UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LA UNION DEL PUEBLO ENTERO, et al.,	§	
	§	
Plaintiffs,	§	
	§	No. B:08-cv-487 (HGT)
v.	§	
	§	Civil Action
FEDERAL EMERGENCY MANAGEMENT AGENCY,	§	
	§	
Defendant.	§	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

Jerome Wesevich
Tracy Figueroa
Robert Doggett
Kelsey Snapp
TEXAS RIOGRANDE LEGAL AID
316 South Closner Boulevard
Edinburg, Texas 78539
(915) 585-5120

Ed Stapleton
LAW OFFICE OF ED STAPLETON
622 E. St. Charles St.
Brownsville, Texas 78520
(956) 504-0882

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

STATUTES

REGULATIONS

OTHER

Plaintiffs are eleven families and the membership organization *La Union del Pueblo Entero* (LUPE). They claim that Hurricane Dolly damaged their homes, and Defendant Federal Emergency Management Agency (FEMA) denied them repair assistance without sufficient explanation. Dkt. No. 1 at 1.[1] They seek summary judgment as follows:

QUESTIONS PRESENTED

1. Whether FEMA violated the Administrative Procedure Act (APA), 5 U.S.C. § 552(a)(1), by:

   (a) using generally applicable rules that are procedural, interpretive, or substantive;

   (b) that are not published;

   (c) to adversely affect applicants for home repair assistance following Hurricane Dolly.

2. Whether FEMA violated a separate APA statute, 5 U.S.C. § 553, by using "substantive" rules without first subjecting those rules to "notice and comment rulemaking."

3. If FEMA violated either statute, what is the proper remedy?

STANDARD OF REVIEW

Rule 56 summary judgment standards apply without modification to all actions "against the United States or an officer or agency thereof." FED. R. CIV. P. 56 advisory committee's note; Dkt. No. 75 at 5-8 (stating summary judgment standards). The parties agree that no material facts should be disputed, and this case should be decided on summary judgment. Dkt. No. 103 at 2; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The factfinding capacity of the district court is ... typically unnecessary to judicial review of agency decisionmaking.").

This Court decides *de novo* and as a matter of law which agency statements must be published under 5 U.S.C. §§ 552(a)(1) and 553. *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 627

[1] "Dkt. No. [#] at #" cites to the Court's docket using document and page numbers stamped in blue at each page's top.
"Fact [#]" cites to the numbered fact in Plaintiffs' Statement of Undisputed Facts, Dkt. No. 119-2.
"AR-#" cites to the page number of the administrative record that FEMA filed in Dkt. No. 118.
"SAR-#" cites to the page number of the supplemental administrative record that Plaintiffs filed in Dkt. Nos. 121-28.

(5th Cir. 2001) (Agency "conclusions of law regarding whether [an agency statement] is a 'rule' for APA purposes are not given deference and are ... reviewed *de novo*.").

PROCEDURAL HISTORY

Plaintiffs attempted to avoid litigation by simply writing FEMA's General Counsel and requesting that FEMA disclose all standards that it used to decide eligibility for repair assistance. Fact 32. FEMA refused, so Plaintiffs filed this lawsuit challenging FEMA's failure to publish ascertainable standards, and sought all appropriate relief. Dkt. No. 1 at 1-2.

Plaintiffs first sought a preliminary injunction on the ground that FEMA's regulations at 44 C.F.R. 206.110-19 were facially insufficient to satisfy the demand for regulations that appears in 42 U.S.C. § 5174(j). Dkt. No. 2. This Court agreed and issued a preliminary injunction. Dkt. No. 22 at 11. But the Fifth Circuit "vacate[d] the district court's grant of injunctive relief and remand[ed] the case" for development of a factual record rather than finally deciding *any* claim. *LUPE v. FEMA*, 608 F.3d 217, 222 (5th Cir. 2010); *id.* at 223 n.2 (the final outcome of Plaintiffs' § 5174(j) claim depends in part on whether "on remand Plaintiffs are able to establish that FEMA makes eligibility determinations using non-published criteria"); *id.* at 225 ("even if Plaintiffs have some chance of prevailing after an adjudication on the merits, the preliminary injunction was issued in error").

While the facial sufficiency of FEMA's regulations was being litigated on preliminary injunction, Plaintiffs sought partial summary judgment on a second independent ground. Plaintiffs assert that FEMA used eligibility criteria that were not published in the Federal Register, including without limitation a "deferred maintenance rule," to deny Dolly home repair applications in violation of 5 U.S.C. § 552(a)(1). Dkt. No. 75 at 15 n.4. This Court held that while FEMA admissions give this claim "vitality," the facts were insufficiently developed in March 2011 to support summary judgment:

> FEMA's answer states that it collects data concerning deferred maintenance and denials of disaster assistance, but this admission does not establish that an unpublished rule is being used to deny applications for housing assistance.
>
> The Court need not engage in a searching analysis to determine whether it ought to look outside of the administrative record for such evidence, for even if it did, Plaintiffs concede that their summary judgment evidence provides none: "The record in this case does not yet disclose when, how, why, or by whom FEMA adopted its deferred maintenance rule." Partial Mot. for S.J. 7 n.4, Dkt. No. 28. Plaintiffs point to nothing in the summary judgment record to establish when, where, or how a deferred maintenance rule is being used. Given the present state of the record, summary judgment on this claim must therefore be denied.

Id. at 13. The Court then granted discovery to all parties as necessary to ensure that FEMA produces the complete administrative record showing whether and how it used any unpublished eligibility criteria to deny home repair assistance. *Id.* at 13-15; Dkt. 96 at 1-2 (FEMA must produce a record showing "both what the policies and criteria are and how they were applied.").

Two years of discovery battles ensued, with FEMA producing documents on some ten different occasions, providing one Rule 30(b)(6) deposition, and serving discovery on Plaintiffs. *See* Dkt. Nos. 76-110; SAR-300-446; SAR-10815-11161. Plaintiffs studied and organized everything FEMA produced. While the record is still not perfectly complete, Plaintiffs now believe that the puzzle is complete enough to reveal all material facts necessary for the Court to decide this motion. The detailed Statement of Undisputed Facts attached to this motion shows how FEMA decided the precise amount of money it would provide to each Dolly applicant, as ordered in Dkt. Nos. 75 at 13-15 and 96 at 1-2. Only through discovery did Plaintiffs learn this.

The only motions presently pending in this litigation are: (a) Dkt. Nos. 118-20, FEMA's motion for summary judgment and Plaintiffs' response in opposition; (b) Dkt. No. 121, Plaintiffs' motion to supplement the administrative record; and (c) this motion for summary judgment based exclusively upon FEMA's violation of 5 U.S.C. §§ 552(a)(1) and 553.

SUMMARY OF UNDISPUTED FACTS

Plaintiffs seek summary judgment based upon the record evidence cited in their Statement of Undisputed Facts, Dkt. No. 119-1.[2] These facts are fairly summarized as follows.

A. FEMA Publishes Public Assistance Policies and Conceals Individual Assistance Policies

FEMA's two most costly disaster recovery programs are called the "Public Assistance Program" (PAP) and the "Individuals and Households Program" (IHP). Fact 29. PAP and IHP both include building repair, but PAP only applies to public buildings like courthouses and IHP only applies to private homes. Fact 39. Congress created PAP and IHP together to begin operation in 2002. Fact 40. FEMA has distributed roughly ninety billion dollars through these two programs during their first ten years of operation beginning October 1, 2002. Fact 41. FEMA's actual publication of its PAP Policies proves FEMA's ability to publish its IHP Policies as required by 5 U.S.C. § 552(a)(1).

FEMA uses a hierarchy of "governing documents" to decide eligibility for public facility repair under PAP. Fact 42. Highest is the PAP statute at 42 U.S.C § 5172. Then FEMA's PAP regulations interpret the PAP statute. *See* 44 C.F.R. §§ 206.200-396 (2008). Then FEMA uses hundreds of PAP Policies to interpret the PAP regulations. Fact 42. FEMA organized all of its PAP Policies and published them at a single website for all to see, http://www.fema.gov/public-assistance-policy-and-guidance Facts 62 and 63.

[2] The Statement of Facts divides the 294 facts into four sections. Dkt. No. 119-2. First is an overview of the parties and Hurricane Dolly. *Id*. at Facts 1 to 32. Second is the text of numerous specific standards that FEMA used to decide Dolly applications for repair assistance, from statute to regulation to policy. *Id*. at Facts 33 to 107. Third is a chronological and detailed list of the actions that FEMA took to decide precisely how much repair assistance to provide each Dolly applicant, including all Plaintiffs. *Id*. at Facts 108 to 272. Fourth is a full account of the experience of Dolly applicant Angelina Bravo, to show just how FEMA's administration of repair assistance affects real people. *Id*. at Facts 273 to 294.

Among FEMA's PAP Policies is one on "deferred maintenance" which provides: "[i]n instances where damage can be attributed to the disaster instead of lack of maintenance, repairs are eligible. It is the applicant's responsibility to show that the damage is disaster-related." Fact 43.

FEMA uses the same hierarchy of "governing documents" to decide eligibility for repair of private homes under IHP. Fact 44. First is the IHP statute at 42 U.S.C. § 5174, then are FEMA's IHP regulations at 42 C.F.R. § 206.110-19 (2008), and then are hundreds of IHP Policies. Facts 45 and 66; SAR 282:3-7 (FEMA has more than 250 IHP policies.). FEMA issues IHP Policies "so that the regulations are interpreted consistently across the nation and from disaster to disaster." Fact 61. FEMA has not organized its IHP Policies as it has done for PAP. Fact 63. Various versions of IHP policies remain scattered among FEMA sub-agencies and contractors in some dozen different formats. *Id*. FEMA marks its IHP Policies **"FOR INTERNAL USE ONLY"** and does not publish them on the internet as in PAP, in the Federal Register as required by § 552(a)(1), or anywhere else for the public to see. SAR-5986 (emphasis in original); Fact 62. FEMA staff told management that Dolly applicants sought FEMA's IHP Policies "over and over," but FEMA management responded that the policies "cannot be released to the public." SAR-3517-3721.

Among FEMA's IHP Policies is one on deferred maintenance, which differs from the PAP policy on the same subject. Facts 67 to 76. Where the PAP deferred-maintenance policy provides that damages are eligible for repair if they "can be attributed to the disaster," the IHP policy provides that the damages must be attributable to the disaster "without question." Fact 70. And where the PAP policy provides that all disaster-related damages are eligible for repair, the IHP policy provides that even if a disaster actually damages an item, the disaster must "significantly worsen" the item's pre-disaster condition. Fact 71.

B. Statute, Regulations, and Policies Governing Home Repair

Three statutory IHP eligibility criteria are at issue in this case:

(1) **Ownership:** the home must be an owner-occupied primary residence;

(2) **Disaster-Related:** assistance is only available to repair "disaster-related" damage to the home; and

(3) **Habitability:** repair of disaster-related damage must be necessary to render the home "habitable."

42 U.S.C. § 5174; Dkt. No. 118-1 at 4-5 nn. 1 and 4; Fact 47.

FEMA's IHP regulations appear at 44 C.F.R. § 206.110-19 (2008). These regulations take three markedly different approaches to the three statutory IHP eligibility criteria cited above:

(1) **Ownership:** the text of the regulations themselves provide adequate public notice of how FEMA decides which homes are owner-occupied primary residences, *LUPE*, 608 F.3d at 221-22;

(2) **Disaster-Related:** the regulations only repeat the statutory term "disaster-related" without providing any notice at all of how FEMA decides which damages are disaster-related, *id.* at 224; and

(3) **Habitability:** the regulations define the statutory term "uninhabitable" to mean "not safe, sanitary, or fit to occupy," and then broadly define the statutory terms "safe," "sanitary," and "functional," which provides some notice of how FEMA decides habitability, albeit "imprecisely," *id.* at 221.

See 44 C.F.R. § 206.110-19 (2008); Facts 54 to 56 and 87 to 89.

FEMA's IHP regulations are of limited use because they are so vague. Facts 55, 56, 59 and 60. Whenever FEMA needs more specificity than the regulations provide in order to administer the IHP program, FEMA issues IHP Policies. Facts 44, 45. FEMA has issued many IHP Policies. Facts 61, 62, 63, and 66. Plaintiffs challenge these IHP Policies in this litigation:

(1) **Deferred Maintenance:** FEMA records observed damages to an item (*i.e.* a roof) as **disaster-related** only if disaster damage to the item is "significant, obvious and without question." Otherwise FEMA records the damage as "deferred maintenance" even if the disaster actually worsened the pre-disaster condition of the item. Facts 67 to 76.

