks notice to all hotel evacuees whose applications for Assistance had either been granted or denied prior to 1/23/06. However, FEMA presumably did not know the hotel addresses of many hotel evacuees when it sent its notices since many had not registered and obtained authorization codes by that time. Unless these evacuees had separately notified FEMA about their hotel addresses, FEMA presumably must have sent the notices either to pre-disaster addresses or addresses existing prior to the hotel stays. This would explain the grave discrepancy between FEMA saying that it gave the notices and the hotel evacuees saying they never received the notices.

reprocess for Assistance under the revised rules; and (6) standards and procedures for providing retroactive relief to evacuees wrongfully denied or delayed Assistance. Within 5 days after receiving defendants' plan, plaintiffs shall submit comments on the plan to defendants and the Court may then hold a hearing on the plan and enter final injunctive relief.

E. Reporting and Monitoring

Plaintiffs request that the Court continue its jurisdiction over this case after entry of permanent injunctive relief for at least six months to ensure that defendants comply with the relief requirements. In order to determine whether defendants are in compliance, certain reports and monitoring are necessary. Each month, defendants must continue to provide plaintiffs' counsel, *inter alia,* the same information they have previously been providing but that information should pertain not only to pending cases but to all applications for Assistance, including CRA. Defendants must also report on the total number of evacuees who have received retroactive Assistance and the total amount of retroactive Assistance provided. They must also provide, from a random selection and under a protective order to ensure confidentiality, a certain number of evacuees' files for review by plaintiffs or their designated representative to help determine, *inter alia,* whether defendants are carrying out the Court's orders. Plaintiffs request that the Court appoint an independent monitor, paid by defendants, to carry out these review functions.

Respectfully Submitted,

LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

By: /s/ John C. Brittain ______
John C. Brittain, Esq. – Admitted Pro Hac Vice
Joe Rich, Esq.
1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

THE PUBLIC INTEREST LAW PROJECT
Steve Ronfeldt, Esq.
Craig Castellanet, Esq.
449 15th Street, Suite 301
Oakland, California 94612
(510) 891-9794

NATIONAL LAW CENTER ON
HOMELESSNESS & POVERTY
Maria Foscarinis, Esq.
Rebecca K. Troth, Esq.
1411 K Street, NW, Suite 1400
Washington, DC 20005
(202) 638-2535

SCHULTE ROTH & ZABEL LLP
Howard O. Godnick, Esq. - Admitted Pro Hac Vice
Daniel L. Greenberg, Esq. - Admitted Pro Hac Vice
Jeffrey S. Sabin, Esq. - Admitted Pro Hac Vice
Sena Kim-Reuter, Esq. - Admitted Pro Hac Vice
919 Third Avenue
New York, New York 10022
(212) 756-2000

JOHN K. PIERRE, ATTORNEY AT LAW
John K. Pierre, Esq. - Bar No. 20328
2900 West Fork Drive
Suite 200
Baton Rouge, Louisiana 70816
(225) 295-5638

Attorneys for Plaintiffs

Dated: New York, New York
March 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing documents was served on all counsel of record by electronic mail on this 15th day of March, 2006.

_/s/ Jonathan Schulman ___ __
Jonathan Schulman