(2) **Primary Cause:** As part of FEMA's **habitability** determination, FEMA denies repair assistance altogether whenever it judges deferred maintenance and not the disaster itself to be the "primary cause" of a home's overall "unsafe" condition." Facts 77 to 91.

(3) **Appeal:** FEMA bars or restricts appeals of its repair assistance decisions whenever FEMA records deferred maintenance in a home, regardless of whether the appeal involves which damages were **disaster-related** or which homes were **habitable**. Facts 92 to 95.

(4) **Floors and Caps:** FEMA imposes floors and caps on IHP repair assistance that compound uncertainty as to why applicants are denied repair assistance, and alone render some applicants ineligible for some amounts of repair assistance even when they have **disaster-related** damages that render their homes **unsafe**. Facts 96 to 101.

(5) **Other**: FEMA uses many other IHP policies to restrict which damages are recorded as **disaster-related**, and which homes are recorded as **unsafe**. Facts 83 to 86 and 102.

FEMA has used basically the same IHP Policies to decide the amount of repair assistance to provide applicants in over one hundred disasters, some ten each year since 2002. Inspectors record all information that FEMA uses to decide which homes are owner-occupied primary residences, which damages are "disaster-related," and which homes are "safe." Facts 12 and 111. FEMA needs temporary access to many inspectors on short notice, so it contracts with inspection management companies, including Partners for Response and Recovery, Inc. (PaRR). Fact 112. PaRR recruits "independent contractor inspectors" (Inspectors) from across the nation, deploys them to disasters as needed, and communicates FEMA instructions to them on site. Facts 113 to 122. Whether inspectors or appeal officers were FEMA employees, PaRR employees, or independent contractors, they all applied FEMA's IHP Policies. *Id.*; SAR-6219 ("The methods described in this procedure are mandatory."). As PaRR flatly informed all Dolly Inspectors: "PaRR does not contradict FEMA." SAR-560; Fact 150.

C. How FEMA Gathered Facts and Decided the Amount of Dolly Repair Assistance

On July 23, 2008, Hurricane Dolly struck South Texas. Fact 1. Dolly damaged thousands of homes with winds that FEMA recorded at 120 miles per hour and up to 18 inches of rain. Facts 2 to 4 and 10. Dolly's winds and rain damaged poorly constructed homes easier than those homes

that were not poorly constructed prior to Dolly. Fact 6. Dolly caused $1.05 billion in property damage, making it the fourth most destructive hurricane to hit Texas in recorded history, and ranking it among the 144 United States disasters that have caused over $1 billion in property damage since 1980. Facts 23 and 24. Plaintiffs photographed what they claim is Dolly damage to their homes, for example:

SAR-7964.

By July 31, 2008, FEMA employees had conducted a Preliminary Damage Assessment for Dolly and concluded that: (1) most Dolly damage to homes involved roofs and flooding; and (2) many homes in South Texas, particularly those in *colonias,* were poorly constructed prior to Dolly. Facts 123 to 126. FEMA printed a map showing the precise boundaries of hundreds of *colonias* in Cameron, Hidalgo, and Willacy counties. SAR 3043. FEMA then ordered PaRR to deploy Inspectors to South Texas and to tell Inspectors to "expect sub-standard construction [and]

deferred maintenance." AR-510. FEMA also told its Appeal Officers that if an Inspector marked deferred maintenance for the "General" area of deferred maintenance that includes roofs, any appeal concerning damage to the roof must be summarily denied. Fact 92.

PaRR deployed 231 Inspectors to FEMA's Dolly field office, 55 of whom had "quality control" scores that PaRR reported to FEMA as "unacceptable." SAR-2270; Fact 249. These 55 performed Dolly inspections nonetheless. *Id.* While many Dolly Inspectors were experienced, FEMA only required a criminal background check as its sole condition of Inspector employment. Facts 119, 121, 146 and 147. Dolly inspections averaged 15 minutes each, and Inspectors were paid $50 for each completed inspection. Facts 119, 205.

FEMA required Inspectors to begin each inspection by demanding photo identification that positively identified each applicant. Fact 167. FEMA then required Inspectors to secure each applicant's ink signature on a form attesting to knowledge that if the applicant misleads an Inspector in an attempt to obtain disaster assistance, this is a federal crime punishable by "severe criminal and civil penalties, including a fine up to $250,000, imprisonment, or both." Fact 170.

To decide the first home repair element (Ownership), FEMA directed Inspectors to ask applicants specific questions, obtain specific documents from applicants, and record information about ownership of the home. Fact 168. FEMA also required Inspectors to record their evidentiary *basis* for the ownership information they recorded. Fact 169.

To decide the second home repair element (Disaster-Related), FEMA directed Inspectors to examine each *part* of each home. Fact 172. FEMA never directed Inspectors to ask applicants anything about which damages were disaster-related, even though the applicants were still standing right in front of them and still under oath. Facts 182 and 183. Instead, FEMA directed Inspectors to tour the house and record all observed damages on an electronic device called an "ACE Pen Tablet." Fact 172. FEMA required Inspectors to record all disaster-related damages

and all "deferred maintenance" damages. Facts 71, 72 and 172. For disaster-related damages, FEMA programmed the ACE Pen Tablet to seek two specific pieces of information about what *repairs* are needed: (1) the type of repair from a list of hundreds of repair "line items" (*see* SAR-6219-6247, examples range from "Skylight, Replace" to "Support Column, Wood, Replace"); and (2) the quantity of repairs needed (which varied for each line item, *e.g.*, square feet, unit cost, or lump sum). Facts 69, 173 and 174.

To record deferred-maintenance damages, Inspectors did not need to record anything about type or quantity of damage. Instead, FEMA directed Inspectors to simply check a box in ACE Pen Tablet identifying the "Area" of the house where the deferred-maintenance damage was observed. Fact 175. Because "Roof" does not appear on FEMA's list of "Areas of Deferred Maintenance," FEMA directed Inspectors to check the "General" Area of Deferred Maintenance to record deferred maintenance to a roof. Fact 176. FEMA directed inspectors to record damages as disaster related only if the "significant, obvious and without question" standard is met, and otherwise to record observed damages as deferred maintenance. Facts 70, 71, 72, 177 and 178. Dolly Inspectors were told the text quoted in Fact 70 and nothing else about how to distinguish disaster-related damage from deferred maintenance damage. Fact 157. FEMA did not require Inspectors to record anything about the *basis* for their decisions as to which damages were disaster-related and which damages were deferred-maintenance. Facts 183 and 187 to 193. Consequently, whenever Inspectors lacked the training, experience, tools, or time to determine that the disaster "significantly worsened" the pre-disaster condition of an item "without question," FEMA directed Inspectors to record the damage as deferred maintenance and not as disaster-related. Facts 71 to 74, 156, and 170.

To decide the third home repair element (Habitability or Safety), FEMA directed Inspectors to consider each home's overall condition after recording all disaster-related damages.

Fact 198. Based on the Inspector's judgment of each home's "overall" condition, FEMA directed Inspectors to simply record "yes" or "no" in response to "HRR" or "Habitability Repairs Required?" Facts 198 to 201. FEMA instructed Inspectors to decide HRR as "yes" if disaster-related damage merely "affected" home safety or caused "any" hazards to occupants, with two exceptions that FEMA calls "Special Circumstances." Facts 87 and 199. By the first Special Circumstance, FEMA directed Inspectors to record HRR as "no" whenever they judged repairs of disaster-related damage to be so "minor" that it was "reasonable" for the homeowner to pay for repairs. Fact 88. FEMA informed applicants of this "minor damage" standard in writing. Fact 90. By the second "Special Circumstance," FEMA directed Inspectors to record HRR as "no" whenever they judged deferred maintenance, and not the disaster, to be the "primary cause" of a home's overall unsafe condition. Fact 89.[3] FEMA never informed applicants of this second Special Circumstance. Fact 90.

FEMA decided Dolly applications for home repair assistance based on the information recorded by Inspectors. Facts 111, 166, and 206 to 210. FEMA deemed applicants ineligible when:

(1) the applicant is ineligible for a reason that does not involve the nature of damage to the home (i.e., whether the home is an owner-occupied primary residence, citizenship, or insurance coverage);

(2) the inspector does not record any repairs in the line items;

(3) the inspector answers HRR as "no;" or

(4) the cost of repairs recorded in the line items totals under $50.

[3] Plaintiffs refer to this Special Circumstance as FEMA's "Primary Cause Rule" (which operates on the statutory term "uninhabitable," *see* Fact 89) to avoid confusion with the entirely separate "Deferred Maintenance Rule" described above (which operates on the statutory term "disaster-related," *see* Fact 70). FEMA simply refers to both statements as "Deferred Maintenance." *Compare* AR-504-05 (FEMA uses "deferred maintenance" to decide which damages are disaster-related) *with* AR-345 ("Deferred maintenance" is FEMA's second "Special Circumstance" exception to FEMA's Habitability Policy).

Fact 209. If an Inspector marked HRR as "yes" and recorded some repair line items, and if the applicant was otherwise eligible, then FEMA calculated the precise amount of repair assistance by:

(1) multiplying each line item quantity recorded by the inspector by a line-item multiplier that FEMA compiles for each disaster; and

(2) adding all of these numbers together.

Id.; AR-623-626. For example, FEMA used the following calculation to decide to pay Plaintiff Alvarado precisely $410.10 in repair assistance:

462 w.f. of Paint (capped at 11,200)	x	$0.24 per wall foot	=	$110.88
62 w.f. of Sheetrock (capped at 8,800)	x	$1.58 per wall foot	=	$97.96
70 s.f. of Roofing (capped at 3,000)	x	$1.49 per square foot	=	$104.30
32 l.f. of Soffit (capped at 200)	x	$3.03 per linear foot	=	$96.96
TOTAL ELIGIBLE AMOUNT			=	**$410.10**

SAR-8809.

FEMA collected few of the available facts on disaster-related damage before deciding eligibility for repair assistance. FEMA knew little about *why* inspectors decided that damages were or were not disaster-related because inspectors do not volunteer to take the time to record this information in comments. Facts 183 and 187 to 193; *see also* SAR-11164-11188 at Rows 10, 20, and 24 (comments rarely recorded). FEMA refused direction from its own Inspector General to require Inspectors to record the reasons for their decisions. SAR-7148; Fact 268. FEMA recorded nothing about applicant knowledge of disaster-related damage, even though applicants were present at each inspection and sworn to veracity, and even though many applicants had relevant evidence such as eyewitness accounts or receipts showing maintenance performed prior to the disaster. Facts 10 and 158. And even though Inspectors had digital cameras, FEMA did not

require Inspectors to photograph the disaster-related and deferred-maintenance damages that they recorded in writing. Facts 159 and 194 to 197; *see, e.g.*, SAR-11164-11188 at Rows 11 and 21.

D. What FEMA Told Applicants

FEMA has published over 500 notices of its actions in the Federal Register each year for the past five years, including eight notices concerning Hurricane Dolly alone. Facts 105 and 106. Some Dolly notices concerned minutiae that occurred long after the disaster. See. e.g. 74 FED. REG. 20,969 (May 6, 2009) (Stating the name of a new Federal Coordinating Officer.). But FEMA never published any of its IHP Policies in the Federal Register. Fact 107.

FEMA never told Dolly applicants how it decided which damages were disaster related, or which homes were safe. Facts 211 to 212 and 242. When FEMA found an applicant eligible for repair assistance, FEMA told the applicant the eligible amount, but nothing about how that amount was calculated, and nothing about which items were omitted from the eligible amount due to application of FEMA's deferred maintenance rule. Facts 213 and 214. FEMA sent these limited-information eligibility letters to 9,461 Dolly applicants. Fact 26; SAR-8736 (Plaintiff Alvarado's letter).

When FEMA found an applicant ineligible due to "insufficient damages," FEMA gave the applicant a menu of possible reasons for ineligibility without ever stating which one applied in any case. FEMA's insufficient damages letter states:

> Based on your FEMA inspection, we have determined that the disaster has not caused your home to be unsafe to live in. This determination was based solely on the damage to your home that [is] related to this disaster.
>
> Although the disaster may have caused some minor damage, it is reasonable to expect you or your landlord to make these repairs. At this time you are not eligible for FEMA housing assistance.

Facts 13 and 217. FEMA sent this text to 11,744 Dolly applicants as their only explanation for why they were denied home repair assistance. Fact 26. This text does not inform applicants

whether they were denied assistance because Dolly did not damage their homes, because Dolly's damage was minor, or because Dolly's major damage did not affect the safety of their homes. Facts 217 and 218. FEMA has form letters that specify which one of these ineligibility reasons apply, including letters explaining deferred maintenance as the ineligibility code, but FEMA chose to use the generic "insufficient damage" letter for Dolly instead. Facts 210, 215 and 221.

FEMA never wrote Dolly applicants anything about deferred maintenance, primary cause, the $50 floor, or its other IHP Policies. Fact 242. Instead, FEMA deliberately concealed these policies from Dolly applicants. Facts 82 and 91.

E. How Appeals Worked

According to FEMA, "appeals are tricky." SAR-193:17. FEMA invited appeal of any adverse IHP decision within 60 days, but only if the applicant could write "detailed" reasons to support the appeal, and only if the applicant was willing to do so under penalty of perjury. Fact 225. During the 60-day appeal window, the only information available to applicants about the reasons for FEMA's adverse decision was stated in FEMA's (a) letters to the applicant; (b) "Help After a Disaster" brochure, and (c) applicant file. Fact 226. The first two of these items contained no applicant-specific information about the basis for FEMA's adverse decision. Facts 136 to 143, 213 and 214. The third does, but FEMA routinely ignored applicant requests for their files, as it did for eight Plaintiffs. Facts 14, 15 and 227. Consequently, applicants often had difficulty knowing whether or how to appeal. Facts 17, 18 and 228.

Whenever Dolly applicants submitted appeal letters questioning "the extent, cause, type, or amount of damages" recorded by Inspectors, FEMA simply denied these appeals unless: (1) FEMA first granted an "appeal inspection;" and (2) the appeal inspector verified the damages claimed in the appeal letter. Fact 229. FEMA restricted appeal inspections in many ways without ever revealing the restrictions to applicants. Fact 230. Whenever Dolly applicants appealed a

decision involving a roof, all appeal inspections were denied if "General" was marked as an "Area of Deferred Maintenance. Fact 92. If Dolly applicants appealed a decision involving another part of the home that was marked as an "Area of Deferred Maintenance," FEMA still denied the appeal inspection unless "unique circumstances" were present and the appeal included a "detailed explanation of disaster-related damages, not addressed in the first inspection." Fact 93. FEMA also denied appeal inspections unless the appeal included what FEMA considered to be a sufficiently detailed estimate from a "licensed" contractor or a local official, even though FEMA only wrote applicants that local officials and contractors were *examples* of acceptable sources of estimates, not required sources. Fact 94. Even when applicants could pay for estimates from licensed contractors, FEMA still denied appeal inspections whenever it deemed the estimates insufficiently detailed. Fact 95.

Dolly applicants appealed 2,125 adverse repair decisions, and in response FEMA granted 884 appeal inspections. Facts 235 and 236. For each appeal inspection, a new Inspector applied the same IHP Policies as the initial Inspector to record which damages were disaster-related, and which homes were safe. Facts 231 and 233. Appeal Inspectors did not record the reasons for their deferred maintenance determinations. Fact 232. FEMA reports that appeals changed eleven Dolly home repair results out of 2,125 appeals. Fact 236.

F. Consequences

Over 12% of all homeowners in Cameron, Hidalgo, and Willacy counties applied for Dolly repair assistance. Fact 130. Inspectors recorded deferred maintenance in 24,027 of the 33,689 total Dolly inspections, or 71%. Fact 184. FEMA concluded that 11,744 Dolly applicants, or 41%, were ineligible for repair assistance because disaster-related damages did not cause their homes to be unsafe. Fact 26. FEMA admits that this insufficient-damage denial rate is unusually

high, but FEMA will not disclose what it did to investigate or respond to this rate after gaining actual knowledge of it. Facts 20 to 22 and 251.

When FEMA and PaRR staff randomly checked the work of Dolly's independent-contractor Inspectors, they found "egregious" errors in 24% of Dolly inspections. Fact 245. The PaRR executive in charge of administering the PaRR-FEMA inspection management contract testified that FEMA's deferred maintenance policy is "confusing," especially to inexperienced inspectors, and "you can get 50 inspectors to go out and do inspections and you can get 50 different results." Fact 160. FEMA knows that vagueness, subjectivity, and secrecy in its IHP eligibility standards undermine consistency in IHP decisions, yet FEMA has refused actions that would decrease vagueness, subjectivity, and secrecy in its standards. Facts 252 to 269.

FEMA paid $21.2 million total to repair 9,461 homes following Hurricane Dolly, an average of $2,240.78 per home. Facts 25 and 26. This $21.2 million is 4% of the $525 million in total Dolly uninsured property losses. Fact 24. FEMA refuses to disclose how the amount of its Dolly repair assistance compares to other disasters. Fact 127. Throughout IHP's operation, from 2004 Florida Hurricanes through 2012 Superstorm Sandy, applicants across the nation have voiced the same complaint: "what standards could possibly lead FEMA to find 'insufficient damage' when the disaster obviously caused substantial damage?" Facts 271-72.

SUMMARY OF ARGUMENT

FEMA has spent billions of dollars without complying with the simple publication requirement of 5 U.S.C. § 552(a)(1) or the separate notice-and-comment requirement of 5 U.S.C. § 553. Deferred maintenance is Plaintiffs' primary focus because of its adverse impact upon Dolly applicants. But FEMA's APA violations are by no means limited to deferred maintenance. Unless this Court enters a meaningful remedy, FEMA's opportunities for developing new secret law on disaster assistance will be limitless.

ARGUMENT

Section 552(a) "represents a strong congressional aversion to secret agency law." *NLRB v. Sears*, 421 U.S. 132, 153 (1975). This statute "has been drawn [based] upon the theory that the administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready access of knowing with definiteness and assurance." S. REP. NO. 752 at 198, 79th Cong., 1st Sess. (1945).

Respect for Congress's objectives is "critical" when evaluating APA notice requirements. *United States Steel Corp. v. EPA*, 595 F.2d 207, 210 (5th Cir. 1979). Good reasons for prohibiting agency use of secret rules include: (1) public scrutiny improves the quality of the rules adopted by agencies; and (2) the public cannot fairly dispute adverse agency action without knowing what standards the agency used. *Morton v. Ruiz*, 415 U.S. 199, 232-33 (1974); *see also Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (The APA is a statutory expression of due process.); *St. John's Hickey Mem'l Hosp., Inc. v. Califano*, 599 F.2d 803, 814-15 (7th Cir. 1979) ("Procedural inadequacies surrounding the administrative decision deprive it of any presumption of correctness."); *Northern Cal. Power Agency v. Morton*, 396 F. Supp. 1187, 1191-92 (D.D.C. 1975) ("The statute clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby. ... Congress wisely recognized after years of experience that [administrative] proceedings require the discipline which a published set of rules drawn up in advance can provide.").

The only issues presented in this motion are whether FEMA has complied with the procedural requirements of two separate statutes: §§ 552(a)(1) and 553. The wisdom of FEMA's IHP Policies is not at issue in this motion. Nor is FEMA's plenary power and responsibility to interpret the IHP statute.

I. FEMA PERVASIVELY VIOLATES 5 U.S.C. § 552(a)(1)

To secure relief under § 552(a)(1), Plaintiffs must prove three elements:

A. FEMA made a statement that falls within the APA definition of "rule" and is "generally applicable;"

B. FEMA failed to publish the statement either by placing it in the Federal Register or by providing "actual and timely notice of the terms" of the rule; and

C. Plaintiffs were adversely affected "in any manner" by FEMA's use of the rule.

5 U.S.C. § 552(a)(1)(A)-(E); *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994). Part A below quotes not one but numerous FEMA statements that qualify as generally applicable rules. Part B shows that FEMA not only failed to publish these rules, but FEMA knew that Dolly applicants sought these rules "over and over" and then deliberately decided to withhold the statements from the public. Part C shows that Plaintiffs were adversely affected in many ways by FEMA's use of these rules.

A. FEMA'S IHP Policies are "Rules" Subject to the § 552(a)(1) Publication Requirement

FEMA's administration of IHP "is based on a hierarchy of statute, regulations, and policies." Fact 44. First is 42 U.S.C. § 5174. Next are FEMA's published interim IHP regulations, 44 C.F.R. §§ 206.110-19 (2008), which state FEMA's interpretation of the statute. Next are many "IHP Policies," which in turn state how FEMA interprets both the statute and the regulations. Fact 45. FEMA uses many labels for its IHP Policies, including "policies," "standard operating procedures," "guidance," and "eligibility criteria." Facts 62 and 63. "The label that the particular agency puts upon its given exercise of administrative power is not ... conclusive; rather it is what the agency does in fact." *Phillips*, 22 F.3d at 619 (citations omitted). Plaintiffs assert that the specific IHP Policies quoted in Part I.A.1-4 below are subject to the publication requirement of § 552(a)(1).

The APA requires each agency to publish all of the following:

> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
> (E) each amendment, revision, or repeal of the foregoing.

Id. at § 552(a)(1)(B)-(E). The § 552(a)(1) publication requirement thus broadly applies to all agency statements of "rules," regardless of whether the rules are characterized as substantive,[4] interpretive, or procedural. *Davidson v. Glickman*, 169 F.3d at 999 (substantive); *Mission Group Kansas v. Riley*, 146 F.3d 775, 783 n.10 (10th Cir. 1998) (interpretive); *Military Order of the Purple Heart v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1296 (Fed. Cir. 2009) (procedural).

FEMA asserts that it has made a "determination" that its IHP Policies are "rules of procedure" or "interpretive rules." Dkt. No. 118-1 at 23 and 26. This "determination" alone proves that § 552(a)(1) required publication of FEMA's IHP Policies regardless of whether the policies are procedural or interpretive as FEMA argues, or substantive as Plaintiffs argue in Part II below.[5] Ample authority and record evidence only confirms that FEMA's IHP Policies are generally applicable rules, and thus subject to the § 552(a)(1) publication requirement.

The APA defines "rule" as follows:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial

[4] Courts routinely use the terms "legislative rule" and "substantive rule" interchangeably when discussing the APA. *See, e.g., Davidson*, 169 F.3d at 997.

[5] Separate from the § 552(a)(1) publication requirement, the APA also requires agencies to afford the public notice and an opportunity to comment on some rules—only *substantive* rules— prior to the date of publication. 5 U.S.C. § 553. FEMA attempts to avoid § 553 by characterizing its rules as procedural or interpretive, but this only concedes liability under § 552(a)(1). *See* Dkt. No. 120 at 13-14 (describing the relationship between § 552(a)(1) and §553).

> structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4). This definition is quite broad. *Coalition for Common Sense in Gov't Procurement v. Sec. of Vet. Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006). But § 552(a)(1) narrows the § 551(4) definition of "rule" in one important way. While § 551(4) provides that "rule" includes any "statement of general or particular applicability," § 552(a)(1)(D) excludes "particular" and only requires Federal Register publication of statements of "general applicability." *See American Broadcasting Co. v. FCC*, 682 F.2d 25, 31-32 (2d Cir. 1982) (distinguishing rules of general and particular applicability, with rules of particular applicability limited to those explicitly naming parties to an existing agency proceeding); S. REP. NO. 813, 89th Cong., 1st Sess. at 6 (1965) (change of statutory text from "not ... addressed to and served upon named persons" to "general applicability" was "technical" and not substantive).[6]

Whether a statement is "generally applicable" depends upon two facts: the text of the statement and the date it was made. *See United States v. Cannon,* 345 Fed. Appx. 301, 303, 2009 WL 2905978 at *1 (9th Cir. 2009) (The text of "Instruction 32-8 [prohibiting coyote hunting on a military base] has general applicability and legal effect [so it] should have been published in the Federal Register."); *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) (Park Service unpublished rule is generally applicable when on its face it applies to all demonstrators in Lafayette Park.); *El Paso Hosp. Dist. v. Texas Health and Hum. Servs. Comm'n*, 247 S.W.3d 709, 714 (Tex. 2006) (rule is one of "general applicability" when its text shows that it affects the

[6] Because the text of § 552(a)(1)(D) limits the publication requirement to substantive and interpretive "rules of general applicability" while the text of §§ 552(a)(1)(C) and (D) omit this limitation, the "general applicability" limitation only applies to substantive and interpretive rules, and not to procedural rules. Thus, if FEMA's IHP Policies are rules of procedure as FEMA emphatically asserts, then the rules are required to be published under § 552(a)(1)(C) regardless of whether they are "rules of general applicability." *See* Dkt. No. 118-1 at 23 ("FEMA views the guidelines relating to deferred maintenance and pre-existing condition as rules of agency practice and procedure which do not [affect] an applicant's rights in any substantive way.... FEMA's determination is entitled to deference.").

"interest of the public at large" or all regulated parties equally). Courts also examine the date of agency statements, specifically whether the statements were made in advance of their application to any identifiable person, to determine whether the statements are "generally applicable." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892 (1990) (announcement of actions to be taken in the future as to regulated parties not yet known indicates a rule of general applicability); *Coalition for Common Sense*, 464 F.3d at 1317 (The agency statement was of general applicability because it "was not written as part of an adjudicative process, such as an enforcement proceeding against a particular manufacturer. Instead, the [statement] prospectively requires action on behalf of all drug manufacturers."); *Shell Offshore*, 238 F.3d at 628 (rules that apply indefinitely to many regulated parties in the future are generally applicable); *Waste Management, Inc. v. United States EPA*, 669 F. Supp. 536, 539 (D.D.C. 1987) ("an agency statement describing conduct that the agency intends to follow in the future is a statement of 'future effect designed to . . . prescribe law or policy . . . or procedure' and thus a rule").

Courts have found many agency statements to be generally applicable rules that must be published in the Federal Register. *See Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) ("the purpose of the APA would be disserved if an agency with a broad statutory command (here, to detect weapons) could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation (here, requiring passengers to clear a checkpoint) and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations"); *Davidson,* 169 F.3d at 999 (Where a regulation allowed amendment of a crop report but an unpublished Handbook disallowed any change that would make a farmer eligible for disaster assistance, the "Handbook provision imposes conditions on the revision of acreage reports beyond those required by the regulation, thereby qualifying as a legislative rule by 'affecting individual rights' and creating new law."); *NI*

Industries, Inc. v. United States, 841 F.2d 1104, 1108 (Fed. Cir. 1988) (Where the published standard enabled any defense contractor to submit requests to share in savings from changes in arms manufacturing processes, an unpublished policy cannot be used to limit sharing to the first submitter.); *Satellite Broad. Co.*, 824 F.2d at 3-4 (Regulations did not state whether a broadcasting application must be filed in Sacramento, CA or Washington, D.C., but unpublished policy did. In disallowing use of the unpublished policy, the court held: "The Commission through its regulatory power cannot ... punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.' The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation."). *PPG Industries v. Costle*, 659 F.2d 1239, 1249 (D.C. Cir. 1981) (Industries "charge that essential provisions in [regulations] cannot be understood without the Guidelines document, which was neither published nor properly incorporated in the Federal Register. We agree.").

FEMA statements quoted in Parts I.A.1-4 below are indistinguishable from the agency statements at issue in all of the cases cited in the preceding paragraph, which courts held to be generally applicable rules. FEMA admits that its IHP Policies are generally applicable rules. Dkt. No. 118-1 at 23 "rules of agency procedure"); *id.* at 26 ("interpretive rules"); SAR-16:13-21 ("FEMA issues policies so that the regulations are interpreted consistently across the nation and from disaster to disaster."); SAR-6789 ("This document is meant to ... clarify the ways [all] decisions are processed ...."); SAR-43:16-17 ("the purpose is to establish a national policy"). As shown next, the record proves that the policies are generally applicable rules.

1. Unpublished Rule One: FEMA Uses a "Deferred Maintenance" Rule to Limit Which Damages are Recorded as "Disaster-Related"

Congress limits "eligibility" for disaster assistance to "disaster-related" needs. 42 U.S.C. § 5174(b)(1). The statutory term "related" is usually construed broadly, not only by executive agencies but by courts. *See, e.g., Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) ("The phrase 'related to' [embraces items] 'having a connection with or reference to' [other items], whether directly or indirectly. [The] ordinary meaning of ... 'related to' is a broad one ...."") (citations omitted); *Fire Eagle L.L.C. v. Bischoff (In re Spillman Dev. Group)*, 710 F.3d 299, 304 (5th Cir. 2013) ("Proceedings are 'related to' bankruptcy cases if their outcome could conceivably have any effect on the estate being administered in bankruptcy.") (quotation omitted). Yet FEMA interprets "disaster-related" quite narrowly, as follows.

"The terms deferred maintenance and pre-existing condition appear in [FEMA documents] as a means of assisting contract inspectors to identify and distinguish between damage which is [recorded in "line-items" as] disaster-related and damage which is not." Dkt. No. 118-1 at 22. FEMA wrote the following statement to provide this "assistance" to Inspectors:

> [T]he term "Deferred Maintenance" will be applied to any real property item that has been neglected to the extent that it can no longer adequately perform its intended function. Examples of deferred maintenance are rotting boards, roofs with missing and/or crumbling shingles, and foundations with predisaster cracks all of which allow unwanted elements into the home.
>
> Items suffering from deferred maintenance that were not significantly worsened by the disaster are not to be listed in real property line item specifications. The inspector will [instead] record areas of deferred maintenance not worsened by the disaster in the ["Areas of Deferred Maintenance" listed on the] Post Inspection Screen. For instance, if the foundation has superficial cracks that are pre-existing and were not worsened by the disaster the inspector will check the Foundation/Masonry box under "deferred maintenance."
>
> Any deferred real property damage listed in line items must have been **significantly worsened by the disaster**. Disaster damages to these items **must be significant, obvious and without question**. The listing of deferred maintenance items worsened by a disaster [in repair line items] should never be speculative.

SAR-6779 (emphasis in original); SAR-5550; AR-504-505; Fact 70. By this statement, FEMA deems damages "disaster-related" only if the disaster "significantly worsened" the pre-disaster condition of a part of the home "without question." Facts 73 and 74. Even if the disaster actually worsened the home's pre-disaster condition, FEMA does not consider this damage "disaster-related" unless the worsening is "significant, obvious and without question." Facts 71 and 72; *cf.* Fifth Circuit Oral Argument at 12:08 (http://www.ca5.uscourts.gov/ OralArgRecordings/09/09-40948_2-2-2010.wma visited January 23, 2014) (Judge observes that where both pre-existing damage and disaster damage exist, "it seems to me there is disaster-related damage. It's almost a causational question."). If FEMA's deferred maintenance standard is not met, FEMA does not allow the damage to be listed in line items. Facts 69 and 172 to 179. FEMA uses only damage listed in line items to calculate the precise amount of repair assistance that is awarded. Fact 209.

FEMA's deferred maintenance rule for IHP (private residences) quoted above is facially more restrictive than FEMA's deferred maintenance rule for PAP (public buildings) quoted next:

> Normal maintenance items that existed prior to the disaster, such as pothole repair, routine pulling of ditches, and minor gravel replacement; and deferred maintenance, such as replacing rotted timber, and repairing deteriorated asphalt and leaking roofs, are not eligible because they do not meet the criterion of being disaster-related. ... [But in] instances where damage **can be attributed** to the disaster instead of lack of maintenance, repairs are eligible. It is the applicant's responsibility to show that the damage is disaster-related.

Fact 43 (emphasis added). Thus, FEMA requires proof of disaster-relatedness beyond doubt for IHP ("without question") while requiring proof of the identical item by a preponderance for PAP ("can be attributed"). *Compare id. with* Fact 70. FEMA disclosed the lower standard for PAP while concealing the higher standard for IHP.

Of course a preponderance standard will "broaden coverage" of any claim or defense, *Grogan v. Garner*, 498 U.S. 279, 288-90 (1991), while "beyond a reasonable doubt" will restrict

coverage. *Addington v. Texas*, 441 U.S. 418, 432 (1979).[7] This is why the APA requires agencies to notify the public precisely which standards of proof they will actually use. *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 373-74 (1998); *Fraga By and Through Fraga v. Smith*, 607 F. Supp. 517, 523 (D. Ore. 1985) (citing cases) ("Rules setting forth the standards of proof and acceptable sources of proof for [immigration] applications are 'of such a nature that knowledge of them are needed to keep the outside interests informed of the agency's requirements ... and are therefore within the publication requirement" of § 552(a)(1).).

By narrowing the ordinary meaning of the statutory term "disaster-related," FEMA's IHP deferred maintenance instruction plainly "implements, interprets, or prescribes law or policy," and is thus a rule under § 551(4). This rule is generally applicable. On its face it applies to all applicants equally in every case without exception. Facts 66 to 70 ("will be applied to any real property item;" recording of damage as disaster-related "should never be speculative"). FEMA wrote the IHP deferred maintenance rule in or before November 2002, and both of FEMA's inspection management contractors repeated the rule *verbatim* through Dolly in 2008. *See* SAR-6779 (FEMA 2002); SAR-7025 (Parsons-Brinkerhoff 2003); AR-504-505 (PaRR 2008). FEMA instructed Dolly inspectors to apply this rule to decide whether to record each and every instance of damage as "disaster-related" or "deferred maintenance." Facts 172 to 179. Dolly inspectors actually recorded deferred maintenance in 24,027 of 33,689 Dolly applications, or 71%. Fact 184. For all of these reasons, the record fully supports FEMA's admission that deferred maintenance is a generally applicable rule, and even one of FEMA's IHP "eligibility criteria." AR-280-¶25.

[7] A restrictive standard of proof may be inappropriate to decide inherently uncertain questions like psychiatric diagnosis. *Addington*, 441 U.S. at 432. The notice and comment process described in Part II.B. below would enable FEMA to have public input as it examines whether the pre-disaster condition of a home carries the same uncertainty identified in *Addington*, making a "without question" standard inappropriate.

2. Unpublished Rule Two: FEMA Uses a "Primary Cause" Rule to Limit Which Homes are Recorded as Uninhabitable

Congress limits eligibility for IHP repair assistance to persons who were either actually displaced from their homes or, for those not actually displaced, whose homes were rendered "uninhabitable" by the disaster. 42 U.S.C. § 5174(b)(1). FEMA usually reads "uninhabitable" broadly, to include any home where disaster-related damage "affects" safety or presents "any" hazards to occupants. Facts 87 and 199; *see, e.g.* AR-327 ("damaged light fixtures make the home unsafe"); AR-501 (home is unsanitary unless it is "mold-free"); AR-515 ("damaged sheetrock and insulation on the common wall should be addressed"); SAR-6247 (skylight may need replacement to make home safe).[8]

However, FEMA has also written several "Special Circumstances" that state "exceptions" to its broad reading of "uninhabitable." Facts 87, 173 and 200. One of these directs Inspectors to mark homes as "habitable," even when disaster-related damages affect safety, if Inspectors subjectively judge deferred maintenance rather than the disaster to be the "primary cause" of a home's overall unsafe condition. Facts 89 and 200. If an inspector marks a home as "habitable," the applicant is ineligible for any repair assistance unless this habitability determination is reversed on appeal, even if the inspector actually recorded disaster-related damage to the home in line items. Fact 201.

By creating a "primary cause" exception to FEMA's definition of the statutory term "uninhabitable," FEMA's primary cause statement implements, interprets, or prescribes law or policy, and is thus a rule under § 551(4). This rule is generally applicable. It was written by 2005,

[8] FEMA, PaRR, and Inspectors often use the word "safe" as shorthand for all four statutory and regulatory words "safe," "sanitary," "functional," and "habitable." Facts 83-86; *see* 44 C.F.R. 206.111 (defining all four terms). Thus, when FEMA informs applicants that they are denied repair assistance, FEMA never uses any form of the words "habitable," "sanitary," or "functional." SAR-7876-7882; Facts 139 to 143. Instead FEMA only reports its conclusion that the disaster did not cause the home to be "unsafe." Facts 217 and 238.

long before Dolly could have been anticipated. SAR-7148 (FEMA "informed contract inspectors that if deferred maintenance (and not disaster-related damages) is the primary cause of a home being unsafe, inspectors should not record the home as being unsafe for purposes of program eligibility."). FEMA taught this rule to Dolly inspectors prior to their deployment for use in all cases. SAR-49:16 to 51:16; AR-345; Dkt. No. 118-1 at 14. Because this rule is generally applicable, § 552(a)(1) required FEMA to publish it.

3. Unpublished Rule Three: FEMA Uses a $50 Floor Like Congress's $25,000 Cap

In 2000, Congress capped IHP assistance at an inflation-adjusted $25,000. 42 U.S.C. § 5174(h); 72 Fed. Reg. 57341 (Oct. 9, 2007) (The 2008 cap for Dolly was $28,800.). FEMA set an IHP floor at $50 by internal memorandum, which FEMA has applied to every application for repair assistance since July 10, 2005. SAR-475. If the total amount of eligible assistance is under $50, FEMA computers automatically deem the applicant ineligible for assistance. SAR-18:3-8. FEMA's floor is no less a generally applicable rule than Congress's cap. *See* Part II.A.1 below.[9]

4. FEMA Uses Many Other Rules to Limit Which Damages are Disaster-Related and Which Homes are Uninhabitable, Which Should All be Published

FEMA gave three documents to Dolly inspectors prior to their deployment. Facts 126 and 179. These documents were entitled "IHP Inspection Guidelines," AR-511-528, "Habitability Document," AR-382-390, and "IHP Line Item Descriptions," SAR-6219-6247.[10] These documents state many caps and floors that limit eligibility for assistance. Facts 99 to 101; *see,*

[9] The proper amount of an IHP floor is not at issue. Plaintiffs only claim that they were adversely affected by FEMA's failure to disclose the amount of its IHP floor, as discussed in Part I.C.2.a. below.

[10] FEMA provides these three documents to Inspectors in every disaster, but the documents may be edited anew prior to Inspector deployment in each disaster, so they contain small variances from disaster to disaster. Three variances of the IHP Inspection Guidelines appear at AR-511-528 (2008), SAR-345-357 (2003), and SAR-358-373 (2011). These documents are 16-18 pages long. The IHP Line Item Descriptions document changes by disaster according to "procedure [that is] formally approved], and is 29 pages long. SAR-6219-6247 ("The methods described in this procedure are mandatory."). Versions of the 3-page Habitability Document appear at AR-325-327 and AR-382-390.

e.g., AR-519 ("Record the square footage of decking that needs to be replaced ... to a maximum width of 10 feet.").

These three documents state many other intriguing IHP Policies. For example, while people who see rainwater leaking through an inside ceiling will normally and correctly deduce that something is wrong with the roof above, FEMA does not. Instead, FEMA directs Inspectors to find deferred maintenance:

> Do not record 'Roof Covering, Replace' simply because the dwelling has suffered interior damage from wind driven rain. It is not uncommon for new leaks to occur through older (deferred maintenance) roofs, to be blown up under shingles, through vents, etc.

Fact 102. By this statement FEMA denies assistance even if the disaster creates a "new leak," which is disaster-related damage. *Id.*; SAR-122:11-22. The reason for the denial is that the roof was labeled "deferred maintenance" simply because the Inspector judged the roof to be "older."[11] For another example, FEMA instructs Inspectors not to record a home as "unsafe" simply because a disaster broke windows in the home, despite the presence of children or the risk of intruders. Fact 102.

FEMA's IHP Inspection Guidelines, its IHP Line Item Descriptions, and its Habitability Policy state many standards that inspectors use to decide which damages are disaster-related and

[11] Neither FEMA nor PaRR teaches Inspectors what "older" means or how to determine which roofs are "older." Facts 153 to 156. Some shingles are rated to last fifty years. *See* https://www.youtube.com/watch?v=-Xuiv3N5hjM (Powerpoint on differences between 20, 30, 50 year shingles, including "If you ... are renovating a home to sell immediately, a 20-year shingle might be the best selection. It's much lower in cost, but also lower in quality. Buyers and lenders will be more interested in the fact that the roof is new, rather than the type of shingle used.").

Neither of FEMA's other two justifications for denying roof-covering assistance survive scrutiny either. If the "new leak" was created because wind driven rain was "blown up under shingles," this concedes that the disaster is what "blew up" the shingles. Shingles cannot be blown up without displacing nails, and shingles may crack when they are blown up. *See* SAR-111-116 (if storm lifts or cracks a shingle, this may not be seen because Inspectors cannot climb roofs). This very nail-and-shingle displacement by the disaster is damage to the roof—*disaster-related* damage—that would be eligible for assistance but for FEMA's secret rule saying otherwise. As for vents, rain could enter them without roof damage only if the vent is damaged or if rain falls upward. Damaged vents could be seen and documented by the inspector, and any ceiling wetness would occur in the vicinity of the vent. The notice and comment process described in Part II.B. below would enable FEMA to have this kind of public input as it examines whether this "wind-driven rain rule" has a rational basis in fact, and what its roof-repair response should be when rain has entered the dwelling.

which homes are unsafe.[12] These documents instruct Inspectors how to record data for "all inspections." AR-513. These three documents should have been published in the Federal Register pursuant to § 552(a)(1).

In addition to the three documents issued to Inspectors, FEMA issued a series of statements to its Appeal Officers which restricted all Dolly applicants' right of appeal. These statements included this categorical denial of appeals specifically for Dolly:

> **Do not request appeal inspections for roof repairs when the 'General' category is listed under Deferred Maintenance. ... If an applicant requests an inspection for roof damages and 'General' is noted under [the] deferred maintenance box, this indicates that the roof damages have been addressed in a previous inspection. Do not request an appeal inspection.**

SAR-3060 (emphasis in original). These statements also included this conditional denial of appeals:

> **Deferred Maintenance Exception:**
>
> Issuing an appeal inspection is not automatic, when the inspector notes deferred maintenance. When an applicant has appealed for items the inspector listed under deferred maintenance, it would normally be inappropriate for the applicant to receive a second inspection; however, there may be unique circumstances in which a detailed explanation of disaster-related damages, not addressed in the first inspection, would warrant a second inspection.
>
> If the applicant has submitted an estimate/receipt for items listed under deferred maintenance, the caseworker must call the contractor and verify the cause of damage and whether it was disaster-related. An appeal inspection will be generated if appropriate.

SAR-3046-3047 (emphasis in original). These generally applicable rules concerning appeals should have been published in the Federal Register pursuant to § 552(a)(1).

---

[12] For example, while FEMA's published general definition of "safe" appears in 44 C.F.R. § 206.111, FEMA actually tells Inspectors this more specific definition:

> Safe is defined as (1) exterior is structurally sound to include windows, doors, and roof (2) functioning electricity, gas, heat, plumbing, etc. (3) Interior is structurally sound to include floors, walls, ceiling (4) Access and egress are possible (5) Septic and sewage are functioning properly (6) Wells are functioning.

Fact 83. Further unpublished IHP Policies direct inspectors as to specific items that must be deemed "safe," and certain items that must be deemed "unsafe." Fact 84.

B. FEMA Has Not Published its IHP Policies

FEMA has never published in the Federal Register any of the statements quoted in Part A above. Fact 107; SAR-31:15-17. Nor did FEMA provide actual notice of the terms of any of these statements to any Dolly applicants. Fact 242; *see also* SAR-391 ("FEMA states that the agency does not provide applicants for home repair assistance with any documents relating to deferred maintenance."). This failure to publish alone is sufficient for § 552(a)(1) liability. *Davidson*. 169 F.3d at 999; *Satellite Broadcasting Co*., 824 F.2d at 4 (if an agency "wishes to use [an] interpretation to cut off a party's right, it must give full notice of its interpretation").

While failure to publish alone is sufficient for § 552(a)(1) liability, Plaintiffs emphasize that FEMA withheld its IHP Policies from the public deliberately. When FEMA's Texas staff told FEMA senior management that Dolly applicants asked "over and over" about what standards FEMA used to decide home repair applications, FEMA senior management made a deliberate choice to withhold this information. Facts 82 and 91; *see also* SAR-3518 ("this cannot be released to the public"); SAR-5986 ("**FOR INTERNAL USE ONLY**") (emphasis in original); Dkt. No. 121 at 1-3 (history of difficulty discovering FEMA's policies); Dkt. No. 82-1 at 1-24 (email seeking discovery).

FEMA had the ability to publish all of the statements cited in Part A above. Nothing could have prevented FEMA from publishing the $50 IHP floor at the same time that it annually publishes the inflation-adjusted IHP cap. *See, e.g.*, 72 Fed. Reg. 57341 (Oct. 9, 2007). FEMA's actual publication of its deferred maintenance rule for PAP (public buildings) proves its ability to publish its deferred maintenance rule for IHP (private residences), especially considering that FEMA issued the same deferred maintenance instruction to Inspectors since 2002 and the same primary cause instruction to Inspectors since 2005. Facts 64 and 89. None of the IHP Policies quoted in Part I.A. above are lengthy even compared to FEMA's adequate definitions of "owner-

occupied" and "primary residence," which FEMA actually published in its regulations. *See* 44 C.F.R. § 206.111. FEMA's ability to publish its IHP Inspection Guidelines, IHP Line Items Document, and Habitability Document is proved by the fact that at least four other agencies publish similarly detailed housing standards in the Federal Register. *See* 7 C.F.R. §§ 3560.103, *et seq.* (USDA Rural Housing Standards), 20 C.F.R. §§ 654.404, *et seq.* (DOL Migrant Labor Housing Standards); 24 C.F.R. § 982.401, *et seq.* (HUD Housing Quality Standards), 29 C.F.R. § 1910.142 (OSHA Temporary Housing Standards).

Federal Register publication constitutes legal notice to the public. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947). FEMA Headquarters makes deliberate choices about which items to publish in the Federal Register, which includes over 500 publications per year and directions to issue Federal Register publications during disaster responses. Fact 105; SAR-470. FEMA published eight such notices during its Dolly response concerning relative minutiae. Fact 106 (describing each publication). Even though FEMA knew that many Dolly applicants did not understand why they were denied repair assistance and that applicants sought the terms of FEMA's standards, FEMA did not publish the terms of any of its Dolly IHP Policies anywhere. Facts 107 and 269 to 271; *see also* SAR-7730-7731 (In just 718 words, the Houston Chronicle clearly describes public perception of deferred maintenance after Hurricanes Dolly and Ike.).

C. Dolly Applicants Were Adversely Affected by Unpublished IHP Policies

Agencies may not use unpublished generally applicable rules to adversely affect a person "in any manner." 5 U.S.C. § 552(a)(1). The record here proves adverse effects that are both substantive and procedural.

1. The Policies Restrict Eligibility for Repair Assistance

The text of all IHP Policies quoted in Part I.A. alone proves that these policies adversely affected applicants for repair assistance. *See Davidson*, 169 F.3d at 999 (finding adverse effect

based upon policy text alone). This is because all of these policies only restrict eligibility for repair assistance. FEMA's deferred maintenance rule alone imposes the "significant, obvious, and without question" restriction on the ordinarily broad meaning of "related." Facts 67 to 71. FEMA's "primary cause" rule only decreases the number of homes that are eligible for repair assistance. Fact 89. FEMA's appeal rules only increase the number of appeals that are denied. Facts 92 to 95. FEMA's many floors and caps bar repair assistance that would otherwise be available. Facts 96 to 101. *See also* Part II.A.2. below (not only do text of FEMA's policies prove adverse effect *qualitatively*, but the full record proves that the policies have "substantial" adverse effect *quantitatively*).

2. Failure to Publish the Policies Prevented Applicants from Testing the Veracity of FEMA's Adverse Findings

Not only are Plaintiffs adversely affected by the restrictive substance of FEMA's unpublished IHP Policies, Plaintiffs are also adversely affected procedurally when these policies are not disclosed. The Fifth Circuit so found, specifically as to IHP:

> Until a disappointed applicant is informed of the reasons that FEMA believes him to be ineligible for assistance, including the factual basis underlying that decision, he simply has no way to "test the veracity of the agency's findings against him."

Ridgely v. FEMA, 512 F.3d 727, 741 (5th Cir. 2008) (quoting *Billington v. Underwood*, 613 F.2d 91, 94 (5th Cir. 1980)). So did this Court. *See* Dkt. No. 22 at 14 ("The Court finds that if FEMA were to outline more specific criteria and standards for eligibility, decisions made by FEMA implementing eligibility requirements could increase the relief awards granted to some or many of the Plaintiffs, which would alleviate their injuries."). By failing to publish its IHP Policies, FEMA inhibited Dolly applicants from taking the following actions to test the veracity of FEMA's adverse findings: (a) writing effective appeals; and (b) helping Inspectors ascertain the facts.

(a) Appeal. FEMA's appeal procedure begins with deficient notice of adverse decisions. FEMA's only notice is stated in the same form "notice letters" that the Fifth Circuit criticized in *Ridgely*. *See* 512 F.3d at 741 (these letters do not "provide applicants with a meaningful understanding of the agency's decisions on their requests for assistance"). The 9,461 Dolly applicants who received FEMA's "Eligible" notice letter were not informed of adverse decisions that limited the amounts that FEMA provided to them. Facts 212 to 214.[13] Although FEMA had more specific eligibility letters in its computer system, the 11,744 Dolly applicants who received FEMA's "Ineligible—Insufficient Damage" (IID) notice letter were only informed of three possible reasons for their ineligibility: absence of disaster-related damage, disaster-related damage that did not cause the home to be unsafe, or disaster-related damage that was judged to be minor. Facts 13, 217, 218 and 221. FEMA provided Dolly applicants no other notice whatsoever. Fact 242. None of these letters state any of the facts that FEMA used to calculate the amount of assistance. None of these letters state anything about deferred maintenance, primary cause, or the $50 floor. *Id*.

To appeal, FEMA requires applicants to state "detailed" reasons for the appeal in writing, and to do so under oath. Fact 225. Thus, after withholding all facts upon which FEMA's adverse decision is based, and after providing a limited description of some of the standards that FEMA may have applied to reach its decision, FEMA demands exquisite specificity from anyone wishing to challenge the decision on pain of criminal sanction. "Kafkaesque" is a proper description of such agency action. *See ACORN v. FEMA*, 463 F. Supp. 2d 26, 35 (D.D.C. 2006), *stayed in part on other grounds*, 2006 WL 3847841 at *1 (D.C. Cir. 2006); *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 35 (D.C. Cir. 1997). FEMA further inhibits effective appeals by:

[13] FEMA does not tell eligible applicants anything about the extent to which damage was deemed ineligible because its disaster-related nature could not be determined "without question," and if so what items and what quantities. Facts 213 and 214; *see, e.g.,* SAR-8736 (FEMA wrote Plaintiff Alvarado that she was eligible for $410.10 in repair assistance, and provided no other information about what facts produced this amount.).

telling applicants that contractor estimates are optional when FEMA actually requires them, Fact 94; requiring applicants to get costly estimates from licensed contractors in the midst of disaster recovery regardless of applicants' financial capacity to secure these estimates, *Id.*; and telling applicants how to request their files for appeal and then routinely ignoring those requests while the 60-day time limit for appeals expires, Facts 14, 15, and 227.

Applicants' ability to use appeal to test the veracity of FEMA's adverse findings would only have improved had FEMA disclosed the IHP Policies quoted in Part I.A. above.

Dolly applicants have evidence as to whether the disaster significantly worsened the pre-disaster condition of items in their homes. This evidence includes witness statements (applicants, family, neighbors, visitors) and may also include maintenance receipts, photographs, and expert statements of contractors. Fact 10; SAR-7902-7980 (applicant declarations); SAR-8575-10401 (FEMA applicant files). Because FEMA's notice letters do not inform applicants which damaged items were recorded as disaster-related and which items were recorded as deferred maintenance, applicants do not know which items need evidentiary attention on appeal, *i.e.* what to ask a contractor to estimate. Because FEMA's notice letters do not inform applicants that the applicable standard includes "significantly worsened," applicants do not know to gather evidence of significance on appeal, *i.e.* to ask the contractor to opine whether the disaster "significantly worsened" the pre-disaster condition of the item. Similarly, FEMA's IID letter suggests nothing about FEMA's elaborate procedures for deciding which homes are "unsafe." Facts 13, 217 and 218. The text of FEMA's IID letter could lead any reader to assume that the Inspector evaluated the likelihood of harm from disaster-related damage to determine whether the home was "unsafe." But Inspectors do no such thing. Instead, Inspectors follow specific rules.[14] If applicants were

[14] Specifically, for example, FEMA tells Inspectors that disaster-related damage to swimming-pool fences never affects safety. SAR-6621. For reasons known only to FEMA, damage to fences *other* than those around swimming

told that FEMA actually deems homes "unsafe" if disaster-related damage merely "affects" home safety subject to specific "exceptions," more applicants would have appealed and they would have directed their appeals to the specific exceptions. And reasonable as FEMA's $50 floor may be, applicants reading the text of FEMA's IID letter saw only "minor damage" and never the specific $50 amount. Facts 13 and 217. Applicants could reasonably assume that FEMA's amount of "minor damages" was higher than $50, and FEMA used this higher amount to deny assistance. Were applicants told that the amount was $50, they would have a specific benchmark to use in determining whether and how to appeal. If applicants had been told all rules that FEMA actually used to determine eligibility for repair assistance, fewer applicants would have been confused about which of the many possible denial reasons listed in FEMA's IID letter applied to them.

In sum, neither eligible nor ineligible applicants can effectively appeal without knowing FEMA's IHP Policies, which would help them know what their damage estimates should address, what language must be used ("significantly worsened, without question"), and when an estimate from a licensed contractor is required. Several courts of appeals in addition to the Fifth Circuit so recognize:

> it is common sense that [an appeal] scheme which relies on beneficiaries to seek out basic information on why the agency took the action it did will result in only the aggressive receiving their due process right to be advised of the reasons for the proposed action. The meek and submissive, in contrast, will remain in the dark. Such an outcome seems particularly likely where, as here, many ... claimants face obstacles, such as advanced age, or disability, which make the process of seeking further information difficult.

---

pools may affect safety, but only if the applicant "can prove a serious need" for the fence. *Id.* Of course this makes no sense to anyone who has experience with young children. *See* http://www.cdc.gov/Features/dsSafeSwimmingPool/ (The U.S. Centers for Disease Control identifies swimming pool fences as the primary way to prevent child drownings that decimate some five in every 100,000 U.S. families each decade.). The notice and comment process described in Part II.B. below would enable FEMA to have this kind of public input as it examines which disaster-related damage to fences affects home safety.

Kapps v. Wing, 404 F.3d 105, 126 (2d Cir. 2005) (citations and quotations omitted, collecting cases); *accord Ridgely*, 512 F.3d at 741; *Safe Air for Everyone v. United States EPA*, 488 F.3d 1088, 1098 (9th Cir. 2007).[15]

(b) Help Inspectors. FEMA requires applicants to be personally present at each inspection. Fact 167. FEMA carefully directs Inspector-applicant discussions of citizenship, home ownership, and insurance, but FEMA does not require Inspectors to ask a single question to applicants about disaster-related damage, pre-existing conditions, habitability, or safety. Facts 168, 169, 182, 183, 192 and 193. Instead, FEMA directs inspectors to walk through the house, record observed damages as disaster-related or deferred maintenance, record "Habitability Repairs Required" as yes or no, and then leave. Fact 164; SAR-91:8 to 94:3 (FEMA cannot point to a single document that directs Inspectors to ask applicants anything about damages or home safety.).

Applicants can take many actions to help Inspectors discern which damages are disaster-related, and what is the primary cause of a home's unsafe condition. For one extreme but clear example, an applicant may climb on the roof to photograph damages because FEMA prohibits Inspectors from doing so. Fact 181.[16] Less extreme examples include answering Inspector questions about the home, showing the inspector receipts or photographs that document the pre-disaster condition of the home, or showing the inspector building materials left over from the most recent repairs, such as extra shingles and their durability rating. *See* note 11 above. But until

[15] Some Plaintiffs' ability to seek further information is similarly impaired by advanced age and disability, and all applicants' ability to seek further information is further impaired by having endured a disaster. *See, e.g.,* SAR-7904 (Francisca Adame is 80 years old.); SAR-7938-7939 (Jose Gonzales is quadriplegic.).

[16] FEMA's safety rationale for keeping Inspectors off of all roofs makes sense because any roof may be damaged. But absence of the evidence that would be gained from close inspection of roofs should be accounted for in the procedures that FEMA does choose. So far FEMA has no alternative for gaining this evidence, such as a stand-alone ladder placed adjacent to, but not touching, the house, or training in roof damage. FEMA has done neither, and substituted instead a secret standard that effectively presumes no roof damage and places a high burden on applicants to rebut this presumption. Facts 152 to 157. The notice and comment process described in Part II.B. below would enable FEMA to have this kind of public input as it examines how to fairly inspect roof damage without climbing on roofs.

applicants are told that the Inspector must find damage to be disaster-related "without question," applicants do not know that they need to learn what questions prevent the Inspector from doing so, and help answer those questions. For example, if an Inspector states that he marked a roof as "deferred maintenance" because it is "old" (Fact 102), the applicant could show a receipt showing when the roof was last replaced or a photograph of the pre-disaster condition of the roof.

Under FEMA's current practice, inspectors may refuse to disclose any reasons for recording an item as deferred maintenance. SAR-558-559 (PaRR told Dolly inspectors that the three "most popular" complaints are "rude, in a hurry, and did not look at all the damages."); SAR-1430 ("Complaint against the inspector James Stone; When she attempted to show him the damages, he told her to leave him alone, pointing to the door."). In such a case, the inspection itself is the applicant's *only* opportunity to test the veracity of this adversary finding. This is because FEMA does not require Inspectors to record the reasons for their deferred maintenance findings. Facts 183 and 189 to 192.

The record thoroughly proves that Inspectors need help from applicants. FEMA knows that Inspectors should have "professional knowledge and training in construction," Dkt. 118-1/18, but FEMA did not take the most obvious actions to ensure that Dolly Inspectors had this knowledge and training. Facts 153 to 155. FEMA requires Inspectors to have a criminal background check, and nothing else. Fact 119. FEMA does not require Inspectors to have any prior education or experience in housing construction, although many do. Facts 119, 121 and 146. FEMA does not require PaRR to certify that any Inspector has been trained in how to conduct inspections, although basic training is available to all Inspectors. Facts 147 to 149. FEMA ordered Inspectors to "expect deferred maintenance" especially as to roofs, but FEMA and PaRR provided Dolly Inspectors no training in how to discern the pre-disaster condition of a home, or how to ascertain roof damage. Facts 152 to 160. Nothing in the record indicates whether

Inspectors knew even the most basic roofing facts, such as how shingles are attached to a roof. Fact 153. Inspectors conducted 33,686 Dolly inspections, 61% of which were completed within the first two weeks. All Plaintiffs' inspections were completed in the first two weeks except that of Ms. Gallardo. Fact 163. After these first two weeks, PaRR reported to FEMA that "[t]he non-traditional, 'sub-standard construction' seems to be a factor in the time it takes to do inspections. Many homes are built by the occupants and the building components don't closely correspond to our line-items. We get frequent calls from inspectors asking for guidance on how to record damage to owner-built homes. This is becoming less of a challenge as we get through this particular learning curve." SAR-2277; Facts 250 and 251.

Plaintiffs' ability to check the work of any incompetent Inspectors was impeded by FEMA's refusal to disclose the standards those Inspectors used. Applicants cannot know how to help Inspectors accurately ascertain the facts because FEMA does not inform applicants of how Inspectors make the findings that determine eligibility.

The record thoroughly proves all elements of Plaintiffs' § 552(a)(1) claim. The statute itself specifies the appropriate relief, as described in Part III below.

II. THREE FEMA POLICIES ARE SUBSTANTIVE RULES UNDER 5 U.S.C. § 553

Not only are FEMA's IHP Policies subject to the publication requirement of § 552(a)(1), but some of those policies are also subject to the separate pre-publication notice and comment requirement of 5 U.S.C. § 553. That is because some IHP Policies are plainly substantive rules, not procedural or interpretive rules as FEMA argues. *Compare* Dkt. No. 118-1 at 22-26 (FEMA's motion for summary judgment on § 553) *with* Dkt. No. 120 at 12-19 (Plaintiffs' response in opposition to each FEMA § 553 argument).[17]

[17] FEMA's summary judgment motion on § 553 does not assert that IHP assistance is a "benefit" under 5 U.S.C. § 553(a)(2), rendering the entire statute inapplicable. *See* Dkt. No. 118-1 at *passim.* That is because FEMA waived this

A. Precedent Firmly Establishes that Three FEMA Policies are Substantive Rules

FEMA correctly observes that courts often have enormous difficulty drawing the line between the substantive rules that are subject to § 553 and the interpretive and procedural rules that are not. Dkt. No. 118-1 at 24 (quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984). Courts attempt to draw this line in hundreds of opinions, many of which express frustration with the absence of clear guidelines for doing so. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979) ("A 'substantive rule' is not defined in the APA, and other authoritative sources essentially offer definitions by negative reference.") (citing *Morton*, 415 U.S. at 232-36 as helpful on the definition).

Some § 553 cases, however, are simpler than others. At least in the Fifth Circuit, consistent precedent establishes five relevant factors that distinguish substantive rules from interpretive and procedural rules.

First, the more impact a rule has on the outcome of the agency's decision, the more likely it is a substantive rule. *Davidson*, 169 F.3d at 998-99 (Where an applicant for disaster assistance was eligible under the published rule but ineligible under the unpublished rule, the court held: "The [unpublished rule] imposes conditions on [eligibility for disaster assistance] beyond those required by the regulations, thereby qualifying as a legislative rule by 'affecting individual rights' and creating new law."); *Phillips*, 22 F.3d at 621 ("This change in valuation technique dramatically affects the royalty values of all oil and gas leases. Thus, the Procedure Paper should have been published in the Federal Register and offered for notice and comment."); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701-03 (5th Cir. 1979) ("An announcement stating ... the method by which an agency will grant substantive rights" has "substantial impact."); *accord*

---

exception by regulation, specifically 44 C.F.R. § 1.4. Many federal agencies have similarly waived the benefits exception. *Ohio Dep't of Human Servs. v. United States Dep't of Health & Human Servs., Health Care Fin. Admin.*, 862 F.2d 1228, 1233 & n.1 (6th Cir. 1988); *Batterton v. Marshall*, 648 F.2d 694, 700 & n. 23 (D.C. Cir. 1980).

Time Warner Cable Inc. v. FCC, 729 F.3d 137, 168 (2d Cir. 2013) ("Because all procedural rules affect substantive rights to some extent, the distinction between substantive and procedural rules might well be characterized as 'one of degree depending upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.'") (citations omitted).

Second, the more that the text of the rule indicates that the rule has "binding effect" within the agency, the more likely it is a substantive rule. *Phillips*, 22 F.3d at 620-21 ("The rule narrowly restricts the discretion of [agency] officials in determining the value of [mineral leases]. It forecloses other valuation methods by prescribing binding valuation criteria.").

Third, the more the rule appears to be a choice among policy alternatives that was made by agency policymakers, the more likely it is a substantive rule. *Brown*, 607 F.2d at 700-01.

Fourth, the more an agency changes the substantive impact of a rule over time, the more likely it is a substantive rule. *Shell Offshore,* 238 F.3d at 630 ("If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obligated, under the APA, to submit the change for notice and comment.").

Fifth, substantive rules apply to the regulated public generally, and the date that the agency created the rule must have been prior to its application in an individual case. *Shell Offshore*, 238 F.3d at 628.

The following three FEMA IHP Policies are substantive rules under all five tests.

1. The $50 Floor is a Substantive Rule

A single page of the record shows that on July 10, 2005, FEMA policymakers set a "national policy" changing the minimum IHP award from $0.01 to $50.00, which rendered all applicants with repair awards under $50.00 categorically ineligible for assistance. SAR-475. This

single page shows that FEMA's $50 floor meets all five tests for a substantive (or "legislative") rule. FEMA's IHP floor is no less legislative than the $25,000 IHP cap established by the nation's legislative branch in 42 U.S.C. § 5174. In the extensive canon of jurisprudence distinguishing substantive from interpretive rules under § 553, not one shred of argument can be found to indicate that FEMA's $50 floor is anything but a substantive rule.[18]

2. The Deferred Maintenance Rule is Substantive

IHP first took effect in October 2002. Fact 40. In November 2002, a FEMA manual already contained the text of the deferred maintenance rule that appeared verbatim in the instructions provided to Dolly Inspectors. Fact 70. The "significantly worsened" part of that text renders some damages ineligible for repair assistance as not "disaster-related" even when the disaster actually worsened the pre-disaster condition of the item. Fact 71. The "without question" part of that text sets a restrictive standard of proof, and the Supreme Court repeatedly holds that agency "assignment of the burden of proof is a rule of substantive law." *U.S. Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 271 (1994); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986).

Damaged item by damaged item, FEMA's deferred maintenance rule is as outcome determinative as the disaster-assistance rule that the Fifth Circuit found to plainly be a substantive rule in *Davidson,* 169 F.3d at 999. FEMA's deferred maintenance rule is stated in thoroughly binding language. *See* Dkt. No. 120 at 14-16 (quoting binding text of FEMA rule); *see also* SAR-6219 ("The methods described in this procedure are mandatory."). The fact that Dolly Inspectors actually applied FEMA's deferred maintenance rule one or more times in 71% of all Dolly inspections only confirms its binding force and substantial effect. Fact 184; *see PPG Industries*,

[18] Plaintiffs offer a "where-there's-smoke-there's fire" argument based on FEMA's $50 IHP Floor. FEMA's use of such an obvious substantive rule without publishing it, let alone subjecting it to notice and comment, proves FEMA's disregard for § 553 in administering IHP. Plaintiffs submit that this disregard extends to "deferred maintenance."

659 F.2d at 1250 (where an unpublished agency standard would alter 30-40% of results, the impact is so substantial that the rule is substantive under § 553); *Vigil v. Andrus*, 667 F.2d 931, 938 (10th Cir. 1982) (Unpublished rules "have an adverse effect that is significant, both qualitatively and quantitatively," where 13% of students would have their school lunch reduced or eliminated.); *Brown Express,* 607 F.2d at 702 (Rules that affect how $485,934.00 in gross revenue per month is distributed among motor carriers have a "substantial impact" upon the regulated industry.).

FEMA's actual use of an alternate deferred maintenance rule for PAP (public buildings) proves that FEMA's IHP (private homes) deferred maintenance rule is a choice among policy alternatives. *Compare* Facts 43 and 70. Over time, FEMA has changed the way that it uses deferred maintenance as a factor in determining eligibility for home repair assistance. FEMA Admission No. 15, SAR-342-73. FEMA's deferred maintenance rule thus has no characteristic that distinguishes it from the rules that the Fifth Circuit found to be substantive in *Shell Offshore*, *Davidson*, *Phillips*, and *Brown* discussed above. The deferred maintenance rule is substantive.

3. The Primary Cause Rule is Substantive

FEMA policymakers began deliberating a "Habitability Policy" for IHP's predecessor program by 1998, and changed that policy over time. AR-384-385 ("A Brief History of Habitability"). By 2005, FEMA informed inspectors of its "primary cause" rule. *See* SAR-7148 (FEMA "informed contract inspectors that if deferred maintenance (and not disaster-related damages) is the primary cause of a home being unsafe, inspectors should not record the home as being unsafe for purposes of program eligibility."). By 2008, FEMA taught Dolly Inspectors that deferred maintenance is an "exception," or "Special Circumstance" that may cause a home to be marked as safe or habitable even if it would otherwise be marked as unsafe and uninhabitable. Thus, FEMA's primary cause rule has the same outcome determinative effect as FEMA's deferred

maintenance rule: if the rule is not satisfied, the applicant is not eligible for repair assistance. FEMA actually applied this rule to render some 11,744 Dolly applicants ineligible for repair assistance. Fact 26.

The Fifth Circuit teaches that where a disaster damages a poorly maintained structure—the precise facts at issue in this lawsuit—both the disaster and the substandard maintenance are but-for causes of the damage. *In re Katrina Canal Breaches Litig*., 495 F.3d 191, 223 (5th Cir. 2007).[19] When FEMA sees these two but-for causes, it applies its "primary cause" rule to deny all repair assistance rather than prorating assistance based on an apportionment of fault between the two but-for causes. This makes the *legislative* choice of contributory fault over comparative fault. Legislatures in all fifty states have chosen either contributory or comparative fault laws. *See, e.g., Dugger v. Arredondo*, 408 S.W.3d 825, 2013 Tex. LEXIS 680 at *12-13 (Tex. 2013) ("Before the Legislature enacted the proportionate responsibility scheme, Texas followed the all-or-nothing-system of contributory negligence. .... In 1973, the Legislature adopted article 2212a, the first comparative negligence statute, evidencing a clear policy purpose to apportion negligence according to the fault of the actors."); *Kampen v. American Isuzu Motors*, 157 F.3d 306, 324 (5th Cir. 1998) (Louisiana). FEMA's choice of contributory fault for Dolly is no less legislative, no less substantive.

B. Notice and Comment is Fair and Necessary

Congress enacted § 553 to ensure that the public has a voice in important agency decisions, and the statutory term "substantive rule" must be construed to achieve Congress's objective.

[19] *Accord Small v. McCrystal*, 2012 U.S. Dist. LEXIS 47749 at *32-33 (N.D. Iowa Apr. 4, 2012) ("For any given event, there can be a number of factual causes, *i.e*., things that were necessary for the result to come about. For instance, temperature, past precipitation, relative humidity, presence of dead plant material, and a lightning strike can all be the factual causes of a forest fire."); RESTATEMENT (THIRD) OF TORTS §§ 26-34.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969); *Time Warner*, 729 F.3d at 168; *Phillips*, 22 F.3d at 619-20; *United States Steel Corp.*, 595 F.2d at 210.

Plaintiffs have already noted several specific examples of the kind of public input that FEMA may expect if it is required to submit its rules for notice and comment. *See* footnotes 6, 10, 13, and 15, above. The two issues that merit public input the most, of course, are deferred maintenance and primary cause.

As for deferred maintenance, notice and comment would facilitate a public discussion of issues like:

(1) why is the PAP deferred maintenance standard for public buildings different than the IHP standard for private homes?

(2) in those cases where FEMA admits that there is no reliable way to tell what damages were caused by the disaster and what damages pre-dated the disaster, what is a fair way to decide the amount of repair assistance?

(3) what can be done to promote consistency in light of PaRR's testimony that "you can get 50 inspectors to go out and do inspections and you can get 50 different results?"[20]

(4) why should Inspectors not be required to photograph all damages they record and record the reasons for their deferred maintenance decisions?

(5) how should FEMA record and use applicants' uniquely personal knowledge of which damages are disaster-related?[21]

(6) is an IHP floor of $50 or another amount a fairer and more efficient means of excluding payment for minor damages than having inspectors make this judgment in each case?[22]

[20] SAR-7672; *see also* Facts 252 and 253.

[21] *Compare, e.g.*, Complaint, Dkt. No. 1 at ¶¶ 39-48 (Plaintiff Alvarado's detailed allegation of damage.) and Dkt. 28-1 at 8-10 (Alvarado's sworn statement) *with* Answer, Dkt. No. 29 at ¶¶ 38b-48 (FEMA is largely "without knowledge or information sufficient to form a belief" as to Plaintiffs' allegations.); *see also* Fact 269.

(7) why do FEMA's eligibility letters lack applicant-specific information that FEMA actually has, and that would help applicants know how to appeal?

As for primary cause, notice and comment would facilitate a public discussion of what FEMA means by "primary cause." Of course lawyers commonly wrestle with questions of causation. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928). So far FEMA has not wrestled with these questions. It expects its Inspectors to consistently make "primary cause" decisions without any training at all in how to do so, and without any explanation of whether primary cause means first cause, last cause, but-for cause, cause of greatest volume of injury, or most important cause, all of which are plausible but vastly different meanings of "primary cause." *See Board of Governors of Federal Reserve System v. Agnew*, 329 U.S. 441, 450-51 (1947) (Rutledge, J. concurring); *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010); *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 170 (D.C. Cir. 2007); *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 482 (7th Cir. 1991). Accordingly, FEMA's own Inspector General reported almost a decade ago that "improved guidance for unsafe home determinations and deferred maintenance are also necessary to ensure proper funding for home repair." SAR-7148-7149.

In sum, FEMA's IHP Policies obviously have room for improvement, Congress directed that § 553 notice and comment be used specifically to help agencies make informed choices about such improvements, and this above all should guide the Court's decision as to whether FEMA's rules are substantive or interpretive.

[22] Facts 254 and 255.

III. THE PROPER REMEDY IS PUBLICATION AND REMAND FOR FEMA TO RECONSIDER THOUSANDS OF DOLLY APPLICATIONS

The proper remedy for FEMA's violation of the APA is extensive, but it is also specific and justified. After all, Plaintiffs wrote FEMA in October 2008 seeking its IHP policies and an administrative remedy for lack of publication, and FEMA simply refused to disclose the policies. Fact 32.[23] FEMA thus had every opportunity to avoid the remand remedy now sought, and it chose secrecy and defensive litigation instead. In light of these facts, FEMA should not now be allowed to prevent effective relief by pointing to circumstances of its own deliberate creation. *See* SAR-3587-3588 (FEMA E-mail: "This [case] just looks to me like a freight train coming straight at us.").

A. The Court Should Enjoin FEMA to Publish its Policies After Notice and Comment

Courts are empowered to enter all injunctive relief necessary to secure agency compliance with §§ 552(a)(1) and 553. 5 U.S.C. § 706(2); *Coalition for Common Sense*, 464 F.3d at 1319. The record thoroughly proves that FEMA has resisted publishing its IHP Policies since 2002. Facts 82 and 91. As in *Coalition for Common Sense*, FEMA should therefore be enjoined to subject three of its policies to notice and comment and publish its policies before using them further, as specified in Plaintiffs' proposed order, attached.

B. Remand is the Remedy for Violation of § 552(a)(1)

Courts must "set aside" all agency action found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Two such procedures appear in §§ 552(a)(1) and 553. *Coalition for Common Sense*, 464 F.3d at 1319 ("we set aside the [unpublished agency statement]

[23] FEMA could have disclosed its policies in response to Plaintiffs' letter and then permitted late appeals. FEMA has a late-appeal rule that is not published: "Approval of late appeals will be reviewed on a case-by-case basis where sufficient explanation of inability to appeal within the [60-day] timeframe exists." SAR-780; *but see* 44 C.F.R. § 206.115 ("Applicants must file their appeal within 60 days after the date that we notify the applicant of the award or denial of assistance. [No exceptions.]"). This late-appeal rule does not adversely affect applicants, so FEMA could have invoked it.

because it is procedurally defective ... and remand the matter to the agency for compliance with the APA's procedural requirements, including both 5 U.S.C. §§ 552(a)(1) and 553").

The uniform remedy for § 552(a)(1) violations is remand for the agency to reconsider each of its adverse decisions *without* the use of any generally applicable rules that had not been published at the time that the agency made the adverse decision. *Shell Offshore,* 238 F.3d at 630; *Davidson,* 169 F.3d at 999; *Phillips,* 22 F.3d at 621. Courts apply this identical remedy to redress the broadest imaginable array of § 552(a)(1) violations. *See, e.g., Davidson*, 169 F.3d at 999 (disaster assistance); *Cannon,* 345 Fed. Appx. at 303 (criminal law on a military base); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 749 (2d Cir. 1995) (immigration procedures); *NI Indust.*, 841 F.2d at 1108 (defense contracting); *Satellite Broad. Co.*, 824 F.2d at 4 (broadcast license); *Vigil*, 667 F.2d at 938-39 (eligibility for subsidized school lunches); *St. John's Hickey Mem'l Hosp.*, 599 F.2d at 814-15 (Medicare reimbursement).

The remand remedy that Plaintiffs seek does not require this Court to make individualized determinations of any kind. *See* Proposed Order, attached. Plaintiffs only seek FEMA's reconsideration of applications using proper legal standards, leaving FEMA to address the merits of each individual claim without further Court involvement. *See UAW v. Brock*, 477 U.S. 274, 284 (1986) ("[T]his action does not directly seek ... benefits. [D]ecisions as to the eligibility of individual claimants for benefits will remain the province of [the agency]."). Practically, this means that FEMA will have to either gather for itself or consider applicant evidence of which damages were disaster "related," without applying the "significant, obvious, and without question" restriction. This evidence may include another inspection, declarations from applicants and neighbors and other visitors to applicants' homes, photographs, receipts, canceled checks, estimates, and insurance statements. FEMA already follows this very procedure in deciding which damages are disaster-related in PAP. Fact 43. Applicants still have access to this evidence and

should now be allowed to have FEMA consider it if FEMA lacks a more reliable alternative. *See* Fact 10; SAR-7902-7980; SAR-11164-11188 at Row 15 (citing estimates in individual files). In doing so, FEMA will not be allowed to apply its caps and floors, primary cause rule, wind-driven rain rule, or any of its other unpublished policies.

C. The Scope of Remand Must be Broad

From the outset Plaintiffs have sought remand not only of their own eleven individual applications, but also of thousands of other Dolly applications. Dkt. No. 2-3 at 2. Specifically, all Dolly applicants who fall in one or more of the following categories belong in the scope of the remand order:

(a) the 9,461 applicants who FEMA found eligible for some amount of repair assistance, including Plaintiffs Alvarado and Lopez, because FEMA provided these applicants with no notice of which damages were deemed eligible and which were not, and because FEMA directed inspectors to limit the *quantities* of all disaster-related damages recorded to FEMA's unpublished caps and to those damages that satisfied FEMA's deferred maintenance rule;

(b) the 11,744 applicants who FEMA found owned their homes and assigned ineligibility code IID (Ineligible—Insufficient Damage), including all Plaintiffs except Ms. Iglesias, Ms. Lopez, and Ms. Villarreal, because these applicants were all denied repair assistance using a combination of FEMA's primary cause rule and its deferred maintenance rule; and

(c) the 2125 applicants who appealed from FEMA's denial of home repair assistance, including all Plaintiffs, and particularly those appellants who also requested their files from FEMA, because FEMA did not disclose its appeal standards and withheld applicant files that were necessary to know how to effectively appeal.

Plaintiffs rely upon four grounds to seek relief that benefits persons other than themselves even though Plaintiffs did not bring this case as a Rule 23 class action.

First, the APA provides for broad relief that benefits non-parties: "the reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The FEMA action at issue here is its failure to publish its IHP Policies as required by § 552(a)(1). This action is not "set aside" to the extent that the unpublished policies are allowed to be used against thousands of Dolly applicants other than Plaintiffs. *See Coalition for Common Sense*, 464 F.3d at 1319 ("we set aside the [unpublished] Dear Manufacturer letter"); *see also Mahon v. United States Dep't of Agric.*, 485 F.3d 1247, 1260 (11th Cir. 2007) (Disaster assistance should not be administered so that similarly situated persons are treated differently.).[24] Accordingly, the U.S. District Court for the District of Columbia ordered the exact type and scope of disaster-wide relief against FEMA that Plaintiffs seek in this case. *See ACORN*, 463 F. Supp. 2d at 37 (Ordering FEMA to improve its explanation of IHP denials for parties and non-parties alike, and reconsider appeals after sufficient notice was given. FEMA complied with this disaster-wide part of the injunction and it was not stayed by the Court of Appeals.), *stayed in part*, 2006 WL 3847841 at *1 (D.C. Cir. 2006). Many other courts have read the APA to provide for relief that benefits non-parties when necessary to completely set aside illegal agency action. *See Bresgal v. Brock*, 843 F.2d 1163, 1169-71 (9th Cir. 1987) ("Class-wide relief may be appropriate [to redress federal agency

[24] Disaster-wide relief is also necessary here to avoid duplicative serial litigation. *See Nat'l Mining Ass'n v. U.S. Army Corp. of Eng'rs*, 145 F.3d 1399, 1408-09 (D.C. Cir. 1998) (broad APA relief entered in part to avoid serial litigation of identical claims). This is especially so in light of the six-year statute of limitations for APA challenges to FEMA's Dolly practices, 28 U.S.C. § 2401(a), and the tolling that results from the record evidence that FEMA deliberately concealed its IHP Policies. Facts 82 and 91; *see also American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 552-54 (1974) (additional basis for tolling is pendency of a claim that would benefit non-parties, even those unaware that the claim is pending). There is no dispute but that many additional Dolly applicants have claims identical to those of Plaintiffs. SAR-11164-11188 (listing fifteen people with claims identical to those of Plaintiffs).

violations of federal law] even in an individual action."); *NAACP v. Secretary of HUD*, 817 F.2d 149, 160 (1st Cir. 1987) (per Breyer, J.) ("A court, where it finds unlawful agency behavior, may tailor its remedy to the occasion."); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1085 (N.D. Cal. 2005) (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17 (D.D.C. 2004) ("The Fourth, Fifth, Ninth, and D.C. Circuits have held that an injunction can benefit parties other than the parties to the litigation.") (collecting cases).[25]

Second, Congress specifically directed that the remedy for § 552(a)(1) violations produce an "incentive" for agencies to actually comply with this statute. *Morton*, 415 U.S. at 233 n.27; H. R. REP. NO. 1497, 89th Cong., 2d Sess., 7 (1966), U.S. CODE CONG. & ADMIN. NEWS at 2418, 2424 (1966). Disaster-wide relief is necessary here to provide FEMA with an incentive to actually consider the evidence of damage and decide the applications without using unpublished rules, as directed in § 552(a)(1) and described in Part II.A. above. Otherwise, FEMA's practical economic incentive is to simply pay the few Plaintiffs money in settlement rather than take the actions necessary to actually reconsider applications and comply with the law as Congress directed.

Third, organizational Plaintiff LUPE includes members who were adversely affected by FEMA's unpublished policies, and LUPE used its own resources to help Dolly applicants understand and challenge adverse repair decisions, consistent with LUPE's longstanding organizational purpose. Facts 28 to 31; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (effect on resources of organization and membership is sufficient to support relief benefitting organization). Consequently, both on behalf of itself and its members, LUPE has standing to seek injunctive relief that benefits all persons nationwide—members and non-members

[25] *See also Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 374 (5th Cir. 1981) (In a Title VII case the Fifth Circuit held that "[i]Injunctive relief which benefits non-parties may sometimes be proper even where the suit is not brought as a Rule 23 class action. The Ninth Circuit recognized this fact ... and we approve it here."); 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 8.30 (2d ed. 1997 & 2009 Supp.) ("If the remedy is against the agency who is a party, there is no need for a certified class that will benefit from the order to be a party to the suit.").

alike—who were adversely affected by illegal federal agency action, even without a Rule 23 class action. *Brock*, 477 U.S. at 284-90, *on remand*, 816 F.3d 761, 768 (D.C. Cir. 1987) (ordering nationwide relief for an organizational plaintiff to benefit non-parties without a Rule 23 class); Dkt. No. 43-2 at 1-7 (actual nationwide relief entered in the district court in *Brock* and by the U.S. Dept. of Labor). The Supreme Court has repeatedly held that the APA's "broadly remedial purpose" must be considered in deciding who has standing to sue. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970); *see also Bennett v. Spear*, 520 U.S. 154, 163 (1997) ("what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other [statutes]"); *Heikkila v. Barber*, 345 U.S. 229, 237-38 (1953) (The Senate and House Committee reports on the Administrative Procedure Act, "together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that [the APA] greatly expanded the availability of judicial review. [The APA] should be treated as a far-reaching remedial measure, affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights.").

Fourth, disaster-wide relief is necessary to provide complete relief to all Plaintiffs. *See Bowen v. Massachusetts*, 487 U.S. 879, 912 (1988) (Congress intends the APA, 5 U.S.C. § 706, to afford parties "complete relief."); *Garrido v. Dudek*, 731 F.3d 1152, 1158 (11th Cir. 2013) (In an action by three individuals that did not include class or organizational claims, the Court ordered the agency not to apply its illegal policy to anyone under age 21 as a means of providing "complete relief" to Plaintiffs.). This is because the communities themselves where Plaintiffs reside, and tangible property values of the homes of individual Plaintiffs and LUPE members, are diminished when repair of over 10% of the entire housing stock in their region was inhibited by FEMA's violation of 552(a)(1). Facts 26 and 236 (23,330 applicants affected) and Fact 27

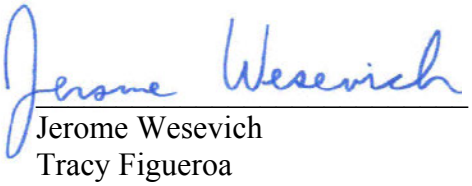
(231,019 owner-occupied homes in Cameron, Hidalgo, and Willacy Counties); s*ee Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1992) (non-party relief may be granted where necessary to afford prevailing parties complete relief); *U.S. Dept. of the Treasury, Proposed Interagency Appraisal and Evaluation Guidelines*, 73 Fed. Reg. 69647, 69659 (Nov. 19, 2008) ("disrepair from a natural disaster" affects neighborhood property values); *see also see Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007) (Remedy is available even for small harms caused by a federal agency that are subject to possible offset.); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (absence of adverse impact must be found "with certainty" to excuse noncompliance with APA notice requirements); 5 U.S.C. § 552(a)(1) (Persons harmed "in any manner" are entitled to relief.).

CONCLUSION

At stake here is no less than whether the rule of law applies to disaster assistance. Congress has repeatedly and explicitly demanded that FEMA publish its eligibility standards, not only in §§ 552(a)(1) and 553, but also in 42 U.S.C. §§ 5151(a), 5174(j), and 5189a(c). The record thoroughly proves FEMA's refusal to comply. Without a complete remedy in this case, billions of taxpayer dollars will continue to be distributed according to secret rules that are subject to infinite amendment and supplementation, *i.e.* political manipulation. The Court should grant summary judgment remanding thousands of Dolly applications for disaster assistance to FEMA for reconsideration without the use of secret rules, as stated in the attached Proposed Order.

Respectfully submitted,

January 27, 2014



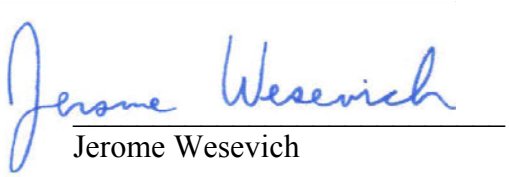
Jerome Wesevich
Tracy Figueroa
Robert Doggett
Kelsey Snapp
TEXAS RIOGRANDE LEGAL AID

316 South Closner Boulevard
Edinburg, Texas 78539
(915) 585-5120

Ed Stapleton
LAW OFFICE OF ED STAPLETON
622 E. St. Charles St.
Brownsville, Texas 78520
(956) 504-0882

CERTIFICATE OF SERVICE

I certify that on the date next to my signature above I caused a true and complete copy of the foregoing document, with all referenced exhibits and attachments, to be served upon all counsel of record for Defendant FEMA using the Court's CM/ECF filing system, as permitted under Local Rule 5.1.



Jerome Wesevich